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October 30, 2017

Dear Chairman Kesto, Representative Howrylak, and Members of the Law and Justice Committee:

Unfortunately, my schedule does not allow me to appear in person and testify before the Committee, although I would welcome the opportunity to do so in the future should the Committee have additional hearings.

I serve as General Counsel for the Michigan Press Association ("MPA"), which represents over 300 newspapers and websites that reach an audience of 6.9 million Michigan residents). One of the services I provide to MPA members is a "hotline" for Open Meetings Act ("OMA") questions across the state. Because of our expertise in this area of the law, I also receive calls from ordinary citizens, as well candidates for public office. Based on the hundreds calls and emails we get each year, I can tell you that OMA is an essential tool for citizens to see government at work. Through OMA, citizens can see whether public officials are fulfilling their duty of due diligence when deliberating on and deciding matters of public policy.

I write on behalf of the MPA in support of HB 4766, which is an important and necessary improvement to OMA.

OMA was enacted in large measure because the prior (1968) statute failed to impose an enforcement mechanism and penalties to deter noncompliance. The 1976 revisions were specifically designed to provide for enforcement by way of several mechanisms, including actions by private citizens to vindicate the rights of the public at large. As noted by the Michigan Supreme Court in 1993:

because the 1968 statute failed to impose an enforcement mechanism and penalties to deter noncompliance, **nothing prevented the wholesale evasion of the act's provisions.** See 1970 CL 15.251-15.253. In 1973, the Michigan Senate established the Special Senate Study Committee on Political Ethics to study a variety of topics, including the 1968 statute. See Senate Resolution No. 7, 1973 Journal of the Senate 36-37. The committee concluded that revisions to the open meetings law were necessary. It stated:

The fact that only the meetings, or parts of meetings, at which votes are actually taken are considered public effectively insulates members of these bodies from public pressure....

Booth Newspapers, Inc v University of Michigan Regents, 444 Mich 211, 221-22 (1993).

Recent court decision – based on the language of OMA – have severely limited the enforcement mechanisms and noncompliance penalties, despite more than 3 decades of a broader interpretation. These recent judicial decisions can be fairly read as giving a public body at least one “free” OMA violation before the public body can be held accountable.

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Moreover, the ability of private citizens to bring OMA complaints has been severely impacted and is generally limited to a small group capable of pursuing legal action at their own personal expense.

This legislation is necessary to permit broader fee recovery in OMA cases.

Frankly, we have seen an increase in OMA violations over the last several years. Here are some examples:

- organized sub-quorum meetings where deliberations take place and at which the public is not permitted;
- failure to allow public comment or severely limiting the comments that the public can make;
- failure to inform the public of the purpose or purposes for calling a closed session;
- public bodies emerging from closed session and taking a vote on the matters discussed in closed session without revealing the subject matter discussed or the decision being rendered; and
- deliberations taking place via email.

These are just a few examples of violations that have been brought to my attention. Although in a number of these cases, complaints were filed with the Attorney General’s or the local prosecutor’s office, lawsuits by the AG/prosecutor were not pursued.

The proposed legislation will likely have very positive effects, including: (1) enhancing the ability of private citizens to bring OMA even though

they are unable to do so at their own personal expense; and (2) the possibility of broader fee recovery in OMA cases will incentivize public bodies to comply with OMA.

I appreciate your willingness to address this issue and your efforts to make Michigan a state where citizens can rely on accountability and transparency.

Sincerely,

A handwritten signature in black ink that reads "Robin Luce Herrmann". The signature is written in a cursive, slightly slanted style.

Robin Luce Herrmann,
General Counsel MPA
Shareholder, Butzel Long