REPORT TO THE LEGISLATURE ON RECOMMENDATIONS FOR REVISIONS TO MICHIGAN'S FREEDOM OF INFORMATION ACT

Transparency is a critical requirement for public entities at all levels of state and local government. And government's handling of highly sensitive personal and administrative matters requires clear and articulate standards for government officials.

As part of its statutory charge to discover defects and anachronisms in the law and to recommend needed reforms, the Michigan Law Revision Commission conducted a review of the Michigan Freedom of Information Act, MCL 15.231 *et seq.*, ("FOIA"), court decisions interpreting FOIA, and legislation from other states to identify issues for consideration by the Legislature to improve the public's access to information regarding the affairs of government. Mindful of the fact that legislation is currently pending to create a new Legislative Open Records Act, the Commission has identified five areas that merit legislative review. Those areas are:

1. Language That Has Been Limited by Court Interpretation
2. Improvements to Statutory Language for Clarity
3. Amending FOIA Regarding Certain Private Entities That Receive Public Funds
4. Publication of FOIA Responses to a Government Website and Expansion of Michigan's Open Data Portal
5. Creation or Designation of an Entity to Monitor Access to Information Under FOIA

I. LANGUAGE THAT HAS BEEN LIMITED BY COURT INTERPRETATION

1. The Words "Granted" and "Fulfilled" Are Not Synonymous. *Cramer v Village of Oakley,* 316 Mich.App. 60; 890 N.W.2d 895 (2016).

A. Background

Under MCL 15.235(2), a public body must respond to a request for information within 5 days of receiving it by granting the request, denying it, granting it in part and denying it in part, or by giving a written notice of an extension of up to 10 days.

In *Cramer v. Village of Oakley*, the plaintiff made six separate FOIA requests regarding the village's reserve police department unit. Five days later, plaintiff was informed the requests were granted, and that the village would conduct a search and provide any documents located. The plaintiff sued, alleging that a written statement saying the village granted the requests did not comply with FOIA; rather, the documents had to be provided when the village responded to the request. Eleven days after receiving the request, the village provided the documents.

The circuit court ruled for the plaintiff, holding that the village did not provide the documents within the statutorily required period, which was tantamount to denial of the request. The Court of Appeals reversed the decision. The court held that the words "granted" and "fulfilled" are not synonymous, and that the village complied with the statute by granting the request within the statutorily required period. The court noted that a requestor can sue for the

fulfillment of their request if "an inordinate delay in the production of requested documents" occurs. *Id.*

B. Question Presented

Should the Legislature amend FOIA to clarify the terms "granted" and "fulfilled"? Should the Legislature define the amount of time that constitutes an "inordinate delay" under *Cramer?*

C. Recommendation

The Commission recommends amending the statutory language of MCL 15.235(2) to the following to clarify the issue:

"(2) Unless otherwise agreed to in writing by the person making the request, a public body shall respond to a request for a public record within 5 business days after the public body receives the request by doing 1 of the following:

(a) Granting AND FULFILLING the request BY PRODUCING THE REQUESTED DOCUMENTS WITHIN 5 BUSINESS DAYS OF RECEIVING THE REQUEST.

(b) Issuing a written notice to the requesting person denying the request.

(c) Granting the request in part and issuing a written notice to the requesting person denying the request in part. THE GRANTED PORTION OF THE REQUEST MUST BE FULFILLED BY PRODUCING THE GRANTED SUBSET OF THE REQUESTED DOCUMENTS WITHIN 5 BUSINESS DAYS OF RECEIVING THE REQUEST.

(d) Issuing a notice extending for not more than 10 business days the period during which the public body shall respond to the request. A public body shall not issue more than 1 notice of extension for a particular request."

2. Notes Taken by Municipal Officials in Public Meetings Are Not Necessarily Public Records. *Hopkins v Twp of Duncan,* 294 Mich.App. 401; 812 N.W.2d 27 (2011).

A. Background

Under MCL 15.232(2)(i), a public record is "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."

In *Hopkins v. Twp. of Duncan,* a township resident requested copies of the notes taken by the members of the township board at a specific board meeting. The township refused to produce the requested records, and the resident filed suit. The Court of Appeals held that "handwritten notes of a township board member taken for his personal use, not circulated among other board members, not used in the creation of the minutes of any of the meetings, and retained or destroyed at his sole discretion, are not public records subject to disclosure under FOIA." *Id.* at 402.

