

Legislative Analysis



GOVERNOR AND LEGISLATURE SUBJECT TO FOIA

Phone: (517) 373-8080
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Senate Bill 669 (S-1) as reported from House committee
Sponsor: Sen. Jeremy Moss

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

Senate Bill 670 (H-1) as reported from House committee
Sponsor: Sen. Edward W. McBroom

House Committee: Government Operations
Senate Committee: Oversight
Complete to 12-18-24

SUMMARY:

Senate Bills 669 and 670 would amend the Freedom of Information Act (FOIA) to define the legislature, the governor, the lieutenant governor, and the executive offices of the governor and lieutenant governor as public bodies subject to the act's provisions related to the disclosure of public records. The bills would provide guidelines and exceptions for records retention and disclosure by these entities and make other changes to the act as described below.

In addition, the bills would newly allow a public body to exempt from disclosure any records or information specifically described and exempted from disclosure by *regulation* (rules). Currently, only records or information specifically described and exempted from disclosure by *statute* (a law passed by the legislature and signed by the governor) is allowed to be exempted by a public body from disclosure under this particular provision. (There are other grounds for exemption in the act.)

Generally speaking, the Freedom of Information Act establishes requirements and procedures for the disclosure of public records by certain public bodies in Michigan unless those records are specifically exempted. Public records are writings prepared, owned, used, possessed, or retained by a public body in the performance of an official function. In addition to laying out which public bodies are subject to the act and which public records are subject to disclosure or exempt from it, FOIA prescribes procedures for those requesting public records, procedures and time frames that a public body must follow in responding to those requests, and fees and costs that may be charged to fulfill a request.

Inclusion of governor and legislature

Currently, the term *public body*¹ is defined so that the act applies to a state officer, employee, agency, department, division, bureau, board, commission, council, authority, or other body in the executive branch, but not to the governor or lieutenant governor or the executive office of

¹ In addition to the entities described above, *public body* includes (and so the act applies to) a county, city, township, village, intercounty, intercity, or regional governing body, council, school district, special district, or municipal corporation, or their boards, departments, commissions, councils, and agencies; and any other body created by state or local authority or primarily funded by or through state or local authority. The act does not apply to the judicial branch or to the office of the county clerk when acting as clerk to the circuit court.

the governor or lieutenant governor. The act also applies to an agency, board, commission, or council in the legislative branch government, but not the legislature itself.

Senate Bill 669 would remove the above exclusions and provide that, for the executive and legislative branches, public body includes (and the act therefore applies to) both of the following:

- A state officer, employee, agency, department, division, bureau, board, commission, council, authority, or other body in the executive branch.
- 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. (However, this would not include the Legislative Service Bureau, the Senate Fiscal Agency, or the House Fiscal Agency.)

Senate Bill 670 would require the speaker of the House and the Senate majority leader to designate a person to act as the FOIA coordinator for their respective chambers, as well as a person to handle appeals of disclosure denials. (FOIA coordinators are responsible under the act for accepting and processing requests for a public body's public records and for approving denials of such requests.)

Exempted information

The act provides a general list of allowable exemptions from disclosure, which include such things as private personal information, confidential security plans, confidential trade secrets, and information subject to the attorney-client privilege.² Senate Bill 670 would add the attorney work product privilege to the latter exemption, and it would amend the allowed exemption of confidential trade secrets to apply information provided to a state legislative public body (a public body in the legislative branch as described above).

In addition to these currently allowed exemptions, Senate Bill 670 would allow the **executive office** of the governor and lieutenant governor to exempt any of the following from disclosure:

- Records created, prepared, owned, used, possessed, or retained by the governor, the lieutenant governor, the executive office, or an executive office employee before the bill takes effect.
- Records created, prepared, owned, used, possessed, or retained by the governor, the lieutenant governor, the executive office, or an executive office employee for less than 30 days.
- Records or information possessed by the executive office or an executive office employee relating to any of the following:
 - The governor's appointment of an individual to a position as provided by law, including that of a department or agency director; of a member of a board, commission, or council; or to fill a judicial vacancy. After an individual has been appointed, this exemption would not apply to records related to them, except those that relate to the selection process, such as applications or letters of reference or recommendation.
 - The removal or suspension from office of a public official or judge under specified provisions of law. After the individual has been removed, this exemption would not apply to records related to them.

