

— LEGISLATIVE —  
**TESTIMONY**

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STEVE DELIE

# **FOIA Reforms A Good Start, But Can Go Further**

Senate Oversight Committee

# Support of SB 669-670

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My name is Steve Delie, and I am the Director of Open Government at the Mackinac Center. We are a 501(c)(3) nonprofit research and educational institute that advances the principles of free markets and limited government. Through our programs, we challenge government overreach and advance free-market approaches to public policy that free people to realize their potential and dreams. I also serve as the Executive Director of the Michigan Coalition of Open Government, which is a coalition of pro-transparency advocates from across the political spectrum. I write today to support Senate bills 669 and 670.

Michigan has long been rated one of the worst states in the country for government transparency. This happens for many reasons, but one of the most important is that neither our governor nor our Legislature is subject to FOIA. This makes us an outlier, as we are one of just two states that exempt these branches of government from open records laws. The two bills before you remedy that situation, and I would respectfully request that the committee vote to approve them.

I would encourage the committee, however, to consider potential amendments that would lead to even greater transparency. I believe that as a rule, it is important that all public bodies operate under the same ruleset. Senate bills 669 and 670, however, create what is essentially a two-tiered system. Under them, the governor and Legislature each have access to a significant number of new exemptions, which provide these branches with greater privileges than those afforded to other public bodies.

Take, for instance, the version of the frank communications exemption available to the governor and the Legislature. The current exemption favors disclosure of these communications, which may only be withheld when the public interest in encouraging frank communications clearly outweighs the public interest in disclosure. The bills before you would establish the inverse rule. Under this special exemption, records will only be released when the public interest in disclosure clearly outweighs the public interest in encouraging frank communication. This is a significant change, and it essentially establishes a default position favoring non-disclosure. I believe that all public bodies, including the governor and Legislature, should be subject to the stricter pro-transparency test.

I am certainly sensitive to the need to exempt certain information, but I would encourage the committee to consider each of the new exemptions against the backdrop of existing ones. Many exemptions currently in the law address the apparent purpose of the exemptions proposed in these bills. As an example, SB 669-670 currently contains language allowing the legislature to withhold records relating to constituent communications. Presumably, this exemption is intended to protect

citizens' private information. As written, however, this exemption is overly broad and goes beyond that purpose. FOIA already permits privacy-related information to be exempted. By exempting all communications from constituents, these bills risk concealing records with a legitimate public purpose.

If the Legislature is not comfortable with relying on existing exemptions, other approaches would better balance privacy and transparency interests. As an example, the constituent communications exemption could be revised to only prevent "intimate, personal, embarrassing, or confidential" information from being disclosed. This would allow for greater disclosure of potentially important public information, without the risk of exposing the details of a constituent's private life. While it's our belief that this information is already protected, this additional clarity would be welcome in SB 669-670.

In short, FOIA already contains numerous, applicable exemptions that likely obviate the need for additional, branch-specific exemptions. Matters such as privacy, security, trade secrets, medical information and Social Security numbers are already protected. These bills, by adding more exemptions, and only applying them to certain public bodies, offer even more opportunity for government to withhold public records.

As I mentioned earlier, these bills are a positive step in the right direction, and I fully support them. But I believe most of the new exemptions are not necessary, and several of them go too far. Outside of situations unique to a specific branch of government, I would suggest the Legislature and governor have access to the same exemptions available to other public bodies.

If the committee is interested in going even further, I would be happy to provide copies of a study I wrote last year, titled "Fixing FOIA: A Guide to Rewriting Michigan's Foundational Transparency Law." In that study, I suggest changes to FOIA from the perspective of a lawyer who has experience as both a FOIA requestor and a FOIA coordinator. The study offers line-by-line amendments to encourage greater transparency in Michigan, and it is also annotated with descriptions of why each change is needed. I would welcome the opportunity to work with any member of this committee interested in implementing additional reforms.

Thank you for working on this important matter. I believe that transparency is a truly bipartisan issue that can have a significant impact on the lives of the average Michigander. I'm happy to support these bills, as well as future efforts designed to allow citizens access to the records and information they need to meaningfully participate in the democratic process.

**Steve Delie**

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