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Law and Justice Committee
Michigan House of Representatives
P.O. Box 30014
Lansing, MI 48909-7514

Re: Support for House Bill No. 4766

Dear Committee:

Thank you for this opportunity to offer my support for House Bill No. 4766. While I currently practice in Tennessee, I have spent much of my legal career advocating for open government on behalf of both citizens and the media in Michigan, Florida, and now, Tennessee. I became familiar with this issue when I represented the *Detroit Free Press* and the *Lansing State Journal* in an ultimately unsuccessful lawsuit to clarify the applicability of the OMA to the University of Michigan Board of Regents. This bill is an important change to Michigan's Open Meetings Act (the "OMA"). First, it would permit litigants to bring declaratory judgment actions, something that until the last couple of years was a possibility under the OMA. Second, it would deter OMA violations and facilitate greater access to attorneys for open government advocates because it would permit fee recovery if declaratory relief was granted for OMA violations.

For much of the OMA's history, the Michigan Court of Appeals permitted those seeking to hold public bodies accountable for violation of the OMA to seek both declaratory relief and attorneys' fees if they succeeded on such a claim. For example, in *Schmiedicke v. Clare School Board*, 228 Mich App 259 (1998), the plaintiff sought both declaratory and injunctive relief for OMA violations by a school board's Personnel and Policy Committee in conducting a private review of the "methods for evaluating school administrators and the length of employment contracts with administrators," among other things. *Id.* at 260. The court granted the declaratory relief sought, but denied injunctive relief because "[t]here is no reason to believe defendants will deliberately fail to comply with the OMA" and "[t]he legal remedy of declaratory relief is adequate." *Id.* at 267. Despite only winning on its claim for declaratory relief, the court held that attorneys' fees and costs should be awarded to the successful plaintiff in that case. *Id.*

The Michigan Supreme Court's decision in *Speicher v. Columbia Township Board of Trustees*, 497 Mich 125 (2014) dramatically changed the landscape of OMA litigation. The issue before the Court in *Speicher* was whether a prevailing party in an OMA suit could recover his attorneys' fees if the only relief granted was a declaratory judgment. *Id.* at 133. Based upon the current statute's language, the Court held that attorneys' fees are only recoverable under the

OMA if injunctive relief was awarded, not when the court grants declaratory relief, a significant departure from the prior interpretation of the statute. *Id.* at 142-43.

The *Speicher* decision has now been extended to also prohibit declaratory relief itself in OMA cases. The Court of Appeals held last year that “the structure of the OMA and the somewhat limited nature of the available remedies as recognized by *Speicher* only allow for causes of action seeking, on the basis of an alleged OMA violation, (1) invalidation of a public body’s decision, (2) injunctive relief, or (3) money damages.” *Citizens for a Better Algonac Cmty. Schs. v. Algonac Cmty. Schs.*, 317 Mich App 171, 181 (2016); *see also Vermilya v. Delta College Bd. Of Trs.*, No. 331958, 2017 Mich App LEXIS 973, at *5 (June 15, 2017) (same).

Elimination of declaratory judgment as an option for an OMA violation is problematic for a variety of reasons. First, not every violation directly involves a decision, which is required for the first type of relief. Thus, the first type of relief does not reach the critical deliberations of public bodies, which are also required to be open under the OMA. Second, injunctive relief, as noted in *Speicher*, “contemplates an ongoing violation.” 497 Mich at 138. But ongoing violations are hopefully the exception, not the rule. The more likely scenario is one in which a public body has violated the law a time or two and is sued for those limited violations, but injunctive relief is not an option in those cases. Moreover, courts generally avoid granting injunctive relief when possible. For example, in *Ridenour v. Dearborn Board of Education*, 111 Mich App 781, 801 (1981), the trial court “did not find it necessary to grant injunctive relief because of the defense attorney’s promise that the defendant would abide by the court’s ruling.” If that is all it takes to avoid injunctive relief and injunctive relief is only available for ongoing violations, then such relief applies to a very narrow class of violations. Finally, money damages are only available against individual public officials for intentional violations, another very narrow type of violation. Mich Code § 15.273(1).

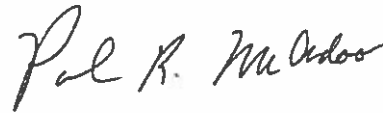
While I have not done an exhaustive survey of the prior case law on the issue, I would not be surprised to find that most cases seek declaratory judgment and injunctive relief and that most cases where a violation is found award just declaratory relief. The *Speicher* case and its progeny demonstrate the need for expanding the relief available under the OMA to promote and encourage compliance with this important transparency law.

Expanding the fee-shifting provision to include declaratory relief is also important. Citizen enforcement of the OMA is the primary means for holding public bodies accountable if they violate the statute. Permitting fee-shifting for declaratory relief would make it much more likely that individuals and entities would be willing to hold their elected official accountable and increase access to attorneys in OMA cases. Expanding the availability of fee shifting also incentivizes public bodies to comply with the OMA.

“Excessive secrecy breeds distrust. It prevents accountability. It does violence to the principle of government based on the informed consent of the governed.” Final Report of Special Senate Study Committee on Political Ethics, at 10 (Mich. Oct. 24, 1973). The provisions in House Bill No. 4766 deter secrecy, enhance accountability and provide additional tools for those seeking to ensure an open and transparent government in Michigan. I fully support passage of House Bill No. 4766.

Very truly yours,

AARON | SANDERS PLLC

A handwritten signature in black ink that reads "Paul R. McAdoo". The signature is written in a cursive, flowing style.

Paul R. McAdoo

