

# Legislative Analysis



## STATE EMPLOYEE OMBUDSMAN ACT

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

**House Bill 5981 as reported**  
**Sponsor: Rep. Annette Glenn**  
**Committee: Government Operations**  
**Complete to 10-12-20**

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

### SUMMARY:

House Bill 5981 would create a new act, the State Employee Ombudsman Act, to create the Office of the State Employee Ombudsman in the Legislative Council and provide for its powers and duties, which would generally involve investigating and evaluating reports of suspected misconduct in state departments and agencies.

#### **State Employee Ombudsman**

The bill would create the Office of the State Employee Ombudsman within the Legislative Council.<sup>1</sup> The state employee ombudsman, the principal executive officer of that office, would be appointed by the council and serve at its pleasure.

The Legislative Council would have to establish procedures for approving the office's budget, expending its funds, and employing personnel. The ombudsman would establish, subject to the council's approval, procedures for receiving and processing complaints, conducting investigations, holding hearings, and reporting findings.

#### **Investigations**

The ombudsman could start an investigation on his or her own initiative or upon receiving a complaint from a *state employee* concerning an *administrative act*.

*State employee* would mean a full- or part-time employee of a *state department or agency*.

*State department or agency* would mean a state department or other agency in the executive branch.

*Administrative act* would include an action, omission, decision, recommendation, practice, or other procedure of a state department or agency.

The ombudsman would have to be given access, upon request, to all information, records, and documents in a state department's or agency's possession that the ombudsman considered necessary in an investigation for misconduct, which would include the following:

- Violations of law or suspected violations of law.
- Conduct by a state department or agency that will endanger public health or safety or is substantially likely to do so.
- Gross mismanagement or waste of public funds.

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<sup>1</sup> The Legislative Council consists of twelve members, six representatives and six senators, who are respectively appointed by the Speaker of the House and the Senate Majority Leader. Each group of six members must include at least two members from the respective chamber's minority party.

The ombudsman could hold informal hearings and could request that any individual appear before the ombudsman or at a hearing and give testimony or produce documentary or other evidence that the ombudsman considered relevant to an investigation.

Upon request of the ombudsman, the Legislative Council could hold a hearing. The council could administer oaths, subpoena witnesses, and examine the books and records of the state department or agency that was a proper subject of investigation by the ombudsman.

### **Complaints**

The ombudsman would have to advise a complainant (person making a complaint) of all administrative remedies open to him or her. Upon request from the ombudsman, a state department or agency would have to provide a progress report concerning the administrative processing of a complaint submitted to the state department or agency. After the state department or agency took administrative action on a complaint, the ombudsman could conduct further investigation at the request of a complainant or on his or her own initiative.

Upon receiving a complaint and deciding to investigate, the ombudsman would have to notify the complainant and the state department or agency. If the ombudsman declined to investigate, the ombudsman would have to notify the complainant, in writing, of the reasons for the decision.

The ombudsman would not have to conduct an investigation on a complaint brought before the ombudsman, and a complainant would not be entitled to have an investigation conducted by the ombudsman.

### **Confidentiality**

Correspondence between the office and a complainant would be confidential, would be privileged communication, and would be exempt from disclosure under the Freedom of Information Act (FOIA). Unless disclosure were necessary to enable the ombudsman to perform his or her duties or to support a recommendation resulting from an investigation, the office would have to maintain confidentiality regarding all matters under investigation and the identities of the complainants or persons from whom information was acquired.

### **Report to complainant**

Within 30 days after completing an investigation, the ombudsman would have to prepare and provide to the complainant a resolution report detailing the findings of the investigation, the recommendations of the ombudsman, and any actions that have been taken to address the complainant's concerns. The ombudsman could request that a state department or agency notify the ombudsman within a specified time of any action taken on any recommendation presented. The ombudsman would have to notify the complainant of the actions a state department or agency takes to address the complaint.

### **Report to Legislative Council**

The ombudsman would also have to prepare and submit a report of its findings to the Legislative Council within 30 days after completing an investigation. This report would have to include recommendations if the ombudsman found any of the following:

- Conduct that will or is substantially likely to endanger public health or safety.
- A violation or suspected violation of law.

- The gross mismanagement or waste of public funds.
- A matter that the state department or agency should consider.
- An administrative act that should be modified or canceled.
- A statute or rule that should be altered.
- An administrative act for which justification is necessary.
- Any other significant concern as determined by the ombudsman.

The recommendations could include recommended corrective actions if a state department or agency penalized a complainant in any way for filing a complaint, providing information to the council or a legislator, or cooperating with the ombudsman in investigating a complaint.

The council could forward the report to the state department or agency and to the complainant who requested the report. However, before announcing to the general public a conclusion or recommendation that expressly or by implication criticized a state department or agency, the ombudsman would have to consult with the state department or agency. If the ombudsman published an opinion adverse to a state department or agency, the ombudsman would have to include in that publication a statement of reasonable length made to the ombudsman by the state department or agency in defense or mitigation of the finding, if that statement was provided within a reasonable time as determined by the council.

A report prepared and recommendations made by the ombudsman and submitted to the council would be exempt from disclosure under FOIA.

