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BILL ANALYSIS

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**Senate Bill 863**

Sponsor: Senator Rudy J. Nichols

Committee: Judiciary

Date Completed: 5-19-88

***SUMMARY OF SENATE BILL 863 as introduced 5-18-88:***

The bill would create the "Privacy Act" to provide procedures for maintaining, amending, and providing access to records maintained by "public bodies". ("Public bodies" would have the same meaning as under the Freedom of Information Act.) The bill would do all of the following:

- Specify procedures by which an individual could request access and amendments to records pertaining to him or her that were maintained by a public body.
- Prohibit the disclosure of records unless certain conditions were met.
- Specify the responsibilities of public bodies under the proposed Act.
- Allow a public body to charge a fee for providing a copy of a record it maintained.
- Authorize an individual to bring a civil action against a public body concerning a dispute pertaining to the bill.
- Specify penalties for violations of the bill.
- Make other provisions relative to persons acting on behalf of other individuals or public bodies; confidentiality; reporting requirements; conflicting disclosure criteria; and disclosure of an individual's Social Security number.

**Record Requests**

**Access.** A person who wanted to inspect, copy, or receive a copy of a record pertaining to him or her could make a written request to the public body that maintained the record. The public body, after receiving a request that was sufficient to enable it to locate the record, would have to allow the requesting party to inspect, copy, or receive a copy of the record or a portion of it. The public body would have to respond within five days. A response would have to be in the form of a written notice and could grant the request, deny the request, or grant it in part and deny it in part. Under unusual circumstances, the public body could issue a written notice to extend the response period for up to 10 business days. Such a notice would have to specify the reasons for the extension and the date by which a response would be made. There could not be more than one extension for each request. A failure to respond would be considered a denial by the public body.

A notice that denied a request would have to be signed by the person responsible for processing requests under the bill. A denial notice would be considered a final determination by the public body and would have to contain all of the following that were applicable:

- If exemption from disclosure were the reason for denying the request, an explanation of the basis for that determination.

- If the record did not exist under the name that was given by the requester or another name "reasonably known" to the public body, a certificate that the record did not exist.
- A general description of the record, or the portion of the record, that was denied or separated, if the description would reveal the contents of the exempt information and defeat the purpose of an exemption.
- A full explanation of the requester's right to seek judicial review.

If a written request to inspect records were received, the public body would have to furnish the requester with a reasonable opportunity for inspection. "Reasonable facilities" would have to be furnished for making memoranda or copies during usual business hours. A public body could make rules necessary to protect the individual's records and to "prevent excessive or unreasonable interference" with the public body's function. During such an inspection of records, an individual could be accompanied by a person of his or her own choosing. The person seeking review would be responsible for the behavior of the accompanying person.

If a public body received a request for disclosure of a record that was exempt from disclosure under the proposed Act as well as material not exempt, the public body would have to separate the exempt material and make the nonexempt material available for inspection and copying.

**Amendment.** Under the bill, an individual could request that a record pertaining to him or her be amended. After receiving such a request, the public body, within 10 business days, would have to acknowledge the request, in writing, and do one of the following:

- Correct or delete any portion of the record that the requester believed was inaccurate, irrelevant, untimely, or incomplete.
- Refuse to amend the record as requested and inform the requester of the reasons for refusal and of the requester's right to seek judicial review.
- Under unusual circumstances, extend the response period in the same manner allowed for a request for access to records.

If the individual requested a review of a refusal to amend a record, the public body, within 30 days, would have to complete the review of its decision and inform the requester of that decision. Under unusual circumstances, a public body could extend the period for response to a request to review for up to 15 business days. If the public body still refused the request, the individual could issue and the public body would have to accept a concise written

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statement of disagreement with the content of the record. The public body would have to file the statement with the record or in a filing system that was keyed to the system in which the record was maintained. If the record were subject to disclosure to another person, the public body would have to include a copy of the statement of disagreement, and could include a written statement of its reasons for refusing the amendment request.

A public body's decision to refuse to amend a record would be considered a final determination and the public body would have to notify the requester of the bill's provisions for judicial review.

#### Disclosure

A public body would be prohibited from disclosing any record or portion of a record, unless disclosure met one of the following requirements:

- It was made pursuant to a written request of the individual to whom the record pertained, or his or her authorization to disclose.
- It was made to personnel of the public body who maintained the record and had a need for the record to perform their official duties.
- It was made for a routine use to a public body under the Attorney General's control for a criminal law enforcement activity.
- It was required under the Freedom of Information Act.
- It was made as a result of compelling circumstances that could affect the health or safety of an individual. (Upon disclosure, the individual whose record was disclosed would have to be notified by first class mail.)
- It was made pursuant to a written request from either house of the Legislature, an elected member of the Legislature, or a committee or subcommittee of the Legislature.
- It was made under a court order for use that was routine and lawful.

