



**House  
Legislative  
Analysis  
Section**

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

**House Bill 5349 as enrolled  
Public Act 130 of 2002  
Second Analysis (4-17-02)**

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

***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 measures designed to protect the security or safety of persons or property, whether public or private, including but not limited to the following, *unless* disclosure would not impair a public body’s ability to protect the security or safety of persons or property or unless the public interest in disclosure outweighs the public interest in nondisclosure in the particular instance:

- building, public works, and public water supply designs to the extent that the designs relate to the ongoing security measures of a public body;
- capabilities and plans for responding to a violation of the Michigan Anti-Terrorist Act;
- emergency response plans;
- risk planning documents;
- threat assessments; and
- domestic preparedness strategies.

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In addition, the bill would amend a provision that allows a public body to exempt from disclosure the personal address or telephone number of law enforcement officers or agents or their special skills, so that the exemption would apply to “active or retired” officers or agents.

MCL 15.243

### ***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. The language has been carefully crafted to narrow the proposed exemption in such a manner as to protect sensitive information while preserving the act’s intent to provide broad public disclosure of government information. A reasonable exemption to the Freedom of Information Act, for the purpose of public security and protection against further attacks, is certainly warranted.

#### ***Against:***

Some 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. 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.

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■ 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.