B. Question Presented

Should the Legislature amend FOIA to clarify that notes taken by municipal officials in public meetings are not public records?

C. Recommendation

The Commission recommends amending the statutory language of MCL 15.232(2)(i) to the following to clarify the issue:

"(i) '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. PUBLIC RECORD DOES INCLUDE THE NOTES TAKEN OR MADE BY A MEMBER OF A PUBLIC BODY IN A PUBLIC MEETING OF THAT PUBLIC BODY. This act separates public records into the following 2 classes:

(i) Those that are exempt from disclosure under section 13.

(ii) All public records that are not exempt from disclosure under section 13 and that are subject to disclosure under this act."

1. Public Funds Do Not Include Fee-For-Service. *State Defender Employees v Legal Aid & Defender Ass'n of Detroit,* 230 Mich.App. 426; 584 N.W.2d 359 (1998).

A. Background

Under MCL 15.232(h)(iv), a public body (all of which are subject to FOIA requests) includes any entity that "is created by state or local authority or which is primarily funded by or through state or local authority."

In *State Defender Union Employees v Legal Aid & Defender Ass'n of Detroit*, the plaintiff requested financial records from a non-profit corporation established to provide legal services to indigent persons residing in the city of Detroit. A majority of the revenue of the non-profit came from "public funds received for services rendered or to be rendered, including contracts with public agencies and as appointed counsel." *Id.* at 428. The Court of Appeals held that the non-profit was not a public body because revenues that are generated from fee-for-service transactions with various governmental entities do not count as being "funded by or through state or local authority" for the purposes of FOIA. *Id.* at 433-34.

B. Question Presented

Should the Legislature review FOIA to clarify that being "primarily funded by or through state or local authority" does not include revenues from fee-for-service transactions, especially for entities that serve a public purpose like social service non-profits that receive public contracts?

C. Recommendation

The Commission recommends amending the statutory language of MCL 15.232(h) to the following to clarify the issue:

"(h) 'Public body' means any of the following:

(i) A state officer, employee, agency, department, division, bureau, board, commission, council, authority, or other body in the executive branch of the state government, but does not include the governor or lieutenant governor, the executive office of the governor or lieutenant governor, or employees thereof.

(ii) An agency, board, commission, or council in the legislative branch of the state government.

(iii) 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.

(iv) Any other body that is created by state or local authority or is primarily funded by or through state or local authority, except that the judiciary, including the office of the county clerk and its employees when acting in the capacity of clerk to the circuit court, is not included in the definition of public body. FOR NON-PROFIT ORGANIZATIONS, REVENUES THAT ARE GENERATED FROM FEE-FOR-SERVICE TRANSACTIONS WITH VARIOUS GOVERNMENT ENTITIES DO NOT COUNT AS FUNDS FOR THE PURPOSE OF DETERMINING IF THE NON-PROFIT ORGANIZATION IS PRIMARILY FUNDED BY OR THROUGH STATE OR LOCAL AUTHORITY."

II. OVERALL IMPROVEMENTS IN STATUTORY LANGUAGE FOR CLARITY

1. Clarify the Definition of Public Body

A. Background

MCL 15.232(h) defines public body as any of the following:

"(i) A state officer, employee, agency, department, division, bureau, board, commission, council, authority, or other body in the executive branch of the state government, but does not include the governor or lieutenant governor, the executive office of the governor or lieutenant governor, or employees thereof.

(ii) An agency, board, commission, or council in the legislative branch of the state government.

(iii) 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.

(iv) Any other body that is created by state or local authority or is primarily funded by or through state or local authority, except that the judiciary, including the office of the county clerk and its employees when acting in the capacity of clerk to the circuit court, is not included in the definition of public body."

Subsection (iii) does not expressly include committees from local government units. Subsection (iii) also does not expressly include mayors, county executives, prosecutors, sheriffs, and other singular local offices—though it is often understood to include these offices.

B. Question Presented

Should the Legislature amend the definition of "public body" under Section 2(h) of FOIA, MCL 15.232(h), to expressly include local government committees and various singular local offices?

C. Recommendation

The Commission recommends amending the statutory language of MCL 15.232(h) to the following to clarify the issue:

"(h) 'Public body' means any of the following:

(i) A state officer, employee, agency, department, division, bureau, board, commission, council, authority, or other body in the executive branch of the state government, but does not include the governor or lieutenant governor, the executive office of the governor or lieutenant governor, or employees thereof.

