



**House  
Legislative  
Analysis  
Section**

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**ENHANCED ACCESS TO RECORDS**

**House Bill 5832 (Substitute H-3)  
House Bill 5726 (Substitute H-3)  
First Analysis (5-21-96)**

**Sponsor: Rep. Robert Brackenridge  
Committee: Local Government**

***THE APPARENT PROBLEM:***

The term "enhanced access" is being employed, generally speaking, to describe the access to government (or other) information through electronic means, often, but not always, at a distance. For example, if a governmental unit has a so-called web site or can be found on the Internet, anyone with the proper computer equipment in the home or at the office can gain access to the information offered there. Some governmental units, Oakland County among them, would like to make aggressive use of such opportunities to provide the public enhanced access to public information. A representative of Oakland County has said that the county "has embarked on an aggressive program to provide businesses and residents the opportunity to obtain government information in their offices and homes at the convenience of the individual requesting the information." There is demand for such information from business, education, and government leaders in the county, according to a report on Oakland County's enhanced access project. In some jurisdictions around the country, governments have joined forces with third-party vendors to provide enhanced access services.

Supporters of enhanced access say legislation is needed if such programs are to be encouraged. Currently, there is no specific grant of authority in statute for governmental units to engage in such programs and no specific authority to charge fees for access to information as a way of recovering the substantial investment involved in developing and maintaining enhanced access programs. Advocates of enhanced access worry about how such programs fit with the Freedom of Information Act. If expensive and innovative programs are developed, will it simply be available at low cost to be re-packaged for commercial purposes? If so, there is little incentive for governments to embark on enhanced access programs and for third party technology experts (such as Ameritech, which has the CivicLink service) to become involved. How can such programs be protected from unfair exploitation under FOIA while at the same time maintaining the public's traditional right to information under that act? On the other hand, there are also

concerns about how enhanced access programs will affect the availability of information currently relied upon by traditional users, and about the impact of new methods of compiling and transmitting information, and the impact of new methods of charging fees for access to information, on records subject to the Freedom of Information Act. Will the underlying records remain available or will only the technologically elite be able to gain access to public records? Legislation has been drafted to address issues raised by the advent of enhanced access.

***THE CONTENT OF THE BILLS:***

House Bill 5832 would create a new act, to be called the Enhanced Access to Public Records Act, under which a public body could provide "enhanced access" for the inspection and copying of public records if it had adopted an enhanced access policy. A public body could also charge a reasonable fee for enhanced access, as described later. The public body could contract with a third party vendor to make the enhanced access to public records available to the general public. The act would not require a public body to provide enhanced access with respect to a specific public record if it had not established an enhanced access policy with respect to that public record. A public record made available by enhanced access would remain the property of the public body providing the enhanced access to a member of the general public or to a third party vendor.

The new act would specify that it does not limit access to a public record under the Freedom of Information Act. A public record available by enhanced access would have to be made available for inspection or copying in accordance with the Freedom of Information Act. (The bill also says this provision would not apply to public records prepared under an act or statute specifically authorizing the sale of those public records to the public, or where the amount of the fee for providing a copy of the public record was otherwise specifically provided by an act or statute.)

House Bills 5832 and 5726 (5-21-96)

The term "enhanced access" refers to a public record's immediate availability for public inspection and copying by digital means. Enhanced access would not include the transfer of ownership of a public record. The term "public body" is adopted from the Freedom of Information Act and refers to various state officers, employees, departments, agencies, etc., in the executive branch of state government (but not the governor and lieutenant governor and their executive offices and employees); agencies, boards, commissions, and councils in the legislative branch; counties, cities, townships, villages, regional bodies, school districts, etc.; and all other bodies created by state or local authority or primarily funded by or through state or local authority. The term does not apply to the judiciary, including the office of county clerk (and employees) when acting as clerk to the circuit court.

