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BILL ANALYSIS

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Senate Bill 669 (Substitute S-1 as passed by the Senate)  
Senate Bill 670 (Substitute S-2 as passed by the Senate)  
Sponsor: Senator Jeremy Moss (S.B. 669)  
          Senator Ed McBroom (S.B. 670)  
Committee: Oversight

Date Completed: 8-9-24

## **RATIONALE**

Generally, the Freedom of Information Act (FOIA) provides public access to certain requested records in the possession a public body in the performance of that public body's official function. Currently, FOIA explicitly exempts the Governor, Lieutenant Governor, the Executive Office of the Governor or Lieutenant Governor (EOG), and employees of those offices from FOIA and does not include the Legislature in the definition of public body. Some believe that FOIA is a tool for constituents to serve as watchdogs for unethical or illegal behavior and that the tool is hindered because members of the Legislature and the EOG are not transparent enough under current exemptions. Accordingly, it has been suggested that the Legislature and the EOG be considered public bodies under FOIA to allow the public to hold these offices to certain standards of accountability.

## **CONTENT**

**Senate Bill 669 (S-1)** would amend FOIA to add and modify definitions as used in **Senate Bill 670 (S-2)**, specifically modifying the term "public body" to include the Legislature and the EOG.

**Senate Bill 670 (S-2)** would amend FOIA to do the following:

- **Require the Senate Majority Leader and the Speaker of the House to designate a FOIA coordinator for the Senate and House of Representatives, respectively.**
- **Prescribe the process for making an appeal to the Legislature upon the denial of a FOIA request by the Legislature.**
- **Apply current FOIA exemptions to public records of the EOG and the Legislature.**
- **Prescribe additional FOIA exemptions to public records of the EOG, such as records concerning executive privileges and records created before the bill's effective date, among other records.**
- **Prescribe additional disclosure exemptions to public records of the Legislature, such as records of communications with constituents and records concerning internal investigations, among other records.**

The bills are tie-barred, and each bill would take effect on January 1 of the first odd-numbered year that begins six months after its enactment.

### **Senate Bill 669 (S-1)**

#### **Definitions**

Currently, "public body" means any of the following:

- A State officer, employee, agency, department, division, bureau, board, commission, council, authority, or other body in the executive branch of the State government.
- An agency, board, commission, or council in the legislative branch of the State government.
- A county, city, township, village, intercounty, intercity, or regional governing body, council, school district, special district, or municipal corporation, or a board, department, commission, council, or agency thereof.
- Any other body that is created by State or local authority or is primarily funded by or through State or local authority.

The term does not include the following:

- The Governor or Lieutenant Governor, the EOG, or employees thereof.
- The Judiciary, including the office of the county clerk and its employees when acting in the capacity of clerk to the circuit court.

Instead, under the bill, "public body" would mean any of the following:

- A State officer, employee, agency, department, division, bureau, board, commission, council, authority, or other body in the executive branch of the State government.
- 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.
- A county, city, township, village, intercounty, intercity, or regional governing body, council, school district, special district, or municipal corporation, or a board, department, commission, council, or agency thereof.
- Any other body that is created by State or local authority or is primarily funded by or through State or local authority.

The term would not include the following:

- The Legislative Services Bureau (LSB), the Senate Fiscal Agency (SFA), and the House Fiscal Agency (HFA).
- The Judiciary or the office of the county clerk and its employees when acting in the capacity of the clerk to the circuit court.

Additionally, the bill specifies that revenue earned by a body created by or funded by a State or local authority pursuant to a fee-for-service transaction with a governmental entity would not count as funds provided by or through State or local authority.

"Legislator" would mean a member of the Senate or House of Representatives.

"Public record" means a writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function, from the time it is created. Public record does not include computer software. The bill specifies that the term would not include notes taken or made by a member of a public body, including notes taken or made during a meeting of the public body, if the notes were for that member's personal use, were not circulated among other members, were not used in the creation of any meeting minutes, and were retained or destroyed at that member's sole discretion.

"Writing" means handwriting, typewriting, printing, photostating, photographing, photocopying, and every other means of recording, and includes letters, words, pictures, sounds, or symbols, or combinations thereof, and papers, maps, magnetic or paper tapes, photographic films or prints, microfilm, microfiche, magnetic or punched cards, discs, drums, hard drives, solid state storage components, or other means of recording or retaining meaningful content. Under the bill, the term also would include hybrid drives, cloud storage, quantum networks, and computing systems.

