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MICHIGAN "FREEDOM OF INFORMATION ACT"

I. Introduction: The Public's "Right to Know"

Although an informed populace is vital to the exercise of free choice in a democracy, federal and state governments generally have been reluctant to provide for public disclosure of government-held information. The public itself has been lax in insisting upon its "right to know."¹ Until recently, the public's "right to know" would more aptly have been described as that which remains after governmental agencies have withheld all information they thought necessary for the agencies' effective operation, or, ironically, for the public interest. The problem of government secrecy has received much attention, and various legislative and judicial solutions directed at reconciling the public's right to information with the government's need for confidentiality have been suggested.² Federal legislation intended to provide for this public "right to know" had characteristically been applied by government agencies to avoid, rather than to promote, disclosure.³ Having to rely upon the discretion of each agency to

¹Schultz, *A Primer in the Public Information Act*, 2 PUB. CONTRACT L. J. 209 (1969). See also, Note, *Freedom of Information: The Statute and the Regulations*, 56 GEO. L. REV. 18 (1967).

²The first general statutory provision for public disclosure of administrative decisions and procedures at the federal level was the Act of June 11, 1946, Ch. 324, § 3, 60 Stat. 238 codified S.V.S.C. App. § 1002 (Supp. II, 1965-1966). Almost immediately after its enactment, bills to improve section 3 were routinely submitted to the Congress and were defeated. See S.2504, 84th Cong., 1st Sess. (1955); S.2541, 84th Cong., 1st Sess. (1958); S.2148, 85th Cong., 1st Sess. (1957); S.4094, 85th Cong., 2d Sess. (1958); S.186, 86th Cong., 1st Sess. (1959); S.1070, 86th Cong., 1st Sess. (1959); S.2780, 86th Cong., 2d Sess. (1960); S.1567, 87th Cong., 1st Sess. (1961); S.1907, 87th Cong., 1st Sess. (1961); H.R.9926, 87th Cong., 2d Sess. (1962); S.3410, 87th Cong., 2d Sess. (1962); S.1666, 88th Cong., 1st Sess. (1963).

³Bennet, *The Freedom of Information Act, Is it a Clear Public Records Law?*, 34 BROOKLYN L. REV. 72, 73 (1967). Section 3 of the Administrative Procedures Act of 1945 was the major statutory excuse for withholding government information from public view. The Attorney General's memo (U.S. DEPT. OF JUSTICE, ATTORNEY GENERAL'S MEMORANDUM ON THE PUBLIC INFORMATION SECTION OF THE ADMINISTRATIVE PROCEDURES ACT (1967) [hereinafter cited as Attorney General's Memo] interpreting Section 3, noted that Congress had left each agency complete discretion

release information, the public was handicapped by the absence of a uniform policy favoring disclosure.⁴ In an effort to establish such a uniform policy, Congress enacted the Freedom of Information Act in 1966.⁵ This Act established a "general philosophy of full agency disclosure" and imposed on government agencies an affirmative duty, enforceable in the courts, to make information readily available to the public.

A policy of public disclosure is as appropriate at the state level as it is at the federal level. There are comparable state agencies for almost all Federal departments concerned with commerce and the public health, safety and welfare.⁶ Through licensing and supervisory powers over businesses and individuals, state agencies exercise extensive quasi-legislative and quasi-judicial powers of immediate concern to the public. The resulting rules, records, regulations, orders and opinions serve as both the factual findings and the substantive law of the particular area administered by each agency. Recognizing this need for public disclosure at the state level, the Michigan Legislature, in the Public Inspection provisions of the Administrative Procedures Act of 1969, required public disclosure by its state agencies.

