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APPEAL TO HEAD OF PUBLIC BODY FOR FOIA DENIALS

House Bill 4849 as passed by the House
Second Analysis (4-19-96)

Sponsor: Rep. Greg Kaza
Committee: Judiciary and Civil Rights

THE APPARENT PROBLEM:

Under the Freedom of Information Act, a public body must respond to a request for a public record within five business days by either granting the request, providing a written denial of the request, granting the request in part and issuing a written denial on the remaining portion, or, under unusual circumstances, extending the time within which it is required to act for up to ten days. The failure to respond to a request is considered to have the effect of a denial.

After a request has been denied by a public body, the individual has the right to seek judicial review of the public body's decision in a circuit court. The circuit court hearing the complaint is required expedite the hearing and trial of the matter and schedule it for the earliest practicable date. The circuit court is required to assess damages against the public body where the court determines that the public body did not comply with the request and the court has ordered the public body to turn over all or part of the record requested. If the court hearing the complaint concludes that the public body should have released the requested records, the public body is required to turn them over to the individual. In cases where the individual was found to be wholly in the right, he or she is entitled to reasonable attorneys' fees, costs, and disbursements. If the individual prevails only in part, then the state agency may, at its own discretion, award an appropriate portion of the person's costs. Furthermore, if the court concludes that the public body acted arbitrarily or capriciously in denying the individual's request, the court is required to award \$500 in punitive damages in addition to the other costs and damages.

Currently, a written notice of the denial of a request must include a full explanation of the person's right to seek judicial review of the denial. It must also include notice of the individual's right to receive attorneys' fees if the circuit court concludes that the denial was improper and orders the public body to disclose all or part of the records requested. The notice of denial must also include either an explanation of why the record is exempt from disclosure, a certificate indicating that the record does not exist, or a description of the records or

information that were separated or withheld as is appropriate given the circumstances of the denial.

Under current law, when an individual's FOIA request is denied, he or she has limited options. The individual may either pursue the matter further by seeking review of the denial in a circuit court, or he or she may let the denial of the request stand. In order to attempt to have the public body's denial of his or her request reversed, the individual who made the request has no other alternative than to hire an attorney and pursue the matter in court. Because review of the public body's decision must be undertaken in circuit court, the potential cost in time and money limits the number of people who are willing and able to seek to have a denial of their request reviewed. It has been argued that a number of denials of requests are made in error; in such cases requiring that the requestor go through the time and expense of a circuit court proceeding serves no useful purpose and undermines the effectiveness of the act. It has been suggested that providing simpler and less costly options for review of a public body's decision to deny a request would increase the public's access to public information and serve to quickly correct denials which were made in error.

THE CONTENT OF THE BILL:

House Bill 4849 would amend the Freedom of Information Act to give an individual whose request for records or information was denied the opportunity to appeal to the head of the public body that denied the request. The individual would have the opportunity to make a written appeal to the head of the public body; the appeal would have to specifically identify itself as an "appeal" and explain the reasons the disclosure denial should be reversed. The head of a public body would be required to respond to a written appeal within ten days after receiving it, by either reversing the denial, sending a written notice to the requesting person that the denial would be upheld, reversing the denial in part and issuing a written statement upholding part of the denial, or under unusual circumstances extend the time to respond for up to ten business days. A written appeal

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submitted to a public body whose head was a board or commission would not be considered to have received the appeal until the first regularly scheduled meeting of that board after the appeal was submitted. If the head of the public body failed to respond to a written appeal, or upheld all or part of the denial, the person requesting the record or information would then be allowed to seek judicial review of the denial in circuit court.

The bill would also amend the act's definition section. The act currently provides that the governor, the lieutenant governor, their respective executive offices and their employees are specifically excluded from the act's definition of a public body and are therefore not subject to the act. The bill would add language to this definition limiting the exemption for the governor, lieutenant governor and their respective offices and employees. The exemption provided to the governor, lieutenant governor and their respective offices and employees would not apply to writings or public documents that had either originated in or were possessed by a public body. The governor's and lieutenant governor's offices could not remove an otherwise accessible public document from the purview of a FOIA request by taking it into their possession.

MCL 15.235 and 15.240

FISCAL IMPLICATIONS:

The House Fiscal Agency reports that the bill has no fiscal implications. (8-22-95)

ARGUMENTS:

For:

Under the current law, few people can afford the time or the money to seek review of a rejected FOIA request. Review of the public body's decision to deny a request is necessary in order to maintain public confidence in the process. If review of the decision is out of the reach of most citizens, then the decision making process itself becomes suspect. While some groups, particularly the media, have access to attorneys and the money required to have denials reviewed through the court system, ordinary citizens rarely have the resources needed to seek review of FOIA denials in the same manner. Further, the committee substitute is an improvement over the original version which would have established a mandatory administrative hearing process. The bill will increase the average citizen's access to public information by giving an alternative means of review to all citizens.

Against:

Most people who have made requests for information under FOIA have already aimed their requests at the person or group in charge of the public body. The bill doesn't offer a real solution; in many cases the head of the public body is the very entity who has already denied the request. The bill would also serve the public better if it included a clear listing of the types of records which are exempted from the act. This would make it simpler for the average citizen to understand what he or she would or would not be able to receive, thus limiting the number of requests seeking exempt material.

Response:

The bill does not require that an individual make an appeal to the head of a public body where it would be futile to do so. The bill merely offers the opportunity to make such an appeal where it might be successful.

Against:

The bill does not go far enough. It would do nothing to repair some of the flaws in the act. Not enough information is made available to members of the public; the act's definition of public body should include the executive office of the governor and lieutenant governor as well as employees of those offices, and it should also include persons or businesses who contract with the state. Limited information regarding these businesses' use of state funds should be available to the public.

POSITIONS:

Common Cause in Michigan supports the bill. (4-10-96)

The Michigan Press Association does not oppose the bill. (4-19-96)

■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.