



**House
Legislative
Analysis
Section**

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UNIVERSITY RESEARCH CONFIDENTIALITY

House Bill 5021 as passed by the House
Second Analysis (8-9-90)

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Sponsor: Rep. Perry Bullard
Committee: Judiciary

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Mich. State Law Library

THE APPARENT PROBLEM:

Universities frequently use in their research information provided confidentially by the private sector; this information commonly takes the form of computer software or information pertaining to research being conducted by the university under a contract with a private firm. However, whether the confidentiality of the information can be protected against requests brought under the Freedom of Information Act (FOIA) is a matter of some concern. Private companies are wary of making valuable trade secrets vulnerable to disclosure under the FOIA, and this in turn operates against efforts to conduct applied and basic research. Also of concern to researchers is the degree to which unpatented and uncopyrighted information is protected against disclosure. While the Freedom of Information Act does protect trade secrets provided to a university under a promise of confidentiality, universities urge the enactment of stronger protections in the form of separate legislation that protects information provided in confidence by the private sector, information on material under development by university researchers or scholars, and proprietary information in which the university holds an interest.

THE CONTENT OF THE BILL:

The bill would create the Confidential Research Information Act to exempt certain university research information from disclosure under the Freedom of Information Act (FOIA). With certain exceptions, it would protect against FOIA disclosure trade secrets, commercial information, and financial information (including such information as it relates to computer hardware or software) provided to a public university or college by a private external source. To receive the protection, the following conditions would have to be met: the information was used exclusively for research and related activities, the private source designated the information for protection under the bill before the college received the information, the institution promised to keep the information confidential, and a description of the information was recorded by the institution within ten days and made available upon request.

The above FOIA exemption for privately-provided information would not apply to any of the following: information submitted as required by law or as a condition of receiving a government contract, license, or benefit; information regarding a product or process in commerce, to the extent that the information indicated a substantial likelihood that a person could be killed or injured by the use of the product or process (the university would have a duty to disclose such information); and, information on a product or process if the university was selling or marketing the product or process.

Also protected against FOIA disclosure would be intellectual property of a person employed by or under contract to the university, until a reasonable opportunity for publication had been provided; original works of

authorship in any tangible medium of expression created by a person employed by or under contract to a university, until reasonable time to obtain a copyright (not exceeding 12 months) had expired; records on a process or a machine, until reasonable time to secure a patent (not to exceed three years) had expired; and, trade secrets and other proprietary information with commercial value in which the university or college held an interest. As with privately-provided information, the above protections would not apply to information regarding a product or process that the university was selling or marketing.

The bill would not limit the ability of a university-employed person to engage in lawful projects independent of a public university or college, nor would it prohibit such a person from disclosing information on such projects or from receiving income from them.

The bill would be strictly construed to limit the exceptions to disclosure.

A person requesting under the Freedom of Information Act information exempted by the bill would have to be provided with a description of the information and the reason the request had been denied.

FISCAL IMPLICATIONS:

According to the House Fiscal Agency, the bill has no fiscal implications. (1-9-90)

ARGUMENTS:

For:

The bill offers strong protection against disclosure under the Freedom of Information Act for certain kinds of research information, including trade secrets entrusted to university researchers, and preliminary data and research in the hands of university researchers and scholars. At the same time, the bill makes it clear that certain kinds of information, such as indications that a process or product is unsafe, are not to be protected. Neighboring states, including Illinois, Wisconsin, and Indiana, give their universities protection of the nature proposed by the bill, and in doing so, give their researchers an advantage in obtaining research sponsors. The bill could improve the position of Michigan institutions in the competition for contracts and grants from private industry.

Against:

Some in the private sector, already concerned about unfair advantages that can occur when publicly-funded institutions assist or engage in for-profit ventures, fear the bill could be used to improperly protect information that should be subject to disclosure. While denials of FOIA requests can be addressed in court, it is not reasonable to expect an individual or small business to have the resources to pursue such litigation. What is needed, some have suggested, is some sort of independent review by a body that can assess the legitimacy of a university's denial.

H.B. 5021 (8-9-90)

POSITIONS:

The American Association of University Professors supports the bill. (8-6-90)

Michigan State University supports the bill. (8-6-90)

Oakland University supports the bill. (8-7-90)