

Legislative Analysis



REQUIRE PERSONAL INFORMATION OF VICTIMS AND WITNESSES TO BE CONFIDENTIAL

Phone: (517) 373-8080
<http://www.house.mi.gov/hfa>

House Bill 4738 as reported from committee
Sponsor: Rep. Kelly Breen

Analysis available at
<http://www.legislature.mi.gov>

House Bill 4739 as reported from committee
Sponsor: Rep. Denise Mentzer

Committee: Judiciary
Complete to 6-29-23

BRIEF SUMMARY: House Bill 4738 would amend the Code of Criminal Procedure, and House Bill 4739 would amend the William Van Regenmorter Crime Victim's Rights Act, to require prosecuting attorneys to redact the personal information of witnesses and victims of crimes from certain court documents and to allow disclosure of the personal information to the defense counsel or the defendant (if not represented by counsel) only upon an order of the court. An unauthorized disclosure would be a misdemeanor offense.

FISCAL IMPACT: Since the potential number of new misdemeanor crimes for unlawfully disclosing confidential information is unknown, the fiscal impact of the bills is indeterminate. (See **Fiscal Information**, below, for more information.)

THE APPARENT PROBLEM:

Generally speaking, the rules of discovery govern the types of information that one party to a criminal proceeding must provide to another upon request. For instance, Rule 6.201 of the Michigan Court Rules (MCR 6.201) mandates that the names and addresses of witnesses who may be called to testify at trial must be turned over to the other party or parties upon request, although in the alternative a party could just provide the name and make that witness available to the other party for an interview. The rule also requires certain information known to the prosecuting attorney, such as a police report, to be provided to each defendant. However, if good cause can be shown that disclosing certain information to another party may, among other things, pose a risk of harm, intimidation, embarrassment, or threats to any person, a court can grant a motion to enter a protective order that excludes the information from the mandatory disclosure requirements.

According to committee testimony, some prosecutors have routinely redacted the contact information of witnesses from police reports before providing the documents to the defense without first seeking a protective order from the court. A few years ago, this practice was challenged in a criminal case, and the trial court granted the defendant's motion to compel the prosecution to provide an unredacted police report on the basis that Michigan court rules do not authorize redacting police reports absent a protective order. The prosecution appealed the trial court's order to the state Court of Appeals, which held that "the prosecution cannot redact witness contact information from police reports produced during discovery absent a showing

of good cause under MCR 6.201(E) or (I).”¹ Earlier this year, in a case based on “whether the contact information of crime *victims* in discoverable police reports is entitled to heightened protection,” the Court of Appeals held that such “information is not automatically shielded” and that “a trial court must determine in each case whether there is good cause to enter a protective order under MCR 6.201(E) or to modify the discovery rules under MCR 6.201(I).”²

According to committee testimony, the impact from the case regarding protecting witness information is already being felt in the increased fear and hesitancy of witnesses to come forward and testify and also in delays of prosecution while prosecutors file motions to suppress the personally identifiable information contained in unredacted police reports. With the more recent decision concerning the protection of victim information, members of law enforcement and victim advocates are concerned that the ruling will further discourage victims from reporting crimes against them.

Legislation has been offered to require prosecutors to redact certain personal information of victims and witnesses and require a defendant to move the court for the release of redacted information.

THE CONTENT OF THE BILLS:

The William Van Regenmorter Crime Victim’s Rights Act identifies various rights afforded to **victims** of a crime, including not having certain information in the court file or ordinary court documents, with some exceptions, and exempting certain information from disclosure under the Freedom of Information Act (FOIA). The Code of Criminal Procedure, among other things, provides for proceedings before trial and the filing of informations, including the required prosecutorial disclosure of the names of certain **witnesses**.

The bills would each add a new section to their respective acts to require the prosecuting attorney to keep the **personal information** of any victim or witness confidential unless the personal information is a part of the *res gestae* of the charged crime.³ Personal information would have to be redacted by the prosecuting attorney from a document provided to the defendant or the defendant’s counsel, as well as from a document submitted by the prosecutor as an ordinary court document or that will be entered into the court file.

Personal information would mean the following information of an individual, but would not include the location of a charged crime:

- Home address.
- Telephone number and cell phone number.
- Driver’s license number or official state personal identification card number.

