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## LIMIT ACCESS TO PRISON RECORDS

House Bill 4800 with committee  
amendment  
First Analysis (9-29-93)

Sponsor: Rep. Dianne Byrum  
Committee: Judiciary

### ***THE APPARENT PROBLEM:***

The Freedom of Information Act of 1976 (FOIA) provides for public access to records of public bodies, and prisoner requests for copies of Department of Corrections' (DOC) records have burgeoned steadily since its enactment. The department's total number of requests rose from approximately 3,500 in 1982 to 56,036 in 1992. Most of the requests are made by, or on behalf of, prisoners under the DOC's jurisdiction. Since the FOIA requires that a public agency respond to a request for disclosure of a public record within five business days of receipt of the request, the department must provide requested information, unless there is a statutory exemption for the document. The reason for a disclosure request generally is not required to be divulged. If the agency denies a request for disclosure of information, it must inform the requester of his or her right to sue the agency. Further, since all prisoners are considered indigent, the first \$20 worth of copied records must be supplied free of charge for information that specifically pertains to the requesting prisoner.

In an attempt to cut down on the abuses that had resulted from the amount of free copying that prisoners were allowed, Public Acts 59 and 99 of 1988 amended the Department of Corrections act and the FOIA, respectively, to exempt certain DOC records from the \$20 waiver for information requested by prisoners. Some contend, however, that many prisoners, intent on "beating the system," and with plenty of time at their disposal to explore loopholes in the law, have found ways to manipulate that law to further harass the department, especially since winning a lawsuit over a FOIA request that has not been properly responded to can bring \$500 in punitive damages. The requirement that requests must be responded to within five business days, for example, places a burden on prison agencies that are already overwhelmed with the volume of FOIA requests from prisoners, and since failure to meet

the five-day disclosure requirement is considered a denial, the agency is open to lawsuits. The provision that certain records be exempt from the disclosure requirements of the FOIA, "if their release would constitute a security risk," has also resulted in litigation where the burden of proof has been on the department in each case to demonstrate the particular security concern. It is contended that the Department of Corrections act should be amended to place further limits on the type of information prisoners can request of the department, and to give the department the authority to establish reasonable restrictions on FOIA requests.

### ***THE CONTENT OF THE BILL:***

The bill would amend the corrections code (Public Act 232 of 1953, MCL 791.230) to place additional restrictions on prisoners' access to records under the Freedom of Information Act (FOIA). ("Prisoners" in this context means people committed to the Department of Corrections whether serving their sentences in a state, local, or federal facility, or whether committed from a Michigan court, another state, or the federal government.)

Current exemptions. Current law exempts from the FOIA a prisoner's request for any of the following: daily log books or similar daily records of events in a correctional facility; staffing charts or other records of departmental employees, the release of which would threaten the security of a correctional facility; records pertaining to civil actions involving the department or employees; departmental meeting records; periodic reports made to superiors by wardens or other employees; and, personnel information (such as home addresses of department employees).

House Bill 4800 would, in addition, exempt records pertaining to other prisoners, and records in a form

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(such as videotape or computer disk) that the department considers to be contraband. The bill also would delete the language explicitly barring prisoners from obtaining personnel information on department employees. Also deleted would be language that exempts staffing charts and other information on duty assignments only if there had been a determination that the release would threaten the security of a correctional facility.

**Fees.** A prisoner's allowable request for information on himself or herself is exempted from the first \$20 of the fee for copying a public record, although information that does not pertain specifically to the requesting prisoner is not. Under the bill, the fee waiver also would not apply to a public record created by that prisoner or previously provided to that prisoner by the department in the performance of its official function.

Before responding to a request for a public record that did not pertain specifically to the requesting prisoner, the department could require that a prisoner submit up to \$20 as a good faith deposit. The deposit would be applied to the fee charged, and any excess amount would be returned to the prisoner. The deposit would not be otherwise refundable or applied to any other request. The department would not be precluded from requiring additional payment for actual copying costs in excess of the deposit.

**Document inspection.** The bill would specify that prisoners could inspect documents as prescribed by the FOIA, subject to reasonable restrictions by the department, unless those documents were otherwise exempt from disclosure.

