



**House
Legislative
Analysis
Section**

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**FOIA: EXEMPT RECORDS OR
INFORMATION OF SECURITY
MEASURES**

**House Bill 5349 (Substitute H-3)
First Analysis (1-24-02)**

**Sponsor: Rep. Marc Shulman
Committee: House Oversight and
Operations**

THE APPARENT PROBLEM:

Passed in 1976, the Freedom of Information Act was, along with its counterpart, the Open Meetings Act (MCL 15.261 et al.), intended to make government more accountable to the general public by providing a means by which average citizens could have more access to find out about and observe the decision-making processes of governmental bodies. The acts minimized the amount of governing that would be allowed to take place behind closed doors and required a degree of openness and public access in governing.

Although the act entitles citizens to “full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees”, certain information held by governmental bodies is exempt from disclosure. Under the act, public records are subject to disclosure unless they are specifically exempted and listed in the act. Generally speaking, exemptions have been justified based upon a weighing of the benefits of full disclosure to the public at large against the potential harm that disclosure could cause to individuals or to other public purposes. The types of information exempted from disclosure include such things as information of a personal nature that would constitute an invasion of an individual’s privacy, investigative records of a law enforcement agency where disclosure would interfere with law enforcement proceedings or deprive a person of the right to a fair trial, trade secrets or financial information of a private business, information subject to attorney-client (or physician-patient, etc.) privilege, and so forth.

One type of record that is specifically exempted from disclosure under the FOIA are records of a public body’s security measures, including security plans, security codes and combinations, passwords, passes, keys, and security procedures, to the extent that the records relate to the ongoing security of the public

body. Given the new awareness of the nation’s vulnerability to terrorist attacks, some have urged that this provision be broadened. It is argued that officials need to be able to withhold certain information that could assist a terrorist in planning an attack – such things as emergency preparedness plans, water supply and utility plant layouts, and blueprints and designs of public buildings and infrastructure.

THE CONTENT OF THE BILL:

The bill would amend the Freedom of Information Act to add to the list of records that may be exempted from disclosure by a public body records or information of security measures, including but not limited to emergency response plans, risk planning documents, threat assessments, domestic preparedness strategies, and capabilities and plans for responding to acts of terrorism or similar threats.

“Records or information of security measures” would be defined to mean measures designed for the protection of persons or property, whether public or private, including but not limited to building and public works designs, to the extent that the records or information relate to the ongoing security measures of a public body.

The bill further specifies that this provision would not prohibit releasing information regarding security measures that have been put in place or, in the public body’s discretion, releasing information that does not create a clear and present danger to the security of the state.

Finally, the bill would require a public body to exempt from disclosure the home address, telephone number, and personnel records of an active or retired law enforcement officer.

MCL 15.243

House Bill 5349 (1-24-02)

BACKGROUND INFORMATION:

According to the National Conference of State Legislatures, several states, the federal government, and many private associations have removed certain information from their Internet web sites because the information could be useful to terrorists in planning attacks. Such information includes the locations of hazardous chemicals and substances used or stored at businesses, maps of water reservoirs and water resources, driver's license data, information about crop duster planes, maps of National Guard bases and camps, the locations of emergency management centers, and information about nuclear power plants, energy plants, pipelines, road mapping, aviation enforcement, and chemical plant site security.

In addition, in 2001 the Washington legislature passed legislation addressing public disclosure of specific information related to acts of terrorism, and another bill is being considered this year to exempt from public disclosure certain documents concerning vulnerability assessments, response plans, inventories, and supporting materials.

FISCAL IMPLICATIONS:

According to the House Fiscal Agency, the bill has no fiscal impact. (1-24-02)

ARGUMENTS:

For:

The Freedom of Information Act allows the general public the opportunity to request and receive copies of or access to records and information held by certain public bodies. Many believe that by allowing citizens this degree of access the act helps to provide for a greater degree of public oversight and citizen involvement and helps to limit the possibility of abuses of the public trust. However, despite the act's important purpose of promoting citizen access to governmental decision making, it is acknowledged that some information should legitimately be withheld from public disclosure in cases where disclosure would harm individuals or the public at large. Given the nation's heightened awareness of threats from domestic and foreign terrorism, it has become clear that certain information held by public agencies could assist those with a desire to do great harm to the populace. There are many examples: blueprints of nuclear plants and water supply systems, emergency response plans, intelligence and threat assessments, security procedures for public transit systems, and so forth. Of particular concern to

the state police, it is important to exempt from disclosure risk assessment documents containing information about the most critical infrastructure sites, such as utility power grids, because without such an exemption it may be difficult to obtain the information from utilities and others who do not wish to have their proprietary information disclosed to the public. As part of the legislative response to the September 11, 2001 terrorist attacks, legislation has been offered to allow public bodies to exempt from disclosure information related to security measures. A reasonable exemption to the Freedom of Information Act, for the purpose of public security and protection against further attacks, is certainly warranted.

Response:

While no one would question the need to protect the blueprint of a nuclear plant from public disclosure, it is also true that most will agree on the need to craft such an exemption with extreme care. The committee-reported version of the bill raises many questions (and indeed further modifications are expected). The language appears to be overly broad, and it must be remembered that state and local officials will have to interpret and implement any such exemption. Denials and appeals will be decided on a case-by-case basis.

A request for information about the engineering of the Mackinac Bridge, for example, could reasonably come from a contractor hoping to bid on construction work, or from an engineering student or a historian writing a research paper. How will the appropriate public body distinguish these legitimate requests from a request with a more sinister intent? And is it permissible for government officials to make those judgments based on the perceived intent of the requestor? In other words, would *all* requests for engineering information on the Mackinac Bridge have to be treated in the same manner? The bill does not address this, but public officials will confront the question.

Further, many fear that opening up the types of information that may be exempted will provide unscrupulous officials with a way to hide information that rightfully should be open to the public. Will the possibility of terrorist acts provide an "excuse" to withhold information about new public works projects, the expenditure of public funds, and so forth? The potential for abuse should be seriously considered in any broadening of the exemptions to the Freedom of Information Act.

And, an apparently unrelated amendment would *require* public bodies to exempt from disclosure the home addresses, telephone numbers, and personnel records of law enforcement officers. While it could be argued that such personal information about any public employee should be exempt from disclosure, some are concerned that this represents yet another step away from the openness in government that was the intent of the act.

In the end, policymakers must weigh the costs and benefits of competing values: living in a free, open society vs. increasing governmental power in order to increase public safety and security. Many would prefer to err on the side of caution, but there are others who would prefer to live in a society that favors openness.

Reply:

It should be noted that the act provides a process for appealing a denial of a request for information, and provides for judicial review. The courts have liberally construed the act and its application in favor of openness to governmental records.

POSITIONS:

The Department of State Police supports the bill. (1-24-02)

The Michigan Press Association supports the concept of the bill. (1-24-02)

Analyst: D. Martens

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