(ii) An agency, board, commission, or council in the legislative branch of the state government.

(iii) 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, COMMITTEE, or agency thereof. IT SHALL ALSO INCLUDE MAYORS, COUNTY EXECUTIVES, PROSECUTORS, SHERIFFS, AND OTHER NON-JUDICIAL LOCAL GOVERNMENTAL OFFICES.

(iv) Any other body that is created by state or local authority or is primarily funded by or through state or local authority, except that the judiciary, including the office of the county clerk and its employees when acting in the capacity of clerk to the circuit court, is not included in the definition of public body."

2. Clarify the Definition of Writing

A. Background

MCL 15.232(l) defines "writing" as "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."

Although the legislature recently added hard drives and solid state storage components and although courts have interpreted "writing" to include digital and other electronically stored information for the purposes of FOIA, the definition of the term "writing" still lacks cloud storage, hybrid drives, and various other forms of digital and other electronically stored information, including likely future forms of electronic storage such as quantum networks and computing systems.

B. Question Presented

Should the Legislature amend the definition of "writing" under MCL 15.232(l) to expressly include more digital and other electronically forms of stored information?

C. Recommendation

The Commission recommends amending the definition of "Writing" in MCL 15.232(l) to read the following:

"(l) '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, HYBRID DRIVES, CLOUD STORAGE, QUANTUM NETWORKS AND COMPUTING SYSTEMS, or other means of recording or retaining meaningful content."

3. Clarify the Language of Section 4(1)(c)

A. Background

MCL 15.234(1)(c) reads in part, "[Except as otherwise provided in this act, if the public body estimates or charges a fee in accordance with this act, the total fee shall not exceed the sum of the following components:] For public records provided to the requestor on nonpaper physical media, the actual and most reasonably economical cost of the computer discs, computer tapes, or other digital or similar media."

Section 4(1)(c) does not include modern forms of non-paper physical media such as flash drives and secure digital cards.

B. Question Presented

Should the Legislature amend Section 4(1)(c) of FOIA, MCL 15.234(1)(c), to include more modern forms of non-paper physical media such as flash drives?

C. Recommendation

The Commission recommends amending the statutory language of MCL 15.234(1)(c) to the following:

"(c) For public records provided to the requestor on nonpaper physical media, the actual and most reasonably economical cost of the computer discs, computer tapes, FLASH DRIVES, SECURE DIGITAL CARDS, or other digital or similar media. The requestor may stipulate that the public records be provided on nonpaper physical media, electronically mailed, or otherwise electronically provided to him or her in lieu of paper copies. This subdivision does not apply if a public body lacks the technological capability necessary to provide records on the particular nonpaper physical media stipulated in the particular instance."

4. Clarify the Language of Section 11(2)

A. Background

MCL 15.241 reads in part:

"(1) A state agency shall publish and make available to the public all of the following:

(a) Final orders or decisions in contested cases and the records on which they were made.

(b) Promulgated rules.

(c) Other written statements that implement or interpret laws, rules, or policy, including but not limited to guidelines, manuals, and forms with instructions, adopted or used by the agency in the discharge of its functions.

(2) Publications may be in pamphlet, loose-leaf, or other appropriate form in printed, mimeographed, or other written matter."

Subsection (2) does not explicitly mention publication by electronic means.

B. Question Presented

Should the Legislature amend Section 11(2) of FOIA, MCL 15.241(2), to explicitly include publication by electronic means?

C. Recommendation

The Commission recommends legislative review of this issue, and to explicitly include publication by electronic means in MCL 15.241(2).

III. AMENDING FOIA REGARDING CERTAIN PRIVATE ENTITIES THAT RECEIVE PUBLIC FUNDS

A. Background

Under MCL 15.232(h), the term "public body" includes any entity that "is created by state or local authority or which is primarily funded by or through state or local authority." All public bodies are subject to FOIA.

In *Sclafani v. Domestic Violence Escape*, 255 Mich. App. 260; 660 N.W.2d 97 (2003), a nonprofit group that educates citizens about domestic violence and provides several services to victims, received sixty percent (60%) of its funding from multiple government sources. The Court of Appeals considered whether multiple government sources can be combined to constitute "primary funding" under this section. While noting that the language of the statute is somewhat ambiguous, the court held that the shelter was a public body, reasoning that any entity that received fifty percent (50%) or more of its funding from grants from state or local government authorities was a public body. The court further held that funding from multiple government sources should

be combined for determining whether fifty percent (50%) or more of a body's funds are from state or local government authorities.