II. The Michigan Statute

A. Information to be Disclosed

The framework of the Public Inspection provisions of the Michigan Administrative Procedures Act closely resembles its federal counterpart. Basically, both Acts specify the types of

to decide what information concerning the agency's action was to be withheld. Section 3 permitted the withholding of information if secrecy was required "in the public interest," or if the records related "solely to internal management," or for "good cause found." In addition, records were to be made available only to persons "properly and directly concerned." *See also* S. REP. NO. 813, 89th Cong., 1st Sess. (1965) [hereinafter cited as S. REP.].

⁴S. REP. at 3.

⁵U.S.C § 552 (1967). The Act attempts to set up workable standards for determining what records should and should not be open to public inspection. Most importantly, it avoids such vague phrases as "good cause found" and "properly and directly concerned," and replaces them with specific and limited types of information that may be withheld (S. REP. at 5).

⁶*See* 48 MICH. STATE BAR J. 282 (1969).

⁷MICH. COMP. LAWS §§ 24.201-313 (Supp. 1969).

⁸MICH. COMP. LAWS §§ 24.221-24.223 (Supp. 1969).

information to be disclosed and provide for certain exemptions from disclosure. The language of the Michigan act, however, is clearer and, in several areas, more inclusive than the Federal act in setting forth both the information to be disclosed and that which is exempted.⁹ Three general categories of agency materials requiring disclosure are specified: (1) "final orders or decisions in contested cases and the records on which they were made,"¹⁰ (2) "promulgated rules,"¹¹ and (3) "other written statements which complement or interpret law, 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."¹²

B. Exemptions from Disclosure

The Act's disclosure requirements are limited by the establishment of categories of materials exempt from disclosure. The first exemption stipulates that agency regulations restricting public access to government material supersede the agency's duty to disclose under the Act¹³ if these regulations are adopted by an agency under a statutory grant of authority.¹⁴

The extent to which this exemption will affect the intent of the

⁹For example, § 21(1)(a) of the Michigan act [MICH. COMP. LAWS § 24.221 (1)(a) (Supp. 1969)] provides that "final orders or decisions in contested cases and the records on which they were made," are to be disclosed, whereas the comparable Federal provision [5 U.S.C. § 552(a)(2)1A] is limited to "final opinions including concurring and dissenting opinions, as well as orders made in the adjudication of cases." [Emphasis added]. See text accompanying note 8, *supra*.

In the enumeration of exempt material, the Federal act does not include non-commercial and non-financial information obtained in confidence, whereas the Michigan statute exempts all matters obtained in confidence, regardless of their nature. See text accompanying note 22, *infra*.

¹⁰MICH. COMP. LAWS § 24.221(1)(a) (Supp. 1969).

¹¹MICH. COMP. LAWS § 24.221(1)(b) (Supp. 1969).

¹²MICH. COMP. LAWS § 24.221(1)(c) (Supp. 1969). The wording of this provision eliminates the implication existing in the Federal act that only "statements" used as precedent are to be disclosed. For example, letter rulings, heretofore not only unpublished but also closed to public inspection, are included within the disclosure provisions. Thus, the language of the Michigan act is broader than the Federal law, which appears to be limited to statements having precedential effect. See text *infra*, at note 33. See also Davis, *The Information Act: A Preliminary Analysis*, 34 U. CHI. L. REV. 761, 763 (1967), wherein Professor Davis argues against the strict ruling of the provision approved by the Attorney General's Memo, at 16, and maintains that agency law under the Federal statute, whether used as precedent or not, must be published.

¹³MICH. COMP. LAWS § 24.222(1)(a)(Supp. 1969).

¹⁴Note, *Freedom of Information: The Statute and the Regulations*, 56 GEO. L. REV. 18, 34 (1967).

