

Legislative Analysis



LEGISLATIVE OPEN RECORDS ACT (LORA)

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<http://www.house.mi.gov/hfa>

House Bill 4383 as introduced
Sponsor: Rep. Ryan Berman

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

House Bill 4384 as introduced
Sponsor: Rep. Mark A. Tisdell

House Bill 4385 as introduced
Sponsor: Rep. Annette Glenn

House Bill 4389 as introduced
Sponsor: Rep. Jim Haadsma

House Bill 4386 as introduced
Sponsor: Rep. Tyrone A. Carter

House Bill 4390 as introduced
Sponsor: Rep. Darrin Camilleri

House Bill 4387 as introduced
Sponsor: Rep. Bryan Posthumus

House Bill 4391 (proposed substitute H-1)
Sponsor: Rep. Beau Matthew LaFave

House Bill 4388 as introduced
Sponsor: Rep. Pat Outman

House Bill 4392 as introduced
Sponsor: Rep. Ann Bollin

Committee: Oversight
Complete to 3-10-21

BRIEF SUMMARY:

Taken together, House Bills 4483 through 4392 would add Part 2 to the Freedom of Information Act (FOIA) to implement a new Legislative Open Records Act (LORA) that would serve to bring the legislature under FOIA. The bills would also remove the current exemption from FOIA for the governor, lieutenant governor, and executive office employees. The bills would change the name of FOIA to the Freedom of Information and Legislative Open Records Act. The bills would take effect January 1, 2022.

Generally speaking, FOIA establishes procedures and requirements for the disclosure of *public records* by all *public bodies* in the state.

Public record means a writing prepared, owned, used, possessed, or retained by a public body in the performance of an official function, from the time it is created, but does not 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.

Public body means a state officer, employee, agency, department, division, bureau, board, commission, council, authority, or other body in the executive branch of the state government (except the executive office of governor or lieutenant governor); an agency, board, commission, or council in the legislative branch of the state government (but 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.

Public body does not include the judiciary or, when acting in the capacity of clerk to the circuit court, the office of the county clerk and its employees.

Generally speaking, the bills propose new language concerning the legislature that mirrors provisions already in FOIA concerning public bodies. However, there are provisions in the bills unique to the legislative branch, notably the process for appealing decisions denying a request for disclosure of a public record under House Bill 4385 and the exemptions from disclosure and limitations on statutory construction in House Bill 4391. LORA would not apply to records created, prepared, owned, used, possessed, or retained by a public body before January 1, 2022.

Under LORA (the proposed new Part 2 of FOIA):

Public record would mean a writing prepared, owned, used, possessed, 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.

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 state government.

LORA coordinators would be designated to serve the role that FOIA coordinators serve under the existing act (to accept and process requests for public records).

House Bill 4383 is tie-barred to the other nine bills, and those bills are in turn tie-barred to HB 4383. A bill cannot take effect unless each bill to which it is tie-barred is also enacted.

DETAILED SUMMARY:

The bills are more specifically described below, organized according to their content and relation to the underlying act, rather than by bill number.

House Bill 4386 would amend section 2 of FOIA to remove the specific exclusion of the governor and lieutenant governor from the definition of **public body**. (That is, the bill would make them subject to FOIA.) The bill would also remove references to legislative agencies, boards, commissions, and councils (since they will be covered by LORA). The bill would exclude records of the office of the governor or lieutenant governor from a provision that allows a person to subscribe to future issuances of public records that are issued on a regular basis. (LORA also would not contain a subscription provision.) Finally, the bill would change the name of FOIA to the “Freedom of Information and Legislative Open Records Act,” in recognition of its expanded scope. The currently existing act would be redesignated as Part 1 of the expanded act, and Part 1 would be called the “Freedom of Information Act.”

House Bill 4392 would amend section 13 of FOIA to remove a provision that says a public record in the possession of the governor or lieutenant governor cannot be withheld if it had been transferred there from a public body subject to FOIA after a request for its disclosure.

The bill also lists exemptions from disclosure that are unique to the executive office of the governor or lieutenant governor. These would include records or information related to:

- Gubernatorial appointments. However, except for letters of recommendation, the exemption would not apply to records or information relating to that individual after he or she has been appointed.
- Decisions to remove or suspend a public official from office under section 10 of Article V of the state constitution or to remove a judge from office under section 25 of Article VI. The exemption would not apply to a record concerning that individual after he or she has been removed or suspended.
- Decisions to grant or deny a reprieve, pardon, or commutation under section 14 of Article V of the state constitution.
- Budget recommendations prepared under section 18 of Article V of the state constitution.
- Reductions in expenditures under section 20 of Article V of the state constitution.
- Messages or recommendations to the legislature under section 17 of Article V of the state constitution.
- The governor's executive residence.

The bill would also exempt the following:

- Information or records subject to executive privilege.
- Records of the executive office of the governor or lieutenant governor, or an employee of either office, created, used, or possessed before January 1, 2022.
- Communications between the executive office of the governor or lieutenant governor, or an employee of either office, and constituents, except for lobbyists or state appointees or employees.
- Records or 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.