Compared to several other states, this is a high threshold. For instance, in Texas, any entity that is supported by public funds is subject to Texas's Freedom of Information Act. TEX. GOV'T CODE § 552.003(xii) (LexisNexis, 2015). However, the Supreme Court of Texas has held this does not include funds from quid pro quo contracts with government entities. *Greater Houston P'ship v. Paxton*, 468 S.W.3d 51, 58 (Tex. 2015).

In Georgia, a non-profit is subject to Georgia's Freedom of Information Act where one-third (1/3rd) or more of its budget is from direct allocations of tax funds (not counting healthcare facilities' Medicaid reimbursements). GA. CODE ANN. § 50-18-70(b)(1) (LexisNexis, 2016). In Kansas, an entity that receives public funds, except in return for goods or services, is subject to the Kansas Freedom of Information Act. KAN. STAT. ANN. § 45-217(f) (LexisNexis, 2017). In Minnesota, non-profit community action agencies that receive public funding and non-profit social services agencies that contract with government agencies are subject to the Minnesota Freedom of Information Act. MINN. STAT. ANN. § 13.02, subd. 11 (LexisNexis, 2017). In North Dakota, all private entities that expend or are supported by public funds are subject to the North Dakota Open Records Statute. N.D. CENT. CODE § 44-04-17.1(12)(c) (LexisNexis, 2017). In South Carolina, public bodies subject to the South Carolina Freedom of Information Act include "any organization, corporation, or agency supported in whole or in part by public funds or expending public funds." S.C. CODE ANN. § 30-4-20(a) (LexisNexis, 2016). In Tennessee, "when a private entity's relationship with the government is so extensive that the entity serves as the functional equivalent of a governmental agency" it is subject to Tennessee's Freedom of Information Act. *Memphis Publ. Co. v. Cherokee Children & Family Servs.*, 87 S.W.3d 67, 78-79 (Tenn. 2002).

In Ohio, private non-profit and for-profit schools are subject to the Ohio Freedom of Information Act, regardless of whether the school receives public funds. OHIO REV. CODE ANN. § 149.43(A)(1) (LexisNexis, 2016). Other states beside Michigan that use a primary funding requirement include Virginia and West Virginia. VA. CODE ANN. § 2.2-3701 (LexisNexis, 2017); W. VA. CODE § 29B-1-2(4) (LexisNexis, 2016).

B. Question Presented

Should the Legislature review the phrase "primarily funded by or through state or local authority" under MCL 15.232(d)(iv), to expressly provide the percentage of a private entity's budget that must be made up of public funds to determine whether the entity is subject to FOIA?

C. Recommendation

The Commission recommends legislative review of this issue, but makes no recommendation of specific legislative action.

IV. PUBLICATION OF FOIA RESPONSES TO A GOVERNMENT WEBSITE AND EXPANSION OF MICHIGAN'S OPEN DATA PORTAL

1. Publish FOIA Responses to a Public Government Website

A. Background

Governments with FOIA and open records laws often get numerous duplicate requests. *See, e.g.*, *FOIA Update: FOIA Counselor: Questions and Answers*, UNITED STATES DEPARTMENT OF JUSTICE (Oct. 16, 2018), https://www.justice.gov/oip/blog/foia-update-foia-counselor-questions-answers-1; *see also* Sandhya Kambhampati, *I've Sent Out 1,018 Open Records Requests, and This Is What I've Learned*, PRO PUBLICA (Oct. 16, 2018), https://www.propublica.org/article/open-records-requests-illinois-foia-lessons. Fulfilling several duplicate requests can be taxing on the time of public employees. Thus, under the federal FOIA, for example, a federal agency will provide an "electronic reading room" for records that are expected to have a high volume of requests or which have been requested at least three times. *See* 5 U.S.C. § 552(a)(2)(D) (2012).

The federal FOIA's concept of an "electronic reading room" requirement can be expanded further. Rather than only post the responses to requests that have been requested at least three times or those records which are expected to have a high volume of requests, all FOIA responses (along with anonymized summaries of the requests) can be published to a public government website, organized by public body and topic. This would boost transparency and likely cut down on the number of duplicate FOIA requests.

B. Question Presented

Should the Legislature amend FOIA to require that responses to FOIA requests be published to a public government website?