### **Senate Bill 670 (S-2)**

#### FOIA Coordinator

Under the Act, a public body that is a city, village, township, county, or State department, or under the control of any such entity must designate an individual as the public body's FOIA coordinator. In a county not having an executive form of government, the chairperson of the county board of commissioners is designated the FOIA coordinator for that county. For all other public bodies, the chief administrative officer of the respective public body is designated the public body's FOIA coordinator.

The bill would require the Senate Majority Leader and Speaker of the House to each designate an individual as the FOIA coordinator for the Senate and the House of Representatives.

#### Denial of a FOIA Request

If a public body makes a final determination to deny all or part of a request, the requesting individual may submit a written appeal to the head of that public body or commence a civil action in the circuit court or court of claims. Under the bill, for the purpose of an appeal of a denial by a State legislative public body, the submission would have to be made to one of the following, as applicable:

- An individual designated by the Speaker of the House of Representatives to respond on behalf of the House of Representatives.
- An individual designated by the Senate Majority Leader to respond on behalf of the Senate.

#### Disclosure Exemptions, Generally

Section 13 of FOIA allows a public body to exempt specified information from disclosure as a public record. Under the Act, among other information, public bodies may exempt trade secrets or commercial or financial information provided to an agency for use in developing governmental policy subject to the following:

- The information is submitted upon a promise of confidentiality by the public body.
- The promise of confidentiality is authorized by the chief administrative officer of the public body or by an elected official at the time the promise is made.
- A description of the information is recorded by the public body within a reasonable time after it has been submitted, maintained in a central place within the public body, and made available to a person upon request.

The bill specifies that this exemption also would apply to information trade secrets or commercial or financial information voluntarily provided to a State legislative public body. Additionally, FOIA allows a public body to exempt information or records subject to attorney-client privilege, and the bill would specify that this provision also would include attorney work product privilege.

## EOG Disclosure Exemptions

In addition to other specified exemptions, the EOG could exempt from disclosure as a public record any of the following:

- Information or records subject to executive privilege.
- Records created, prepared, owned, used, in the possession of, or retained by the Governor, the Lieutenant Governor, or the EOG or an employee of the EOG prior to the bill's effective date.
- Communications, including any related records or information, between the EOG or any employee of the EOG and a constituent, other than a person that received an appointment unless otherwise already exempt from disclosure, or was employed by the State or a person required to be registered as a lobbyist.
- Records or information that could affect the security of the Governor or Lieutenant Governor or the family members of the Governor or Lieutenant Governor.
- The cellphone number of the Governor or Lieutenant Governor or an employee of the EOG.
- Records or information pertaining to an internal investigation.
- Records or information relating to a civil action in which the EOG was a party until such litigation or claim had been finally adjudicated or otherwise settled.
- Records created, prepared, owned, used, in the possession of, or retained by the Governor, the Lieutenant Governor, the EOG, or an employee of the EOG for fewer than 30 days.
- Records created or prepared by the Governor, the Lieutenant Governor, the EOG, an employee of the EOG, a legislator, or an employee of a State legislative public body that related to advice, opinions, or recommendations about public policy or district work.

For purposes of the provision described above, "constituent" would mean an individual who resides in the State and who contacts the EOG for assistance in personally obtaining government services, to express a personal opinion, or for redress of personal grievances.

Additionally, the EOG could exempt records or information in the EOG's possession or in the possession of an employee of the EOG that related to any of the following:

- The appointment of an individual as a department or agency director; as a member of a board, commission, or council; to fill a vacancy on a court pursuant to Section 23 of Article VI of the State Constitution of 1963; or to any other position the Governor appointed as provided by law.
- The decision to remove or suspend from office any public official pursuant to Section 10 of Article V of the State Constitution of 1963, Section 33 of Article VII of the State Constitution of 1963, or to remove a judge from office pursuant to Section 25 of Article VI of the State Constitution of 1963.
- The decision to grant or deny a reprieve, pardon, or commutation pursuant to Section 14 of Article V of the State Constitution of 1963.
- A budget recommendation prepared pursuant to Section 18 of Article V of the State Constitution of 1963.
- A reduction in expenditures pursuant to Section 20 of Article V of the State Constitution of 1963.
- A message or recommendation to the Legislature pursuant to Section 17 of Article V of the State Constitution of 1963.
- The executive residence described in Section 24 of Article V of the State Constitution of 1963.