Finally, current law generally exempts from disclosure communications and notes of a public body that are of an advisory nature, to the extent that they cover materials other than purely factual materials and are preliminary to a final agency determination of policy or action. In order for this exemption to apply, though, the public body must show that the public interest in encouraging frank communication between public body officials and employees clearly outweighs the public interest in disclosure in the particular instance at hand. Under the bill, this exemption would not apply with regard to the executive office of the governor and lieutenant governor if in the particular instance the public interest in disclosure clearly outweighed the public interest in encouraging frank communications.

House Bill 4383 would add the part heading and title for Part 2 of FOIA—the “Legislative Open Records Act” (LORA). It would also add to LORA new sections 21 to 23, which mirror sections 1 to 3 of FOIA but would apply specifically to the legislative branch. Those sections contain definitions and provide general procedures for requesting and inspecting public

records. A *public record* would be defined as a record that had been in possession of a public body for 15 days or more. With some exceptions, a public body could not destroy or alter a public record, or a record that will qualify as a public record, before the record has been in its possession for two years (730 days).

House Bill 4387 would add section 24, which mirrors section 4 of FOIA and applies to, among other things, the fees a public body may charge for searching and copying public records.

House Bill 4388 would add section 25, which corresponds to section 5 of FOIA, regarding the process of submitting a request for a public record and the process for a public agency to grant or deny it. There are several key differences. LORA would not allow a civil action to compel disclosure of a public record. A final determination to deny a request would be appealed to the administrator of the Legislative Council, and there would not be a judicial review.

House Bill 4384 would add sections 26 through 29, which specify that the administrator of the Legislative Council would designate an individual as the LORA coordinator for all public bodies; the House of Representatives could designate an individual as the LORA coordinator for the House; the Senate could designate an individual as the LORA coordinator for the Senate; and a LORA coordinator could designate another individual to act on his or her behalf in accepting and processing requests and in approving a denial.

House Bill 4385 would add sections 29a and 29b, which spell out the appeals procedures for denials of disclosure of public records and the imposition of excessive fees. These correspond to sections 10 and 10a of FOIA. However, appeals under LORA would be made to the coordinator who issued the denial for a reconsideration or to the administrator of the Legislative Council. (There would be no cause for a civil action.)

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

If a request for appeal were reviewed by the Legislative Council administrator, the administrator could charge a reasonable fee of up to \$75 unless the person making the request was eligible for a fee waiver because of indigence. If the administrator determined that a public body had arbitrarily and capriciously violated LORA in refusing a request or delaying the provision of copies, the administrator would recommend appropriate disciplinary action to the Speaker of the House of Representatives or the Majority Leader of the Senate, as applicable. The Legislative Council administrator would have to make any recommendation for disciplinary action publicly available on the internet within five business days after issuing it.

A similar procedure would apply if a person requested that an excessive fee be reduced. The person would have to identify how the fee exceeds the allowable amount, and the Legislative Council administrator could charge a reasonable fee of up to \$50 unless the person making the request qualified for a fee waiver for indigence.

House Bill 4391 would add sections 29c and 29d to LORA.

Section 29c stipulates that LORA should not be construed to limit, modify, waive, or otherwise affect the privileges and immunities guaranteed to the legislature under section 11 of Article

IV of the state constitution and also stipulates that it would not create or imply a private cause of action for a violation.

Section 29d mirrors section 13 of FOIA and describes public records a public body may exempt from disclosure. These would include all of the following:

- Certain private and medical information.
- Communications, including any related records or information, between a legislator or a legislator's office and a constituent of that legislator or a person who intended to communicate with the elected representative and inadvertently contacted the wrong representative, other than a registered lobbyist.
- 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 are preliminary to a final determination of policy or action. This exemption would not apply if in the particular instance the public interest in disclosure clearly outweighed the public interest in encouraging frank communications.
- Records or information pertaining to an ongoing internal or legislative investigation.
- Trade secrets or commercial or financial records or confidential information provided for use in developing governmental policy.
- Records or information subject to the attorney-client privilege or any other privilege recognized by the constitution, statute, or court rule.
- Records or information relating to a civil action to which the public body is a party, before that litigation or claim is adjudicated or settled.
- Records or information specifically described and exempted from disclosure by statute, including the records and information subject to confidentiality requirements in statutes dealing with the Legislative Service Bureau's bill drafting division, the Senate and House Fiscal Agencies, the Veterans Facility Ombudsman, and the Corrections Ombudsman.
- A public record or information described in this section 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 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.
- A bid, quote, or proposal submitted by a person to enter into a contract or agreement, and records created for those purposes, before final notification of the contract or agreement (or records containing a trade secret or financial or proprietary information submitted in connection with a bid, quote, or proposal).
- Records whose disclosure would run counter to the public interest.
- Records created, prepared, owned, used, possessed, or retained by the majority and minority caucuses of each house of the legislature.
- The cell phone number of a public body.
- Records containing location information for future meetings of a public body.