C. Recommendation

The Commission recommends the legislature investigate requiring all FOIA responses (along with anonymized summaries of each request) to be published to a public government website.

2. Expand Michigan's Open Data Portal to Include FOIA Requests

A. Background

According to the National Conference of State Legislatures, an open data law "aims to make nonconfidential government data available for public use in a format that is easily accessible. Open data formats allow government information to be combined, analyzed or presented in new ways by citizens, businesses and other organizations." Open Government Data Legislation, NATIONAL CONFERENCE OF STATE LEGISLATURES (Feb. 7, 2017), http://www.ncsl.org/research/telecommunications-and-information-technology/open-data-legislation.aspx.

Michigan has already created an open data portal at https://data.michigan.gov/, which includes hundreds of open data sets. Many open data sets on the open data portal take the form of

a spreadsheet containing tens of thousands of rows of anonymized data. For instance, the open data portal publishes an anonymized version of the 2018 results of the MME and M-STEP tests, showing how many students were in each of the proficiency categories in each district and school all over the state over a number of different metrics, including grade, ethnicity, gender, homelessness, and subject. *See Downloadable Data Files*, MICHIGAN DEPARTMENT OF EDUCATION, (Oct. 16, 2018), https://www.michigan.gov/mde/0,4615,7-140-22709_35150_47475---,00.html. This information allows academics, economists, statisticians, and the public to look for correlations between student proficiency and state policy to help keep government accountable.

Publishing responses to FOIA requests in an open data format would give the state and the public more information about which entities receive multiple FOIA requests and on what subjects, and would provide better-targeted, more accountable data-driven policies to increase transparency. For instance, if the Michigan Department of Transportation (MDOT) published information about its FOIA requests and responses, then you could see what information citizens were interested in but did not have access to in regard to transportation and infrastructure in the state. For example, if numerous citizens were using FOIA to request information about a specific new kind of road repair technique from MDOT, then MDOT would know that the public would benefit from a new webpage explaining the new kind of road repair technique.

As another example, if an open data set regarding FOIA request and responses kept track of denials, then the state and the public could have a better sense of which information the public wants to know the most about but is routinely being denied access to. This could aid the legislature and voters in deciding how to change exemptions under FOIA.

Several states have developed laws and policies to publish responses to freedom of information requests as open data. Utah requires various freedom of information requests to be published online in open format. UTAH CODE ANN. § 63A-3-403(10)-(11) (LexisNexis, 2016). In Hawaii, the state Office of Information Practices maintains three databases of responses to freedom of information requests: the first provides formal summaries, the second provides informal summaries, and the third contains information request responses. *See generally* State of Hawaii Office of Information Practices (Sept. 17, 2018), https://oip.hawaii.gov/.

B. Question Presented

Should the Legislature amend FOIA to require that responses to FOIA requests be published as open data?

C. Recommendation

The Commission recommends publishing FOIA requests and responses in an anonymized open data format.

V. CREATION OR DESIGNATION OF AN ENTITY TO MONITOR ACCESS TO INFORMATION UNDER FOIA

A. Background

Michigan currently lacks an entity to monitor access to information under FOIA. In other states there are entities that investigate FOIA complaints against public bodies, help mediate disputes over public records, and can either order public record disclosure or file suit in their own name to obtain public records. These entities can potentially resolve FOIA disputes in less time and for less money, thereby possibly reducing litigation.

In Iowa, for example, the Public Information Board provides informal assistance in settling open records complaints, investigates open records complaints, and can issue orders for public bodies to comply with the open records law. 2012 Iowa Acts, 84 G.A., ch. 1115, § 6. Similarly, in Hawaii, the Office of Information Practices can investigate and rule on complaints under the state's Uniform Information Practices Act (its FOIA equivalent). *See Opinions*, STATE OF HAWAII OFFICE OF INFORMATION PRACTICES (Sept. 17, 2018), https://oip.hawaii.gov/laws-rules-opinions/opinions/. In Connecticut, the Freedom of Information Commission has the power to investigate violations of Connecticut's Freedom of Information Act. CONN. GEN. STAT. § 1-205 (LexisNexis, 2016).

B. Question Presented

Should the Legislature create an entity or designate an existing entity to monitor access to information under FOIA?

C. Recommendation

The Commission recommends legislative action that specifically directs the Attorney General to monitor access to FOIA and help mediate disputes over public records.