Act depends upon interpretation of the agencies' regulations. These regulations are of two types: those which are adopted to carry out legislative mandates restricting access to certain information, and those which an agency adopts under a statutory grant giving an agency authority to restrict access as it sees fit. These latter discretionary regulations are arguably outside the intended scope of the exemption inasmuch as the material is "exempted" by the agency acting in its discretion, and not by statute. In this regard, the Federal act, which exempts matters "*specifically* exempted from disclosure by statute"¹⁵ [Emphasis added], is preferable, for it indicates a narrower exemption than might be allowed under the Michigan act. The exemption may create a loophole through which agencies could subvert the policy of the Act by overzealously restricting access to government material.¹⁶

To encourage agency officials to communicate frankly with each other, inter- or intra-agency letters, memoranda, or statements which would not be available to a private party in litigation with the agency, are exempted from disclosure.¹⁷ This exemption may partially conflict with the disclosure provisions inasmuch as inter- or intra-agency memoranda often contain statements which "implement or interpret law, rules, or policy."¹⁸

In two separate but conceptually related provisions, the Michigan act exempts "material the disclosure of which would constitute an unwarranted invasion of privacy,"¹⁹ and "material obtained in confidence from a person, matter privileged by law and trade secrets."²⁰ While the former is simply a recognition of the

¹⁵ U.S.C. § 552(b)(3). "This section does not apply to matters that are . . . specifically exempted from disclosure by statute."

¹⁶Note, *The Information Act: Judicial Enforcement of the Records Provision*, 54 VA. L. REV. 466, 468-469 (1968). Typically, these discretionary regulations place the burden on the requestor (at least with respect to records not automatically available to the public as part of the regular informational activities of the agencies). To this extent they are in conflict with the policy of the Act, which places the burden on the agency. See note 38 *infra*.

¹⁷MICH. COMP. LAWS § 24.222 (1)(b)(Supp. 1969).

¹⁸See note 12 *supra*. Inasmuch as "agency" does not include legislators [MICH. COMP. LAWS § 24.203(2)(Supp. 1969)], correspondence between legislators and agencies is subject to public disclosure.

¹⁹MICH. COMP. LAWS § 24.222(1)(f)(Supp. 1969).

²⁰MICH. COMP. LAWS § 24.222(1)(c)(Supp. 1969).

right of privacy as a fundamental right,²¹ the latter exemption is based on the practical consideration that the vast majority of information which the government obtains comes from the public.²² Confidentiality may well be necessary to preserve this source of information. The Michigan act's exemption in this regard is considerably broader than that of the Federal act, which limits confidentiality to commercial and financial information.²³

In an expansion of the Federal exemption for the regulation of banks,²⁴ the Michigan act exempts financial and commercial information relating to a specific regulated "person,"²⁵ prepared by or for use of an agency responsible for the regulation or supervision of such "person."²⁶ The exemption is intended to protect the financial security of banks, public utilities, and other licensed businesses by proscribing public disclosure of their financial data. The rationale underlying the original exemption for banks can be found in the experience of a former day when uninsured bank accounts and runs on banks were not uncommon.²⁷ To foster the stability of financial institutions and to protect their customers, the banks' financial data were not made available. The extension of this limited, but nonetheless outdated, exemption is unwarranted and contrary to the general policy of full disclosure.

Finally, to prevent premature disclosure, investigatory files concerning either regulatory or law enforcement matters may be withheld except to the extent available through discovery to a party in litigation.²⁸

²¹MICH. COMP. LAWS § 24.222(1)(f)(Supp. 1969). Section 21 (2) also protects the right of privacy by providing that "to the extent required to prevent an unwarranted invasion of personal privacy, an agency may delete identifying details when it publishes or makes available a matter required to be published and made available for public inspection."

²²Davis, *A.B.A. Panel on Public Information Act*, 20 ADMIN. L. REV. 1, 13 (1967).

²³U.S.C. § 552 (b)(4)(1967), "trade secrets and commercial of financial information obtained from a person and privileged or confidential."

²⁴U.S.C. § 552(b)(8)(1967). Matters that are "contained in or related to examination, operating or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions."

