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BILL ANALYSIS

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Senate Bills 211 and 212 (as passed by the Senate)
Sponsor: Senator John J.H. Schwarz, M.D.
Committee: Government Operations

Date Completed: 4-17-95

RATIONALE

Currently, under the Open Meetings Act (OMA), all meetings of a public body must be open to the public and held in a place available to the general public, although the Act contains a list of circumstances under which a public body may meet in closed session. Closed sessions are allowed for such things as considering the dismissal, suspension, or disciplining of a public employee or a student, if the employee or student requests a closed hearing; conducting collective bargaining negotiations; considering the purchase or lease of real property; consulting with an attorney regarding pending litigation; and reviewing the specific contents of an application for employment or appointment to public office if the candidate requests that the application remain confidential, although all interviews by a public body for employment or appointment must be held in an open meeting. Further, the Freedom of Information Act (FOIA) provides that a person has a right to inspect, copy, or receive copies of a public record of a public body, unless the record is expressly exempted from disclosure by the Act. Some people claim that the requirements of the OMA and FOIA have been problematic regarding the selection of university presidents.

The process of selecting the current presidents at the State's two largest universities has resulted in controversy and lawsuits. The selection of President James J. Duderstadt at the University of Michigan and M. Peter McPherson at Michigan State University both led to lawsuits filed by the media. While the case concerning Michigan State is currently before the Court of Appeals (*Federal Publications, Inc.* v *Michigan State University Board of Trustees*, No. 177264), the University of Michigan case was decided by the Michigan Supreme Court (*Booth Newspapers, Inc.* v *University of Michigan Board of Regents*, 444 Mich 211 (1993)). The Supreme Court held that the Board of Regents is a public body that made closed session deliberations and decisions and held private interviews in violation of the OMA, and that the Board violated the FOIA, in choosing a new president. Some people believe that these recent legal entanglements and decisions will require that university presidential searches be conducted entirely in the open, and that this will reduce the pool of qualified candidates available for these positions because candidates will be reluctant to apply knowing that their names will become public and potentially jeopardize their standing in their current positions. It has been suggested that the OMA and FOIA be amended to allow universities to conduct closed presidential searches under certain conditions.

CONTENT

Senate Bill 211

The bill would amend the Open Meetings Act to provide that an institution of higher education could meet in closed session in the process of searching for and selecting a president for the institution, to review the contents of an application, to conduct an interview with a candidate, or to discuss the specific qualifications of a candidate, if a particular process of searching for and selecting a president met the following conditions:

-- The search committee in the process was composed of at least one student, one faculty member, one administrator, one member of the governing board, and one alumnus of the institution; and one representative of the general public.
-- The number of members of the institution's governing board on the search committee was less than a quorum of its governing board.

-- After the search committee recommended three final candidates, the governing board did not take a vote on final selection of the president until at least 30 days after the final candidates had been publicly identified by the search committee.
-- The deliberations and vote of the governing board on selecting the president from the final three candidates took place in an open session of the governing board.

The bill would apply only to State-supported institutions of higher education; it would not apply to community colleges.

Currently, the Act specifies that all interviews by a public body for employment or appointment to a public office must be held in an open meeting. The bill provides that this requirement would not apply to an applicant for president of an institution of higher education.

Senate Bill 212

The bill would amend the Freedom of Information Act to provide that a public body could exempt from disclosure as a public record an application for the position of president of an institution of higher education, and records or information relating to the process of searching for and selecting an individual for the position, if the records or information could be used to identify a candidate for the position. This exemption from disclosure would not apply to an application, record, or information relative to a person that was gathered or obtained in a search and selection process, after the individual or individuals were selected as finalists for the position of president.

The bill would apply only to State-supported institutions of higher education; it would not apply to community colleges.

MCL 15.267 & 15.268 (S.B. 211)
15.243 (S.B. 212)

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 State needs to modify its OMA and FOIA provisions regarding the process of selecting university presidents. Universities have become huge, complex organizations that spend millions of dollars per year and affect the lives of thousands of university personnel in their attempts to educate hundreds of thousands of students. The position of university president demands a unique individual with strong qualifications and skills that will enable him or her to handle the procurement and spending of taxpayer money, a highly educated and diverse workforce, and an eager and diverse student body. Qualified candidates for university president, then, are rare and most often already employed at another university or in another responsible position. Currently, under the OMA and FOIA, a candidate for the head of a Michigan university will likely have his or her name published by the media. Obviously, this can cause some qualified candidates great anguish, embarrassment, and trouble; the controlling board or employer of a candidate may not be pleased to discover that its president or employee is a candidate for another job. If the candidate subsequently does not get the new job, he or she may find that his or her position has been undermined, or that staff morale has deteriorated, because he or she is now viewed as a temporary employee. The OMA and FOIA requirements have a chilling effect on potential candidates, therefore, and may make many reluctant to submit their names. Over time, this will result in State universities' having fewer qualified candidates to choose from and thus less skilled leadership to run institutions of higher learning.

