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BILL ANALYSIS

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Senate Bill 211 (as enrolled) **PUBLIC ACT 464 of 1996**
Sponsor: Senator John J.H. Schwarz, M.D.
Senate Committee: Government Operations
House Committee: Higher Education

Date Completed: 1-13-97

RATIONALE

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.

In recent years, the process of selecting the 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 a decision in the case concerning Michigan State is pending before the Court of Appeals (*Federated 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 be amended to allow universities to conduct closed presidential searches under certain conditions.

CONTENT

The bill amended the Open Meetings Act to allow an institution of higher education to 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 the particular process of searching for and selecting a president meets the following conditions:

-- The search committee in the process, as appointed by the school's governing board, is composed of at least one student, one faculty member, one administrator, and one alumnus of the institution; and one representative of the general public. The search committee also may include one or more members of the governing board, but the number cannot constitute a quorum of the governing board; further, the search

committee must not be constituted in such a way that any one of the groups represented constitutes a majority of the committee.

-- After the search committee recommends five final candidates, the governing board does not take a vote on final selection of the president until at least 30 days after the final candidates have been publicly identified by the search committee.

-- The deliberations and vote of the governing board on selecting the president take place in an open session of the governing board.

If the governing board of an institution violates the bill's provisions regarding the selection of a president, at any time after the recommendation of final candidates is made by the search committee to the governing board, the institution will be responsible for a civil fine of up to $500,000. The civil fine is in addition to any other remedy or penalty under the Open Meetings Act. To the extent possible, the fine imposed under the bill must be paid from funds allocated by the institution to pay for the travel and expenses of the members of the governing board.

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

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 does not apply to the presidency of an institution of higher education.

MCL 15.267 et al.

BACKGROUND

Originally Senate Bill 212 was a companion bill to Senate Bill 211. Senate Bill 212, as enrolled, would have amended the Freedom of Information Act to allow a public body to exempt from disclosing as a public record an application for the position of president of an institution, and records relating to the process of searching for an individual for the position. Senate Bill 212 was not signed by the Governor within the time allowed, which means that it was "pocket vetoed". House Bill 4849 as enrolled, however, 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 after the individual or individuals were identified as finalists for the position of president.

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 needed to modify its OMA 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. Under the OMA, a candidate for the head of a Michigan university would likely have had his or her name published by the media. Obviously, this caused some qualified candidates great anguish, embarrassment, and trouble; the controlling board or employer of a candidate may not have been pleased to discover that its president or employee was a candidate for another job. If the candidate subsequently did not get the new job, he or she could find that his or her position had been undermined, or that staff morale had deteriorated, because he or she was now viewed as a temporary employee. The OMA requirements had a chilling effect on potential candidates, therefore, and might have made many reluctant to submit their names. Over time, this could have resulted 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 was removed from the presidential search process, and it

became a process doomed to failure. The most qualified candidates, those who already had good, highly paid positions, wouldn't risk those positions to apply for one at a university that could not maintain any confidentiality, because doing so would have jeopardized 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 situation hamstrung the selection process in Michigan because it discouraged qualified candidates from applying, or even letting a university consider them if the university was actively recruiting candidates. The lack of confidentiality could even have affected the quality of letters of recommendation; if someone writing a letter of recommendation for a candidate knew that his or her words could be aired or published, the content of the letter might not have portrayed 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 OMA restrictions were a handicap to the selection of the best individuals, which in turn threatened 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 had an open selection process, even though all those states had laws similar to Michigan's OMA. Michigan was correct to join Iowa, Wisconsin, Illinois, Indiana, Ohio, and Pennsylvania in exempting universities' presidential searches from having to be conducted in the open.

Supporting Argument

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

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

Further, allowing the search process to continue until five finalists are announced will 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 could add four 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 will 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 bill rejects that notion and hides public officials behind closed doors, to make decisions that ultimately affect the selection of persons responsible for spending millions in taxpayers' dollars. The bill flies in the face of the purpose of the OMA, which was enacted so that the general public can 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 will erode public confidence in the process and create

an element of distrust of the person selected, because the process will 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 bill? 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 open system. One must ask whether changing the process to a closed environment will result in the hiring of better presidents, or simply a more comfortable process for the selection boards and candidates. It requires a leap of faith to believe that a closed selection process automatically produces 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 two recent 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 needed 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 changing 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 legislation to close a portion of government, the selection of university presidents, to the public. The bill is likely to 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 is allowed to happen, the bill will be the beginning of a path that leads not to less government, but to less accessible government.

Legislative Analyst: G. Towne

FISCAL IMPACT

There could be additional civil fine revenue for local units of government, depending on the frequency of selection process violations and the magnitude of any ensuing fines.

Fiscal Analyst: E. Jeffries

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