### **FISCAL IMPLICATIONS:**

According to the Department of Corrections, the bill would result in an indeterminate amount of savings to the state, and a substantial savings in time for department employees. (9-29-93)

### **ARGUMENTS:**

#### **For:**

The bill would grant the department more discretion in establishing reasonable restrictions on the type of information that could be requested by prisoners, and would reduce the risk of prisoner-instigated Freedom of Information Act (FOIA) lawsuits by removing ambiguous language from the

act. As evidenced by the staggering number of FOIA disclosure requests received by the Department of Corrections (DOC), prisoners have abused their right to information disclosure. While the changes enacted in recent years have reportedly provided some relief from frivolous requests, some contend that prisoners still use their rights to disclosure of information under the FOIA to harass the department and its employees by requesting copies of the same records over and over again, and that prisoners use the privileges granted them under FOIA to provide a "personal photocopying service" at the taxpayer's expense. (According to a DOC report, the department processed 56,036 requests for copies of records under FOIA in 1992. The majority of the requests -- 53,648 -- were made by inmates. The cost for these copies was \$216,602, only \$11,295 of which was collected in fees.) By limiting the records that could be disclosed and waiving rights to free copies in some instances, the bill would reduce disclosure requests and save the state money.

#### **For:**

The bill would ensure that records specifically naming the requesting prisoner still would be accessible. For those prisoners whose requests for information were relevant to their legal battles, therefore, the necessary information would still be available.

#### **For:**

As written, the act contains no provision that would permit the department to deny one prisoner access to the records of another under the FOIA. While the department's policy has been to limit prisoners' access to records on other prisoners, this policy has been called into question by the supreme court in its 1993 decision on Walen v. Department of Corrections (docket number 92556) in which the court held that the FOIA applies to DOC' disciplinary hearings. This recent decision gives new impetus to the need to statutorily limit prisoners' access to other inmates' records. By exempting these records from the disclosure requirements of the FOIA, the bill would put into statute a policy which, for obvious security reasons, makes good sense.

#### **Against:**

Although there has been an increase in so-called nuisance requests, certain documents should remain accessible even if a particular prisoner's name does not appear in the document. Medical records and

staff log books, for instance, should be accessible. If a prisoner filed a suit claiming that a health care worker did not make required rounds, the prisoner would need the log to demonstrate that failure, but his or her name would not actually appear in the log. Under the bill, that document would be inaccessible under the FOIA disclosure provisions. While it is true that if such a suit were filed the information would be subject to the discovery provisions of Michigan court rules, no enforcement of those rules can occur unless a suit actually is filed. The bill, consequently, could result in an increase of frivolous suits against the department.

***Against:***

Such broad restrictions on FOIA disclosure would violate prisoners' legal rights. Since prisoners' mobility is restricted by their confinement, their ability to gain access to information already is limited. The bills would compound that limitation. In addition, although the bills could effectively reduce the abuses of the FOIA, it would occur at the expense of some prisoners whose disclosure requests were legitimate. Currently, the department's policy is that inmate's files may not be disclosed to other inmates, and prisoners who wish to do so must bring action against the department under the FOIA. One prisoner, for example, desired to obtain the "misconduct report" on another who had assaulted her, and against whom she intended to file a lawsuit. The court granted her request. The bill, however, would impose a blanket exemption on such requests.

***Response:***

The courts have recognized that a concern for security is of paramount importance to corrections' officials, and the department's policy that copies of inmates' files are not to be disclosed to other inmates is based on a concern for the safety of inmates and the security of its institutions. In the absence of a blanket exemption for such request, corrections officers would have to decide each request on a case by case basis, and due to the large volume of FOIA requests, it would be impossible for the officers at each institution to determine whether one inmate's request should be granted and another's denied. Moreover, in situations where a prisoner needs another prisoner's records in order to file a lawsuit, the court would grant that access to the attorney handling the case.

***Against:***

Since most prisoners are indigent, it is unreasonable to require them to pay a deposit of up to \$20 for a

copy of a certain type of public record. The provision would violate prisoners' rights by severely limiting their ability to gain access to information.

***Response:***

It makes sense to require that a prisoner submit a \$20 "good faith" deposit. According to department testimony, it is not unusual for inmates to place orders for large numbers of copies (for example, to request "all copies of cafeteria menus for the past ten years"), and then fail to pick up the order. The deposit would be applied to the fee charged for providing the requested copies, and could not be refunded nor applied toward any other charge. This would assure that the department wasn't left "holding the bag" for the copying costs.

***POSITIONS:***

The Department of Corrections supports the bill. (9-29-93)

The Michigan Corrections Organization/SEIU LOCAL 526M supports the bill. (9-28-93)

The Michigan Trial Lawyers Association has no position on the bill. (9-28-93)

The Michigan Council on Crime and Delinquency opposes the bill. While the council agrees that some limits need to be placed on prisoners' access to public records, its position is that the provisions of the bill would be too restrictive and would reduce inmates' capacity to obtain information. (9-28-93)