A person who was responsible for a public body's maintenance of records could exempt certain records from disclosure, but the exemption would not relieve the public body of the bill's notice requirements. Such an exemption would cover records of a public body that performed law enforcement activities, if disclosure of those records would interfere with law enforcement proceedings, reveal the identity of a confidential source who furnished information to the public body, or endanger the life or safety of law enforcement personnel or their relatives. All of the following also would be eligible for such an exemption:

- Records maintained in connection with providing protective services to the Governor, the President of the United States, and other individuals pursuant to Federal law (18 U.S.C. 3056).
- Records maintained for determining suitability, eligibility, or qualifications for State civilian employment, National Guard, State contracts, or access to classified information, if disclosure would reveal the identity of a confidential source.
- Records that would deny any right, privilege, or benefit that an individual was entitled to or eligible for by State or Federal law, if disclosure would reveal the identity of a confidential source.

#### Responsibilities of Public Bodies

A public body would be required to keep an accurate accounting of information relevant to any disclosure of a record that was made, except for disclosures made pursuant to a written request of, or authorization made by, the individual to whom the record pertained or pursuant

to the Freedom of Information Act. The public body would have to retain the accounting for five years or the life of the record, whichever was longer. The accounting would have to be made available to the individuals named in the record upon written request within five business days.

A public body that is a city, township, county, village, or State department, or is under the control of such an entity, the chief administrative officer of the entity, or an individual designated in writing by that officer, would be responsible for fulfilling all the bill's requirements. In a county that did not have an executive form of government, the chairperson of the county board of commissioners would be considered the chief administrative officer.

A public body that maintained records of or about an individual would have to do all of the following:

- Maintain only information that was "relevant and necessary" to accomplish the public body's principal statutory function; and collect information, to the extent practicable, directly from the individual who was the subject of the record, if the information adversely could affect his or her rights, privileges, or benefits under State or Federal programs.
- Notify an individual who was asked to supply information to the body of the body's specific legal authority to solicit the information; whether disclosure of such requested information was mandatory or voluntary; the principal purpose for which the information would be used; and the effects of not providing the requested information.
- Provide public notice, at least annually, by publishing in the Michigan Register a notice of the existence and character of records maintained. (The notice would have to be published at least 30 days before requesting that the Legislature pass a concurrent resolution approving a new or revised use of existing records maintained on individuals.)
- Mail a notice to an individual when any record pertaining to that individual was disclosed to any other person or public body by compulsory legal process.
- Establish rules of conduct for the design, development, operation, and maintenance of records; and establish administrative, technical, and physical safeguards to insure the security and confidentiality of records.

A public body could not maintain a record that described how an individual exercised a right granted in the First Amendment of the United States Constitution or Sections 3, 4, and 5 of Article I of the Michigan State Constitution (freedom of speech, press, and religion; and the right to assembly and to petition the government for grievances), unless it was authorized to do so by that individual.

In order to comply with the bill, each public body that maintained records on individuals and is subject to the Administrative Procedures Act would have to promulgate rules to establish all of the following:

- Procedures for an individual to request notification of a record pertaining to the individual that was maintained by the body.
- Procedures for the disclosure of records pertaining to an individual upon his or her request.
- Requirements for confirming the identity of a requesting individual before acknowledging the existence of or disclosing a record to him or her.
- Procedures for reviewing a request concerning the amendment of a record, for making a determination on the request and notifying the requester, for an appeal of an initial adverse determination and notification of the requester, and for addition measures "as may be

necessary for each individual to be fully able to exercise his or her rights" under the bill.

A public body could arrange the records it maintained on individuals into systems of records. (A "system of records" would mean "a group or collection of records, under the control of a public body, from which information may be retrieved by the name of an individual or by some identifying number, symbol, or other identifying particular of or assigned to an individual".)

#### Fees

Under the bill, a public body could charge a fee for providing a copy of a record. Fees would be limited to the cost of labor incurred in duplicating and mailing records, the actual mailing costs, and the actual incremental cost of duplication. Costs would have to be determined at a rate not to exceed the hourly wage of the public body's lowest paid, full-time clerical employee. Fees could not be charged for the cost of search, examination, and review and separation of records, unless those costs would be unreasonably high and were identified specifically by the body. A public body also could charge the actual, fair, and equitable costs incurred by the body, to an individual who exercised his or her rights under the bill.

#### Civil Actions

The bill specifies that an individual could bring an action in Circuit Court if a public body did any of the following:

- Failed or refused to comply with an individual's request for access to records.
- Made a final determination to deny all or part of an individual's request for access to records.
- Made a final determination not to amend an individual's record according to a request to do so; or failed to make a review of the request.
- Failed to maintain a record concerning an individual "with the accuracy, relevance, timeliness, and completeness necessary to assure fairness and due process in any determination relating to the qualifications, character, rights, privileges, or opportunities of, or benefits to an individual" on the basis of the records, and because of that failure, a determination was made that was adverse to the individual.
- Failed to comply with the proposed Act or a rule promulgated under it, and the failure adversely affected an individual.
- Required an individual to disclose information that was irrelevant to the principal statutory function of the public body or could not be disclosed under the proposed Act.