Supporting Argument

Because of the Michigan Supreme Court decision in *Booth Newspapers*, all privacy has been removed from the presidential search process, and it is now a process doomed to failure. The most qualified candidates, those who already have good, highly paid positions, won't risk those positions to apply for one at a university that cannot maintain any confidentiality, because doing so would jeopardize their positions should they not be selected. As an example of the damage that can happen to a candidate, one need look no further than the recent presidential search at Michigan State. The president of Florida State University, who was one of the finalists in MSU's selection process, was removed as president at FSU after he was not selected at MSU. In effect, the current situation hamstrings the selection process in Michigan because it discourages qualified candidates from applying, or even letting a university consider them if the university is actively recruiting candidates. The lack of confidentiality may even affect the quality of letters of recommendation; if someone writing a letter of recommendation for a candidate knows that his or

her words may be aired or published, the content of the letter might not portray the writer's honest opinion.

Supporting Argument

The issue of closed versus open presidential searches produces conflicting policy goals. On one hand, the public's business, in almost all cases, needs to be conducted in public. On the other hand, in this case, the most important job of the controlling board of a university is to select a highly qualified president. The current OMA and FOIA restrictions are a handicap to the selection of the best individuals, which in turn threatens the public interest because it is in the public's interest to have the best people in these positions. Other states have confronted this problem by favoring the side of confidentiality. Of the states that contain Big Ten universities only Minnesota and Michigan have an open selection process, even though all those states have laws similar to Michigan's OMA. Michigan should join Iowa, Wisconsin, Illinois, Indiana, Ohio, and Pennsylvania in exempting universities' presidential searches from having to be conducted in the open.

Supporting Argument

As passed by the Senate the bills would limit the exposure of candidates, by providing that the final three candidates for president would have to be identified at least 30 days before the selection of the president. This would ensure that all other people who applied for or were recruited for the job would remain anonymous, and thus not be put at risk in their current positions. At the same time, the media and the public would have 30 days to explore the background and qualifications of the final three candidates, and offer input and opinion on them. The bills offer a good compromise between an entirely open process versus an entirely closed process.

Response: While announcing the names of the final three candidates would be preferable to a completely closed process, it still would cause problems. Obviously, candidates on the final list who were not selected as president still would face the possibility of embarrassment, demotion, or disruption in their current positions. Thus, many of the candidates who were informed that they were to be announced as finalists likely would withdraw before exposing themselves to damage, leaving many universities to select from whomever was left or restart the selection process.

Further, allowing the search process to continue until three finalists were announced would allow a university to subvert the goal of disclosure. For instance, a selection process could be conducted behind closed doors until the selection committee decided upon a candidate. It then would add two more names to the list--perhaps people who had no chance of being selected--and announce the finalists. In effect, a search conducted in this manner would be no better than a selection process that allowed closed-door meetings up to the announcement of the final choice.

Opposing Argument

The public, and candidates who run for elected office, have called long and loud in recent years for more accountability in government. The bills would reject that notion and hide public officials behind closed doors, to make decisions that ultimately affect the selection of persons responsible for spending millions in taxpayers' dollars. These bills fly in the face of the purpose of the OMA and the FOIA, which were enacted so that the general public would be able to observe, evaluate, and affect the government that taxes their assets, spends their money, and makes their laws. Open democracy and the public oversight of it may be messy or inconvenient, but a strong case can be made that its warts are far better than the mischief that can result from institutionalized secrecy. If an institution takes public funds, then its decisions should be made in public; thus, public leaders should be chosen publicly. While this basic requirement may cause some embarrassment or discomfort, it provides necessary insurance for the common person that while mistakes may be made, they won't be concealed.

Opposing Argument

Conducting presidential searches in private would erode public confidence in the process and create an element of distrust of the person selected, because the process would be ripe with the potential for abuse. In state and local governments across the country, governing bodies are required to conduct their business in open meetings. Legislatures and Congress are forbidden from closing their sessions to the public. What is so special about university presidents that they need to be discussed and selected in secret, rather than subjected to the public eye like candidates for other positions, or issues that need resolution? Moreover, what is the compelling reason for the bills? The presidents of the University of Michigan, Michigan State University, and Wayne State University have shown admirable and decisive qualities of leadership, even though all were chosen under the current open system. One must ask whether changing the process to a closed environment would result in

the hiring of better presidents, or simply a more comfortable process for the selection boards and candidates. It would require a leap of faith to believe that a closed selection process automatically would produce a better result than the open process does; in fact, the open process is far more likely to result in the hiring of a candidate who has the strength and intestinal fortitude to withstand the bright light of public scrutiny that he or she certainly will face after being hired.

Response: While it is correct to praise the qualities of the current presidents at the State's three major universities, it must be pointed out that the last two hiring processes resulted in lawsuits against the selection boards, accusing them of violating the OMA and FOIA. This is an indication that the boards felt the selection process should offer confidentiality to the candidates. This is compelling evidence that the laws need to be changed.

Opposing Argument

The Michigan Supreme Court ruled that the process of selecting a university president is required to be done in the open, and the State should abide by that wisdom rather than attempting to change the rules. Both the OMA and the FOIA were developed to make government accessible and accountable to the public. Certain exceptions to the openness goal were written into each Act. For nearly 20 years these laws have been allowed to operate and have served their purpose. Now comes a proposal to close a portion of government, the selection of university presidents, to the public. If allowed to prevail, the bills likely would be the first in a succession of proposals by public officials claiming that they too are harmed by the open selection process. School superintendents and city managers, for instance, could make the same arguments made by university presidents for anonymity in the hiring process. If that were allowed to happen, the bills would be the beginning of a path that led not to less government, but to less accessible government.

Legislative Analyst: G. Towne

FISCAL IMPACT

The bills would have no fiscal impact on State or local government.

Fiscal Analyst: E. Jeffries

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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.