The bill would specify that, after an individual had been appointed to a position by the Governor, the exemption would not apply to records or information that related to that individual except for records or information that related to the process undertaken to select that individual for appointment including an application, letter of recommendation, or letter of reference. Additionally, after an individual had been removed from a position, the exemption for records and information would not apply to a record that related to that individual.

#### Legislative Public Body Disclosure Exemptions

In addition to other specified exemptions, a public body that was a State legislative public body could exempt from disclosure as a public record any of the following:

- Communications, including any related records or information, between a legislator or a legislator's office and a constituent, other than a person required to be registered as a lobbyist.
- Records or information pertaining to an internal or legislative investigation.
- Records or information relating to a civil action in which the State legislative public body was a party until such litigation or claim had been finally adjudicated or otherwise settled.
- Records or information specifically described and exempted from disclosure by statute or regulation and including the records and information subject to confidentiality requirements in Sections 109, 501, and 601 of the Legislative Council Act, in Section 9 of Public Act (PA) 198 of 2016, and in Section 9 of PA 46 of 1975.<sup>1</sup>
- Records of the office of sergeant at arms.
- Records created, prepared, owned, used, in the possession of, or retained by the State legislative public body for fewer than 30 days.
- Records created or prepared by the Governor, the Lieutenant Governor, the EOG, a legislator, or an employee of a State legislative public body that related to advice, opinions, or recommendations about public policy or district work.
- Records created, prepared, owned, used, in the possession of, or retained by the majority or minority caucuses of each house of the Legislature.
- The personal telephone numbers of any legislator or employee of the State legislative public body.

Additionally, a State legislative public body could exempt from disclosure records or information related to the appointment of an individual to any position for which the State's Speaker of the House of Representatives or Senate Majority Leader made the appointment as provided by law. Following appointment, the exemption would not apply to records or information that related to that individual except as to an application, letter of recommendation, or letter of reference.

For the purposes of the provision described above "constituent" would mean any of the following:

- An individual who is registered to vote in the district the legislator is elected to represent.
- An individual who is a resident of the district the legislator is elected to represent and who is not registered to vote outside of that district.

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<sup>1</sup> Sections 109, 501, and 601 of the Legislative Council Act provide for the creation and confidentiality requirements of the LSB, SFA, and HFA, respectively. Section 9 of PA 198 of 2016 governs the confidentiality of the Michigan Veterans Facility Ombudsman and Section 9 of PA 46 of 1975 governs the confidentiality of the Legislative Corrections Ombudsman.

- An individual other than an individual described above if it can be reasonably inferred that the individual intended that the communication be with the legislator elected to represent the district where the individual is registered to vote or, if not registered to vote, resides.

The provisions described above would not authorize the exemption from disclosure of any salary record of an employee or official of a State legislative public body.

### FOIA Request to Legislature and EOG

The Act specifies that it does not authorize the withholding of a public record in the possession of the EOG, or an employee of the EOG, if the public record is transferred to the EOG or employee after a request for the public record has been received by a State officer, employee, agency, department, division, bureau, board, commission, council, authority, or other body in the executive branch of government that is subject to the Act. The bill would delete this provision.

Under the bill, FOIA's application to a State legislative public body could 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 of 1963, which generally prohibits senators and representatives from civil arrest or civil process during sessions of the Legislature.

### **PREVIOUS LEGISLATION**

*(This section does not provide a comprehensive account of all previous legislative efforts on the relevant subject matter.)*

There have been many previous legislative attempts to subject the Governor, EOG, and the Legislature to FOIA, including the following:

- Senate Bill 716 of the 2015-2016 Legislative Session.
- House Bills 4569 through 5478 of the 2015-2016 Legislative Session which passed the House but received no further action.
- House Bills 4148 through 4157 of the 2017-2018 Legislative Session which passed the House but received no further action.
- House Bills 4007 through 4016 of the 2019-2020 Legislative Session which passed the House but received no further action.
- Senate Bills 232 through 241 of the 2021-2022 Legislative Session which were reported from the Senate Committee on Oversight but received no further action.