² See <https://www.legislature.mi.gov/Laws/MCL?objectName=mcl-15-243>

- The decision to grant or deny a reprieve, pardon, or commutation.
- A budget recommendation.
- A reduction in authorized expenditures in response to a shortfall.
- A message or recommendation to the legislature.
- The executive residence.
- Records or information that could affect the security of the governor or lieutenant governor or their family members.
- The cell number of the governor, lieutenant governor, or an executive office employee.
- Records or information pertaining to an internal investigation.
- Records or information relating to a civil action (lawsuit) the executive office is a party to until the litigation or claim is finally adjudicated or otherwise settled.
- Communication between the executive office or an executive office employee and a *constituent* and records or information related to that communication. (As used here, *constituent* would mean a Michigan resident who contacts the executive office for help in personally obtaining government services, to express a personal opinion, or for redress of personal grievances.) This exemption would not apply to a state employee, a lobbyist, or (except as described above) a person who receives an appointment.
- Records created or prepared by the governor, the lieutenant governor, an executive office employee, a legislator, or an employee of a state legislative public body that relate to advice, opinions, or recommendations about public policy or district work.
- Records or information subject to executive privilege.

In addition to currently allowed exemptions, Senate Bill 670 would allow a **state legislative public body** to exempt any of the following from disclosure:

- Records created, prepared, owned, used, possessed, or retained by the public body before the bill takes effect.
- Records created, prepared, owned, used, possessed, or retained by the public body for less than 30 days.
- Records or information related to the appointment of an individual to a position by the speaker of the House or the Senate majority leader as provided by law. After an individual has been appointed, this exemption would not apply to records related to them, except those that relate to the selection process, such as applications or letters of reference or recommendation.
- Records of the Office of Sergeant at Arms.
- The personal phone number of a legislator or a public body employee.
- Records or information pertaining to an internal or legislative investigation.
- Records or information relating to a civil action the public body is a party to until the litigation or claim is finally adjudicated or otherwise settled.
- Communication between a legislator or a legislator's office and a *constituent* and records or information related to that communication. (As used here, *constituent* would mean an individual who either is registered to vote in the district the legislator is elected to represent or is a resident of that district and not registered to vote anywhere else. It also would include anyone else, if it can be reasonably inferred that they intended the communication to be with the legislator elected to represent the district where they are registered to vote or, if not registered to vote, where they reside.) This exemption would not apply to a lobbyist.

- Records created or prepared by the governor, the lieutenant governor, an executive office employee, a legislator, or an employee of a state legislative public body that relate to advice, opinions, or recommendations about public policy or district work.
- Records or information specifically described and exempted from disclosure by statute or regulation.³

Other changes

The act now defines the term *public record* as 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, except that *public record* does not include computer software. Senate Bill 669 would additionally provide that notes taken or made by a member of a public body (including during a meeting of the public body) are not a *public record* if all of the following apply:

- The notes are for that member’s personal use.
- The notes are not circulated among other members.
- The notes are not used in the creation of any minute meetings.
- The notes are retained or destroyed at that member’s sole discretion.

The act now defines *writing* (for example, as used in the above definition of *public record*) to mean handwriting, typewriting, printing, photostating, photographing, photocopying, and every other means of recording, and it provides a list of technologies that can be used to record content, including among several other things papers, maps, microfilm, and hard drives. Senate Bill 669 would add hybrid drives, cloud storage, and quantum networks and computing systems to this list of examples of ways to record information.