¹ *People v Jack*, 336 Mich App 316 (March 11, 2021) https://www.courts.michigan.gov/493adb/siteassets/case-documents/uploads/opinions/final/coa/20210311_c354524_32_354524.opn.pdf

² *People v Antaramian*. Mich App, Docket No. 362604 (May 11, 2023) https://www.courts.michigan.gov/49ba43/siteassets/case-documents/uploads/opinions/final/coa/20230511_c362604_34_362604.opn.pdf

³ *Res gestae* is Latin for “things done” or “things transacted.” It refers to the facts and events that constitute an alleged crime or litigated issue. The phrase has often been used in the context of determining what testimony can be admitted as evidence and what is inadmissible under the hearsay rule. In the context of these bills, it would appear to signify information that is part of the facts of the alleged crime.

- Social Security number.
- Date of birth.
- Place and address of employment and employee identification number.
- Mother's maiden name.
- Demand deposit account, savings account, or checking account number or other financial identification information.
- Credit card number.
- Email address.
- Internet identifier, defined to mean a designation used for self-identification or routing used in posting on the internet or in other internet communications.
- Home address, telephone number, and cell phone number of a family member.

The bills would not alleviate the obligation otherwise required under law to make a victim or witness available for interview by the other party.

In addition, the bills would not authorize the disclosure of the confidential address of a program participant under the Address Confidentiality Program Act or preclude the release of information to a victim advocacy organization or agency for the purpose of providing victim services. (Among other things, the Address Confidentiality Program Act provides a participant with a designated address to use for various legal purposes instead of the participant's actual home address, which is kept confidential.)

On motion by the defendant, and subject to the above provision, the court could order the prosecuting attorney to provide personal information of a witness or a victim to the defendant or the defendant's counsel. The motion would have to meet the following requirements:

- Explain the limited purpose for which the personal information is sought.
- Demonstrate that the personal information requested is reasonably necessary to provide an adequate defense.

If the motion were granted, the order would have to do all of the following:

- Limit the disclosure of the personal information to the extent the disclosure is reasonably necessary to provide an adequate defense.
- Specify the limited purpose for which the personal information may be used.
- Prohibit the reproduction, copying, or dissemination of the personal information not authorized in the order.
- Except as provided below, require the personal information to remain in the exclusive custody of the defendant (if not represented by counsel) or the defendant's counsel.
- Include conditions and terms for the defendant (if not represented by counsel) or the defendant's counsel to provide the personal information to the counsel's or defendant's agent, employee, or expert witness if necessary for a limited purpose approved by the court.

A person who is required to keep confidential or redact personal information under the bills and who intentionally and willfully discloses that personal information in violation of the bills would be guilty of a misdemeanor punishable by imprisonment for up to 93 days or a fine of up to \$500, or both.

HB 4738 (Code of Criminal Procedure):
 HB 4739 (Crime Victim's Rights Act):

Proposed MCL 767.40b
 Proposed MCL 780.758a

BACKGROUND:

Section 2(1)(m) of the William Van Regenmorter Crime Victim's Rights Act defines the term *victim*, for purposes of that act, to mean any of the following:

- Except as provided below, an individual who suffers direct or threatened physical, financial, or emotional harm as a result of the commission of a crime.
- Except for the purpose only of submitting or making an impact statement as provided below, the following individuals other than the defendant if the victim is deceased:
 - The spouse of the deceased victim.
 - A child of the deceased victim if the above does not apply and the child is 18 years of age or older.
 - A parent of the deceased victim if the above do not apply.
 - The guardian or custodian of a child of the deceased victim if the above do not apply and the child is less than 18 years of age.
 - A sibling of the deceased victim if the above do not apply.
 - A grandparent of the deceased victim if the above do not apply.
- A parent, guardian, or custodian of a victim who is less than 18 years of age if the parent, guardian, or custodian so chooses and is neither the defendant nor incarcerated.
- A parent, guardian, or custodian of a victim who is mentally or emotionally unable to participate in the legal process if the parent, guardian, or custodian is neither the defendant nor incarcerated.
- For the purpose only of submitting or making an impact statement, if the individual who suffers direct or threatened physical, financial, or emotional harm as a result of the commission of a crime is deceased, is so mentally incapacitated that they cannot meaningfully understand or participate in the legal process, or consents to the individual's designation as a victim, the following individuals other than the defendant:
 - The spouse of the victim.
 - A child of the victim if the child is 18 years of age or older.
 - A parent of the victim.
 - The guardian or custodian of a child of the victim if the child is less than 18 years of age.
 - A sibling of the victim.
 - A grandparent of the victim.
 - A guardian or custodian of the victim if the victim is less than 18 years of age at the time of the commission of the crime and the guardian or custodian is not incarcerated.