MCL 15.232 (S.B. 669)  
15.236 et al. (S.B. 670)

### **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 bills would improve transparency in the State by no longer exempting the Legislature and the EOG from FOIA. The Center for Public Policy awarded the State an "F" grade in transparency, citing a lack of accountability from the Legislature and Executive branch and poor access to public data.<sup>2</sup> Additionally, the Coalition for Integrity ranked Michigan 47th out

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<sup>2</sup> "Michigan Gets an F Grade in 2015 State Integrity Investigation". Center for Public Policy. <https://publicintegrity.org/politics/state-politics/state-integrity-investigation/michigan-gets-f-grade-in-2015-state-integrity-investigation/>. Retrieved July 11, 2024.

of 50 for anti-corruption measures.<sup>3</sup> According to testimony before the Senate Committee on Oversight, there is a lack of public trust resulting from current FOIA standards for lawmakers that has enabled bad actors and possible illegal actions, which is why the State ranks among the least transparent in the country; only Michigan and Massachusetts have such exemptions for the Legislature and EOG.<sup>4</sup> Some believe that disclosing information is vital to holding lawmakers accountable to the constituents those lawmakers represent. The Freedom of Information Act is a tool for individuals to understand how the government works, how and why decisions are made, and to uncover misuse. Requiring the Legislature and EOG to be subject to FOIA would increase transparency at the highest levels of State government and improve residents' trust in their State lawmakers and officials.

### **Opposing Argument**

Exempting information related to constituent communications is too broad and some constituent communication should be eligible for disclosure. While the personal privacy of constituents should be protected, FOIA already prescribes a process to redact personal information and to protect privacy generally. A blanket exemption on all constituent information would hinder public access to understanding how elected officials are interacting with constituents and communities, which is important considering that in many cases State policies are experienced at a local level. Transparency through FOIA can provide information on how and why issues developed and would help hold those in power accountable for actions taken over the course of an issue. Allowing for the disclosure of constituent communications with specific redaction could give insight into early instances of whistleblowing on significant issues.

**Response:** According to testimony on the Senate Committee of Oversight, many constituents reach out to legislatures as a last chance resolve for concerns such as domestic and sexual violence issues, among other things. Those communications often include documents such as birth certificates or medical records. Reportedly, the standard redaction formula under FOIA would not be enough to protect the important information of those constituents that have reached out and not exempting that information from disclosure could close a method for constituents to reach out for help. Some believe that not exempting this communication would penalize a constituent for oversharing. Additionally, information such as how a legislature interacted with other offices in handling constitutional concerns would be released under FOIA and a requester would be able to find out instances of whistleblowing through that type of request.

### **Opposing Argument**

The FOIA coordinator should not be a partisan position, and instead the State should have a FOIA ombudsman office or a FOIA enforcement commission. According to testimony before the Senate Committee on Oversight, as of July 2023, 20 states have FOIA ombudsman offices and 12 states have FOIA enforcement commissions.<sup>5</sup> Creating a separate office to handle FOIA requests would remove the need for a politically aligned appointment and would increase public trust in the FOIA process.

**Response** Requesters should not have concern about political appointment because the final determination if that coordinator did not comply would be given to the courts. Upon denial of a FOIA request, the requesting person may submit an appeal to the head of the public body or commence a civil action in to compel disclosure. Additionally, according to testimony before the Senate Committee on Oversight, while business office positions are

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<sup>3</sup> "The States with Anti-Corruption Measures Index 2020". Coalition for Integrity. <https://www.coalitionforintegrity.org/swamp2020/> Retrieved July 11, 2024.

<sup>4</sup> *Lambert v. Executive Director of the Judicial Nominating Council*, 425 Mass. 406 (1997)

<sup>5</sup> Voters Not Politicians, "State FOIA Ombudsman Commission List". Senate Committee on Oversight 2-6-24.

partisan positions, the roles focus on "day-to-day" operations and are unlikely to act in a politically motivated manner.

Legislative Analyst: Eleni Lionas

### **FISCAL IMPACT**

Senate Bill 669 (S-1) would have no fiscal impact on State or local government.

Senate Bill 670 (S-2) would not have a significant fiscal impact on the State and would have no fiscal impact for local units of government. The bill's requirement for the EOG and the Legislature to comply with FOIA requests and to designate a FOIA coordinator could require the EOG and the Legislature to hire additional staff. The average salary for a classified State employee in Fiscal Year 2022-23 (for comparison purposes as Executive and Legislative employees are at-will employees) was \$145,000 for salary and benefits.

Fiscal Analyst: Joe Carrasco, Jr.

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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.