As noted above, the term *public body* includes any body that is primarily funded by or through state or local authority. Senate Bill 669 would add that revenue earned by a body under a fee-for-service transaction with a governmental entity does not count as funds provided through or by state or local authority.

Finally, the bill provides that application of FOIA to a state legislative public body should not be construed to limit, modify, waive, or otherwise affect the privileges and immunities guaranteed under section 11 of Article IV of the state constitution.⁴

MCL 15.232 (SB 669)

MCL 15.236, 15.240, and 15.243 (SB 670)

Each bill would take effect on January 1, 2027, but can take effect only if both bills are enacted.

BRIEF DISCUSSION:

The bills represent an attempt to increase transparency and make government more accountable to the public by bringing the legislature, the offices of governor and lieutenant governor, and

³ This would include records and information subject to the confidentiality requirements that apply to the Legislative Service Bureau, the Legislative Corrections Ombudsman, the Michigan Veteran’s Facility Ombudsman, the Senate Fiscal Agency, and the House Fiscal Agency.

⁴ That section reads as follows: “Except as provided by law, senators and representatives shall be privileged from civil arrest and civil process during sessions of the legislature and for five days next before the commencement and after the termination thereof. They shall not be questioned in any other place for any speech in either house.”

executive office employees under FOIA. Reportedly, Michigan is one of only two states that exempt the governor's office and the legislature from having to release information under FOIA laws (Massachusetts is the other). Michigan was one of 11 states to receive an "F" grade in a 2015 study by the Center for Public Integrity and Global Integrity, which graded states based on the laws and systems they have in place to prevent corruption. Indeed, the study ranked Michigan last out of the 50 states based on transparency and accountability.⁵ In addition to permissive campaign spending and lobbying disclosure rules, the report specifically cited the exemptions for the legislature and executive branch from the state's FOIA laws as a reason for Michigan's low score.⁶

Some supporters of the bills would like to see them go further, citing the exemptions for constituent communications, for records possessed for less than 30 days, and for records that relate to opinions or recommendations on public policy or district work as creating potential loopholes that could be exploited to thwart the openness in government that both the act and the bills are intended to foster.

FISCAL IMPACT:

Senate Bills 669 and 670 would increase costs for the Executive Office and the legislature, primarily due to the presumed need to hire staff to serve as FOIA coordinators. In addition, the bills would marginally increase administrative and office supply costs with respect to fulfilling FOIA 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.

Personnel costs would depend on the need to hire additional staff to satisfy the bills' requirements. The duties of FOIA coordinators could be fulfilled with existing staff or by hiring dedicated staff. Based on a survey of executive branch departments, labor costs are dependent upon 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 under 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 position. 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 coordinators in the Executive Office and legislature. The average salary and benefits costs of a FOIA coordinator is approximately \$140,000. If the Executive Office, Senate, and House of Representatives each hire employees to be FOIA coordinators, costs would be approximately \$420,000 annually.

Under FOIA, a public body is allowed 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. The vast majority of

⁵ <https://www.publicintegrity.org/2015/11/09/18822/how-does-your-state-rank-integrity>

⁶ <https://www.publicintegrity.org/2015/11/09/18427/michigan-gets-f-grade-2015-state-integrity-investigation>

requests do not exceed \$20. Among the executive branch 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 the costs were paid.

POSITIONS:

A representative of the ACLU testified in support of the bills. (12-11-24)

The following entities indicated support for the bills (12-11-24):

- Department of State
- Michigan League of Conservation Voters
- Michigan Unitarian Universalist Social Justice Network
- League of Women Voters of Michigan
- Michigan State Employee Retirees Association
- American Association of University Women of Michigan
- Citizens for Prison Reform
- Michigan Press Association
- Michigan Association of Broadcasters
- Mackinac Center for Public Policy
- Michigan AFL-CIO
- Progress Michigan

Legislative Analyst: Rick Yuille
Fiscal Analyst: Michael Clossen

■ 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.