²⁵MICH. COMP. LAWS § 24.205(4)(Supp. 1969). "Person" means an individual, partnership, association, corporation, governmental subdivision or public or private organization of any kind other than the agency engaged in the particular processing of a rule, declaratory ruling, or contested case.

²⁶MICH. COMP. LAWS § 24.222(1)(d)(Supp. 1969).

²⁷See Davis, *supra* note 12, at 801.

²⁸MICH. COMP. LAWS § 24.222(1)(e)(Supp. 1969).

C. Enforcement of the Duty to Disclose

The Michigan act establishes an affirmative duty on agencies to disclose all but the statutorily exempt material.²⁹ Agency compliance with this duty to disclose is sought to be assured through two methods of enforcement.³⁰

First, the Act heeds one commentator's admonition that "secret law should be forbidden"³¹ by immunizing persons from being "adversely affected by a matter required to be published and made available and not so published and made available."³² The scope of this protection depends upon the meaning given the words "adversely affected." If this phrase is construed similarly to the interpretation of the corresponding Federal provision,³³ the Michigan act will merely protect an individual from having an undisclosed rule, interpretation, or policy applied against him by the State. A broader interpretation, however, might afford greater protection.

Consider the case of an agency which failed to disclose the unfavorable results of tests it conducted on a particular product found to be defective. An individual who contracted to purchase quantities of this defective product might well argue, in a suit on the contract, that he should be released from his contractual obligation on the ground that he was "adversely affected" by the failure to disclose inasmuch as he would not have entered into the contract if he had known that the goods were defective. Although this interpretation may seem overbroad, it is reasonable on the face of the Act, which states that when an agency has failed to disclose, "a person shall not *in any manner* . . . be adversely affected by" the material that was not disclosed.³⁴ [Emphasis added] Moreover, the material required to be disclosed should not be restricted by the converse application of this provision; that is, an agency should not be able to evade its duty to disclose on the ground that no one will be adversely affected.³⁵

Secondly, the Act may be enforced by the circuit courts of the

²⁹MICH. COMP. LAWS § 24.221(1)(Supp. 1969).

³⁰MICH. COMP. LAWS § 24.223 (Supp. 1969).

³¹See Davis, *supra* note 12 at 1.

³²MICH. COMP. LAWS § 24.223 (1)(Supp. 1969).

³³5 U.S.C. § 552(a)(1)(E). See Attorney General's Memo, *supra* note 3, at 15.

³⁴MICH. COMP. LAWS § 24.222(1)(Supp. 1969).

³⁵See Davis, *supra* note 12 at 774.

State, which are empowered to order the disclosure of any identifiable material improperly withheld.³⁶ Thus, information can be obtained from an uncooperative agency.

III. Evaluation

The Michigan Administrative Procedures Act, like the Federal Freedom of Information Act, differs in three basic ways from previous law and agency practice in its effort to provide the public disclosure of government information. First, any person has standing to seek disclosure of a document regardless of whether he has some basis for seeking the information; second, if the document is withheld, the person desiring the material may seek judicial review and obtain affirmative relief in a state circuit court; third, the burden is on the agency, both upon initial request and in court, to justify any withholding of information.³⁷

The provision for judicial enforcement of the Michigan act is heavily relied upon to effectuate its policy. Its actual effect, though, may not be as significant as that intended by its drafters. From the public's point of view, judicial enforcement of the Federal act has not been altogether satisfactory.³⁸

Ironically, the Michigan act, like the Federal act, may inhibit the implementation of its provisions by overstating its case. The Michigan statute either allows everyone access to the information or allows no one such access; that is, no distinctions are made on the basis of the individual(s) seeking the disclosure.³⁹ While attempting, through rejection of a "standing" test, to make information available to the public as a whole, this approach ignores a possible situation in which information should be released to certain parties even though that same information is not otherwise generally discloseable. Thus, a useful addition to the Act would

³⁶MICH. COMP. LAWS 24.223 (2)(Supp. 1969).