The bill states that LORA would not authorize the exemption from disclosure of any salary record of an employee or an official of a public body (i.e., the legislative branch).

Also, as noted earlier, LORA would not apply to records created, prepared, owned, used, possessed, or retained by a public body before January 1, 2022.

House Bill 4389 would add section 29e, which mirrors section 14 of FOIA, on separating exempt from nonexempt material in a public record, and section 29f, which specifies that the attorney general must counsel and advise a public body on the administration of LORA upon request.

House Bill 4390 would make complementary changes to the Legislative Council Act.

BACKGROUND INFORMATION:

As introduced, this bill package is virtually identical to House Bills 5469 through 5478 of the 2015-16 legislative session, House Bills 4148 through 4157 of the 2017-18 session, and House Bills 4007 through 4016 of the 2019-20 legislative session—the only differences among the bill packages being technical changes and revised effective dates. House Bills 5469 through 5478 of 2015-16 were reported from the House Committee on Oversight and Ethics and passed by the House, but were not taken up by the Senate. House Bills 4148 through 4157 of 2017-18 were reported from the House Committee on Michigan Competitiveness and unanimously passed by the House, but were not taken up by the Senate. House Bills 4007 through 4016 of 2019-20 were reported from the House Committee on Government Operations and unanimously passed by the House, but were not taken up by the Senate.

FISCAL IMPACT:

House Bills 4383 to 4392 would increase costs for the executive office and the legislature, primarily due to the presumed need to hire Freedom of Information Act (FOIA) and Legislative Open Records Act (LORA) coordinator staff under the provisions of the bills. In addition, the bills would marginally increase administrative and office supply costs with respect to fulfilling FOIA and LORA requests. However, most, if not all, of these costs would be offset by charging fees that correspond to the actual cost of labor, materials, and postage, as provided by HB 4387.

The executive office (governor and lieutenant governor) and legislature are currently exempt from the provisions of the Freedom of Information Act (“the Act”). The bill package would effectively extend the Act’s provisions and requirements to the executive office and the legislature.

Personnel costs would depend on the need to hire additional staff to satisfy the bills’ requirements. As with FOIA coordinators, the duties of LORA coordinators could be fulfilled with existing staff or by hiring dedicated staff. HB 4384 requires the designation of a LORA coordinator for all public bodies in the legislature. The bill further permits, but does not require, the designation of separate LORA coordinators for the House of Representatives and Senate. These provisions generally mirror those in section 6 of the Act, which require the designation of FOIA coordinators for all public bodies. Additionally, HB 4386 would eliminate the executive office’s exemption from the Act’s requirements, thereby requiring the designation of a FOIA coordinator for the executive office.

Based on a 2019 survey of executive branch departments, labor costs depend on the size, complexity, and sensitivity of the information sought. Of the departments surveyed, the

department with the largest number of requests (approximately 1,200) had no FTE position solely dedicated to responding to FOIA requests. The department with the smallest number of requests (241) did have a dedicated FTE position due to the nature of the material and the amount of legal review and redaction required to satisfy FOIA exemptions listed in section 13 of the Act. Additionally, for each department, the average total number of personnel hours distributed annually across all employees who help respond to FOIA requests approximately equaled the hours of 1.0 FTE.

Due to the public interest in and nature of executive office and legislative records, it is likely that dedicated personnel would be hired to fulfill the duties of FOIA and LORA coordinators in the executive office and legislature. In 2019, the average salary and benefits costs of a FOIA coordinator among those departments surveyed was \$127,000. While actual personnel needs are not yet known, this analysis assumes for estimating purposes that three positions would be added to the legislature (Legislative Council, House of Representatives, and Senate) for LORA coordinators and one FTE would be added to the executive office for a FOIA coordinator, for an estimated total of \$508,000 in ongoing annual costs. Since the bill package’s effective date is January 1, 2022, only three quarters of the annual salary costs would occur in FY 2021-22.

Table 1 provides an overview of the personnel cost estimates.

Table 1: LORA and FOIA Coordinator Personnel Cost Estimates

	Employees	FY 2021-22	FY 2022-23
Legislature	3	\$285,750	\$381,000
Executive Office	1	\$95,250	\$127,000
Total	4	\$381,000	\$508,000

House Bill 4387 authorizes a public body to charge fees for the actual cost of mailing and duplication or publication of records. These costs may include labor wages, including potential legal counseling, and administrative costs of responding to requests, such as office supplies and postage. These LORA provisions mirror section 4 of the Act. The departments reported that the vast majority of requests do not exceed \$20. Among the departments, the average revenue received annually from fees was approximately \$14,300, and the average number of requests was 555. The departments reported that fees cover all, or nearly all, of the associated administrative and office supply costs. Any remaining costs are marginal and absorbed through existing general fund or restricted fund appropriations to the office or program area that received the request. Fees are generally deposited into the fund from which costs were paid.

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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.