



**House
Legislative
Analysis
Section**

Olds Plaza Building, 10th Floor
Lansing, Michigan 48909
Phone: 517/373-6466

CONFIDENTIAL UNIV. RESEARCH

**Senate Bill 857 as passed by the Senate
First Analysis (3-3-94)**

**Sponsor: Sen. John J.H. Schwarz, M.D.
House Committee: Higher Education
Senate Committee: Education**

THE APPARENT PROBLEM:

Public universities have a professional responsibility to protect the source of confidential research data and to promise confidentiality to organizations that participate in research. 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 that are used to develop public policy and provided to a university under a promise of confidentiality, universities urge the enactment of stronger protection 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:

Senate Bill 857 would create the Confidential Research Information Act to protect certain information concerning research at public universities and colleges from public disclosure under the Freedom of Information Act (FOIA). Specifically, the bill would protect information relating to trade secrets, commercial information, and financial information (including computer hardware and software) that had been provided to a college or university by a private, external source,

and was used in the performance of a lawful function.

FOIA Exemption for Privately-provided Information. Under the bill, trade secrets and commercial and financial information would be exempt from disclosure under the FOIA if all the following conditions were met:

- The institution entered into an agreement to keep the information confidential.
- The information would be used exclusively for research, testing, evaluation, and related activities.
- The information was clearly designated as being confidential by the external source before or at the time it was received by the public institution.
- A description of the information -- sufficient to provide the public with the necessary information to understand the nature of the research or product involved -- was recorded by the institution within 20 working days and made available upon request.

Additional FOIA Exemptions. The following would also be protected against FOIA disclosure: the intellectual property of a person employed by or under contract to a public institution, until a reasonable opportunity for publication had been provided; original works of authorship by an employee of the institution until a reasonable time - - not to exceed 12 months -- to obtain a copyright had expired; records on a process or machine, until a reasonable time -- not to exceed five years -- to secure a patent had been provided; and trade secrets and other proprietary information with commercial value in which the public institution held an interest.

Exclusions. The FOIA exemption would not apply to information that was otherwise publicly available;

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to information submitted as required by law or as a condition of receiving a government contract, license, or benefit; nor to information provided by a private external source regarding a product or process then being used in commerce, to the extent that the information indicated a substantial likelihood that a person could be killed or injured by use of the product or process. The institution would have a duty to notify local, state, and federal regulatory agencies of this latter information. However, this duty would not apply in situations where the manufacturer already had a duty to disclose the information, and the institution was unaware that the information had not been disclosed; where the hazards of the product or process were obvious to the user; or where recommendations or warnings had disclosed the hazards of the product or process to the user or consumer. In addition, the FOIA exemption would not apply to a product or process that the institution sold or marketed to the general public, if it were protected by a copyright or trademark.

General Provisions. The provisions of the bill would not limit the ability of a person employed by an institution to engage in lawful projects independently, nor would it prohibit the person from disclosing information on, or receiving income from, such projects.

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

A person requesting information that had been exempted from the provision of the FOIA by the bill would be provided with a written description of the information and an explanation of the reason for denial of the request.

FISCAL IMPLICATIONS:

According to the Department of Education, the bill has no fiscal implications. (2-8-94)

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. Other states, including New York, Delaware, Virginia, Ohio, Illinois, Wisconsin, and Indiana, give their universities some of the protection proposed by the bill, and in so doing, 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:

The provisions of the bill add to private sector concerns about the unfair advantages that publicly-funded institutions gain when they engage in for-profit ventures. And, while denials of Freedom of Information Act (FOIA) requests can be addressed in court, it is not reasonable to expect that every concerned individual or small business would have the resources to pursue such litigation.

Against:

The public has a right to know the types of research being conducted by public institutions of higher learning. Research at public universities has sometimes posed ethical questions. Should universities in this country, for example, accept funds to conduct research for foreign companies, if the results of that research would give foreign companies an edge over the U.S. in certain technological areas and, ultimately, have a negative effect on this country's balance of trade? With these exemptions to the FOIA in place, it is unlikely that these practices would be exposed for public debate.

POSITIONS:

Michigan State University supports the bill. (3-1-94)

Oakland University supports the bill. (3-2-94)

The University of Michigan supports the bill. (3-2-94)

Michigan Technological University supports the bill. (3-2-94)

The Department of Education has no position on the bill. (3-2-94)