If it were determined that a public body failed or refused to comply with a request for access to records and that disclosure should have been granted, the Court would have to order the body to disclose the records to the individual. Also, the public body would be liable to the individual for exemplary damages of \$1,000. In such an action, the records could be examined in private to determine whether they should be withheld pursuant to the administrator's discretion to exempt records.

If it were determined that a public body denied an individual's request for access to records and that those records were not exempt from disclosure, the Court would have to order the body to disclose the records or that portion which was not exempt. The denied records could be examined in private in order to determine whether they should be withheld pursuant to the administrator's discretion to exempt records.

If a public body denied a request to amend records and it could not prove "by clear and convincing evidence" that the request was contrary to the evidence, the Court would have to order the body to amend the record in accordance with the request, or in a manner that the Court directed. In any other action permitted by the bill in which it was determined that the body acted in the manner charged, the following would have to occur:

- If an individual's records were involved, the Court would have to order the public body to amend the records to ensure accuracy, relevance, timeliness, and completeness and provide a copy of the amended records to persons or public bodies to which disclosure previously had been made.
- If a public body made an adverse determination because of faulty records; denied a right, benefit, or privilege provided by law; or required disclosure contrary to the bill, the Court would have to order the body to review its determination or cease such denial or requirement.
- The public body would be liable to the individual in the amount of actual damages or \$1,000, whichever was greater.

In an action before the Circuit Court under the bill, the matter would have to be determined anew, with the burden of proof being upon the public body. The public body would have no right of appeal. An action to enforce any liability created under the bill could be commenced within two years from the date on which a cause of action arose. If the public body materially and willfully misrepresented any information required to be disclosed, however, an action could be commenced within two years after the individual discovered the misrepresentation.

In an action under the bill in which the individual prevailed, reasonable attorney's fees, costs, and disbursements would have to be awarded. If the individual prevailed in part, an appropriate portion of such fees and costs would have to be awarded. If it were determined that the public body acted in a capricious, arbitrary, or intentional manner, the body would be liable to the individual for exemplary damages of \$1,000, in addition to any other actual or compensatory damages.

#### Penalties

It would be a misdemeanor for an officer or employee of a public body willfully to disclose information protected from disclosure by the bill; for an officer or employee willfully to maintain a record not authorized by the bill or fail to meet notice requirements; or for a person knowingly or willfully to request or obtain a record concerning an individual under false pretenses. A misdemeanor would be punishable by a fine of between \$500 and \$5,000. Guilty parties would be held personally liable for the payment of all fines imposed under the bill.

#### Other Provisions

Persons Acting on Behalf of Others. The bill would allow the parent or legal guardian of any minor or the legal guardian of a person declared incompetent to act on behalf of that minor or person.

A public body could provide for the maintenance of records by a contractor, person, or organization that acted on behalf of the public body. The public body, however, would have to assure that the requirements of the bill were met. Persons or employees of a contractor, person, or organization acting at the direction of the public body would be considered employees of the public body for purposes of the bill.

Confidentiality. The bill would prohibit a public body from selling, renting, or otherwise disclosing an individual's name and address unless specifically authorized by law.

Reporting Requirements. The Governor would be required to submit both of the following to the Legislature by January 10 of each year:

- A consolidated report showing the number of enforcement actions under the bill and the status of those actions.
- A consolidated report showing the number of categories of records and the number and name of categories of records exempted from disclosure under the bill.

Conflicting Disclosure Criteria. The bill specifies that a public body could not "rely on a disclosure restriction contained in an agreement with a state or federal agency, bureau, or other organization, or any other state public body" to withhold records that otherwise would be available under the bill. The bill also specifies that, if a record were both disclosable and exempt from disclosure under the bill, the public body would have to disclose the record unless there existed compelling reasons not to do so.

Social Security Number. A public body could not deny an individual a right, privilege, or benefit due to his or her refusal to disclose his or her Social Security account number, unless disclosure was required by Federal statute. A public body could not require an individual to disclose his or her Social Security number unless disclosure were required by Federal statute. A public body that requested disclosure of a Social Security number would have to inform the individual of all of the following:

- Whether disclosure was required by Federal statute.
- Whether disclosure was considered by the public body to be mandatory or voluntary.
- The State law under whose authority the number was requested.
- The purpose for which the number would be used.
- The effect on the individual of refusing to disclose his or her Social Security number.

Legislative Analyst: P. Affholter

## ***FISCAL IMPACT***

State and local government costs would be increased by an indeterminate amount. Revenue, through fees, would also be increased by an indeterminate amount. At present, no clear fiscal estimate can be provided, because the demand for information or court actions that would result from passage of the bill cannot be anticipated.

Fiscal Analyst: G. Cutler

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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.