³⁷The policy underlying the public information acts and the construction of the Federal statute make it clear that the burden is on the agency. See *Barceloneta Shoe Corp. v. Compton*, 271 F. Supp. 591, 593 (D.P.R. 1967); Fellmeth, *The Freedom of Information Act and the Federal Trade Commission: A Study in Malfeasance*, 4 HARV. CIVIL RIGHTS & CIVIL LIBERTIES L. REV. 345, 346 (1969); Bennet, *supra* note 3, at 74.

³⁸Note, *The Federal Freedom of Information Act as an Aid to Discovery*, 54 LA. L. REV. 141, 156 (1968).

³⁹On the federal level, see *Consumers Union of U.S., Inc. v. Veterans Admin.*, 301 F. Supp. 796, 806 (S.D.N.Y. 1969).

be the incorporation of a provision that would allow such limited disclosure. This could increase the likelihood of disclosure.⁴⁰

Notwithstanding the provision for judicial enforcement, agencies may be able to effectively circumvent the policy of the Act by engaging in lengthy administrative procedures before deciding what action to take on a request for disclosure. Such delaying tactics, which can be tantamount to outright withholding, should not be sanctioned.⁴¹ A significant addition to the Act would be a provision requiring an agency to take its final action on a request for information within a certain time period, such as two weeks. Failure to act within the prescribed period would be construed as a denial of the request, thus allowing the requestor to then seek judicial enforcement. The burden imposed on the agencies by such a requirement would be more than offset by the resulting expeditious determination of a requestor's right to information, which is the key to the Act's policy of full agency disclosure.

Another manner in which the policy of the Act might be better effectuated is through the establishment of a daily distributed state register comparable to the Federal Register.⁴² Eliminating the necessity of channelling request for information through the particular agency would significantly reduce the possibility of agency interference with the public's right of access to information. Furthermore, such cataloguing, indexing of rules, orders and other information in a daily distributed centralized source is more likely to present a clearer over-all statement of current agency policy in a particular area than is the mere duplicate copy of individual opinions, rules, or statements of policy

⁴⁰An additional sub-section which would achieve this result might state: "The provisions of Sec. 22(1) [relating to the exemptions from disclosure] do not apply to matters pertaining solely to the demandant."

⁴¹See Note, *The Information: Judicial Enforcement of the Records Provision*, 54 VA. L. REV. 466, 468 (1968).

⁴²Presently, the sole reference to the methods and procedures for actual implementation of the Act's provisions is in Section 21(3). "The publications may be in pamphlet, loose-leaf or other appropriate form in printed, mimeographed or other written manner. Except as otherwise provided by law, the agency may charge not more than cost for each copy of the publication." For a description of information required to be published in the Federal Register under the Federal Freedom of Information Act, see 5 U.S.C. § 552 (a)(1). It should be noted that the existence of the Federal Register has not brought about full access to information even under a policy of full disclosure. While the degree to which it has removed impediments to accessibility cannot be determined, it has been of value in assisting the public exercise its "right to know."

handed to an individual. Certainly the resulting convenience to the public would enhance the practical significance of their "right to know."

IV. Conclusion

The basic approach of the Act is to make all records presumptively available, placing on the agencies the burden of justifying a refusal to disclose. This approach is both sound and preferable to the prior situation in which the burden of rebutting a presumption of non-availability rested on the individual.

However, the Act is deficient in that it places too much reliance upon judicial enforcement. This mode of enforcement in disclosure suits often has proven to be lengthy and costly, with the judicial decisions frequently resulting in an inadequate amount of information being made available. Thus, the degree to which the policy of full disclosure is effectuated will be highly dependent upon the cooperation of the individual agencies.

For this reason, it is necessary that the present Act be supplemented with provisions which would operate to prevent any agency interference with, or delay in, providing full disclosure to the public. Only in this way will the Administrative Procedures Act's policy of full disclosure have any practical significance.

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