### **Annual report**

The ombudsman would have to submit to the Legislative Council and the legislature an annual report on the conduct of the office that contained information required by the council. The ombudsman would have to post on its website annually a report containing all of the following:

- The number of complaints received.
- The number of complaints investigated.
- The number of complaints resolved.
- The nature of each incident that was the basis for the complaint. However, personal identifying information must not be included.
- The average time from the receipt of a complaint until a resolution report is provided.
- The percentage of repeat complaints.
- Satisfaction feedback.
- Any additional information the council requests or the ombudsman considers relevant.

### **State departments and agencies**

The bill would prohibit a state department or agency from penalizing in any way a complainant for filing a complaint, providing information to the Legislative Council or a legislator, or cooperating with the ombudsman in investigating a complaint. It would also prohibit a state department or agency or any person from hindering the lawful actions of the ombudsman or employees of the office or willfully refusing to comply with any lawful demand of the office.

### **Scope**

The authority granted to the ombudsman under the act would be in addition to other authority granted by law to any other office or agency relative to a remedy or right of appeal or objection for a complainant, or any procedure provided for the inquiry into, or investigation of, any

matter. The authority granted to the ombudsman under the act would not limit or affect any other remedy or right of appeal or objection provided by law and would not be exclusionary.

### **Penalty**

A violation of the act would be a misdemeanor punishable by imprisonment for up to one year or a fine of up to \$1,000, or both.

## **BRIEF DISCUSSION:**

On October 19, 2016, the Joint Select Committee on the Flint Water Emergency issued its final report,<sup>2</sup> which included 36 legislative proposals. In addition to recommendations for health and safety measures in response to issues presented by the Flint Water Crisis, the report included proposals for legislative action to improve governmental oversight and accountability. The first of these recommended the creation of a state employee ombudsman to supplement existing whistleblower protections by providing an independent office to which state employees could confidentially report misconduct without fear of reprisal.

Michigan's Whistleblower Protection Act protects employees from being fired or harassed by their employers for reporting a violation or suspected violation of a local, state, or federal law and also protects them from retaliation for participating in hearings, investigations, legislative inquiries, or court actions. While the act does not apply to those employed by the state classified civil service, section 2-10 of the Civil Service Commission Rules contains similar protections.<sup>3</sup>

But some feel that these protections don't go far enough to ensure governmental accountability. As the Flint Water Crisis showed, sometimes government employees have knowledge or concerns that deserve further investigation and scrutiny but fall short of alleging a crime. Consistent with the joint committee's final report, House Bill 5981 would allow for confidential investigation not only of violations and suspected violations of law, but also of gross mismanagement or waste of public funds and of conduct by a state entity that will, or is substantially likely to, endanger public health or safety. Having an independent office where state employees can bring the latter types of issues might help prevent or mitigate potentially large problems before they can grow.

During committee testimony on House Bill 5981, the issue was raised that the details addressed in the ombudsman's investigation or findings could reveal a complaint's likeliest source and that additional safeguards could be added to protect the identity of employees and ensure the confidentiality of the complaint process.

House Bill 5981 is similar to Senate Bill 788 of the 2017-18 legislative session and to House Bill 4872 and Senate Bill 481 of the current session. It is also related in purpose to House Bill 5492 of the 2017-18 legislative session and House Bill 4177 of the current session. Those bills propose an Office of Government Accountability with some of the same powers and duties as the ombudsman under House Bill 5981.

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<sup>2</sup><https://misenategopcdn.s3.amazonaws.com/99/publications/Final%20Report%20of%20the%20Joint%20Select%20Committee.pdf>

<sup>3</sup> [https://www.michigan.gov/documents/mdcs/MCSCRules\\_625564\\_7.pdf](https://www.michigan.gov/documents/mdcs/MCSCRules_625564_7.pdf)

## **FISCAL IMPACT:**

House Bill 5981 would have an indeterminate fiscal impact on the state and on local units of government. Under the bill, a person that violates provisions of the act would be guilty of a misdemeanor punishable by imprisonment for not more than one year or a fine of not more than \$1,000, or both. There is no way to know the number of convictions that would result under provisions of the bill. New misdemeanor convictions would increase costs related to county jails and/or local misdemeanor probation supervision. Costs of local incarceration in county jails and local misdemeanor probation supervision, and how those costs are financed, vary by jurisdiction. The fiscal impact on local court systems would depend on how provisions of the bill affected caseloads and related administrative costs. Any increase in penal fine revenue would increase funding for public and county law libraries, which are the constitutionally designated recipients of those revenues.

The bill would increase costs for the Legislative Council. Specifically, increased costs would result from staff salaries, benefits, office space, office supplies, travel, and any other costs incurred operating and administering the Office of the State Employee Ombudsman. For context, the FY 2019-20 appropriations for the Legislative Corrections Ombudsman and the Michigan Veterans Facility Ombudsman were \$1,006,900 and \$315,200 respectively.

State departments and agencies likely would incur costs responding to complaint investigations. These costs would be directly correlated to the complexity of any complaint. Whether the actions of the office would result in any state fiscal impact subsequent to the resolution of a complaint cannot be estimated and would depend on the nature of the complaint and the department or agency response.

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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.