House Bills 4738 and 4739 are reintroductions of House Bills 4798 and 4974, respectively, of the 2021-22 legislative session. Those bills were passed by the House of Representatives.

FISCAL INFORMATION:

The bills would have an indeterminate fiscal impact on local units of government. Information is not available on the number of persons that would be convicted under provisions of the bills. New misdemeanor convictions would increase costs related to county jails and/or local misdemeanor probation supervision. The costs of local incarceration in a county jail and local misdemeanor probation supervision vary by jurisdiction. The fiscal impact on local court systems would depend on how provisions of the bill affected caseloads and related

administrative costs. Increased costs could be offset, to some degree, depending on if additional court-imposed fee revenue is generated. Any increase in penal fine revenue would increase funding for local libraries, which are the constitutionally designated recipients of those revenues.

There would be no fiscal impact on local prosecutors' offices or the Prosecuting Attorneys Coordinating Council (PACC).

ARGUMENTS:

For:

Few would dispute that the due process rights afforded to persons accused of committing a crime are central to the justice system. However, protecting the safety of those who come forward as victims or witnesses to a crime is equally important. In recent years, cases of victim and witness intimidation have increased, with some being killed shortly before they are scheduled to testify. The practice by prosecutors of redacting information such as addresses and phone numbers of victims and witnesses has recently been overturned by two Michigan Court of Appeals decisions. As a result, prosecutors now must seek protective orders to suppress the contact information of victims and witnesses. According to committee testimony, the first court ruling regarding witness information has already affected prosecutions, with more witnesses being reluctant to come forward, as well as increasing the costs of prosecution associated with filing the motions for the protective orders. Now, there is concern that fewer victims will come forward or testify for fear of retaliation and harm to them or their families.

Supporters argue that the bills would provide an appropriate balance between automatic disclosure of information that could place a witness or victim in harm's way and automatic redaction of information that may be necessary for a person to defend themselves. The bill's language would establish clear guidelines as to the types of information that would be subject to disclosure limitations, protect the information of persons who participate in the state's address confidentiality program, and still preserve a defendant's ability to obtain information relevant to their defense.

Against:

Critics of the bills argue that current laws and court rules already provide the balance between due process protections and protection of witnesses and victims. Many courts routinely provide unredacted police reports to defense attorneys, who redact the report before providing or showing it to their clients. Prosecutors carry the burden of proof in criminal cases and should rightly carry the burden of obtaining protective orders if they feel it is justified, rather than automatically not disclosing certain information without a clear showing of cause to do so. As it is now, if the defense cannot get a witness's contact information from the prosecution to set up an interview, it must hire investigators to find it themselves—a costly option for most defendants and a burden on public defenders, who often have limited resources. Requiring a defense attorney to file a motion in order obtain a witness's or victim's contact information could require the defense to reveal its strategy or reveal client confidences. Further, restricting timely access to information already held by prosecutors, as the bills would do, would impinge on a defendant's Sixth Amendment rights to effective assistance of counsel.

POSITIONS:

Representatives of the Department of the Attorney General testified in support of the bills. (6-14-23)

The following entities indicated support for the bills:

- Michigan Domestic and Sexual Violence Prevention and Treatment Board (6-21-23)
- Prosecuting Attorneys Association of Michigan (6-14-23)
- Michigan Coalition to End Domestic and Sexual Violence (6-14-23)

A representative of the Criminal Defense Attorneys of Michigan testified in opposition to the bills. (6-14-23)

The ACLU of Michigan indicated opposition to the bills. (6-14-23)

Legislative Analyst: Susan Stutzky
Fiscal Analyst: Robin Risko

■ This analysis was prepared by nonpartisan House Fiscal Agency staff for use by House members in their deliberations and does not constitute an official statement of legislative intent.