Enhanced access by a public body. Under the bill, a public body could, upon authorization by its governing body, do the following:

- Provide enhanced access for the inspection or copying of a public record that was not confidential or otherwise exempt by law from disclosure.
- Establish a reasonable fee for providing enhanced access and also waive the fee in the same way a fee can be waived under the Freedom of Information Act.
- Charge a reasonable fee established by the governing body for providing access to a geographical information system or the output from a geographical information system. (The term "geographical information system" would refer to an informational unit or network capable of producing customized maps based on a digital representation of geographical data.)
- Authorize a person other than the public body to provide the general public with enhanced access on behalf of the public body.
- Require a member of the general public to execute a contract as a condition of the public body's providing the person with enhanced access.

No county-local fee. Under the bill, a county could not charge a local unit of government a fee for viewing by enhanced access a record pertaining to that local unit of government.

Third party vendor. Before a third party vendor could make enhanced access available to the general public, the vendor and the public body would have to execute a contract providing that: a) members of the public would pay any authorized fee to the vendor or the

public body; b) the vendor would not provide access to a public record that was confidential, exempt from disclosure, or not authorized by the public body to be disclosed by enhanced access; c) the vendor would not alter information contained in an original public record; d) the vendor would indemnify the public body for any claims arising out of the provision of enhanced access; e) the vendor would provide security measures satisfactory to the public body to prevent the unauthorized alteration or destruction of a public record and to prevent unauthorized enhanced access; f) the vendor would not obtain an ownership interest in either a public record provided by the public body or a public record provided by a public body for enhanced access that was enhanced by the third party; and g) the vendor would pay to the public body any fee authorized by statute for access to a public record or, if no statutory fee was authorized, at least the actual cost incurred by the body in providing the public record to the vendor for enhanced access purposes. Selection of a third party vendor would be subject to open competitive bidding.

Legacy arrangement. If a public body was providing enhanced access to a third party on the effective date of the new act, it would not be required to meet to adopt an enhanced access policy until six months after the act's effective date.

Definitions. The term "reasonable fee" would mean a charge calculated to enable a public body to recover over time only those operating expenses directly related to the provision of enhanced access. The term "operating expenses" would include, but not be limited to, a public body's direct cost of creating, compiling, storing, maintaining, processing, upgrading, or enhancing information or data in a form available for enhanced access, including the cost of computer hardware and software, system development, employee time, and the actual cost of supplying the information or record in the form requested by the purchaser.

House Bill 5726 would amend the Freedom of Information Act (MCL 15.232 et al.) in the following ways.

- It would specify that the term "public record" does not include computer programming or software. The term "software" would refer to a set of statements or instructions that when incorporated in a machine usable medium is capable of causing a machine or device having information processing capabilities to indicate, perform, or achieve a particular function, task, or result. The term "writing" in the act would be amended so as to specify that it included "any other medium of electronic or digital storage" in addition to

those already listed (e.g., microfilm, microfiche, magnetic or punched cards, discs, and drums.)

-- A public body would be required to protect public records from loss, unauthorized alteration, mutilation, or destruction.

-- Currently, a public body can charge a fee for providing a public record, and the act describes the basis for the fee, including labor costs. The act currently says that in calculating the labor costs, a public body cannot attribute more than "the hourly wage of the lowest paid, full-time, permanent clerical employee to the cost of labor incurred in duplication and mailing and to the cost of examination, review, separation, and deletion." The bill would specify instead that a public body could not "charge more than the hourly wage of the lowest paid public body employee capable of retrieving the information necessary to comply with a request" under the act.

-- The section of the act referred to above regarding charging fees does not apply, under the act, to public records prepared under an act or statute specifically authorizing the sale of the records to the public or where the amount of the fee is specifically provided. The bill would say this provision applies "regardless of which public body actually receives the initial request for the copy of that public record, or which public body ultimately provides the copy of that record."

-- The act currently allows a public body to exempt from disclosure as a public record "information of a personal nature where the public disclosure of the information would constitute a clearly unwarranted invasion of an individual's privacy." The bill would instead allow a public body to exempt from disclosure "personnel files, medical files, and similar files or information, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."

-- A public body could also exempt from disclosure records of a public body's security measures, including security plans, security codes and combinations, passwords, keys, and security procedures, to the extent that the records related to and were necessary for ongoing security of the public body.

-- The definition of "person" in the act would be amended to include a limited liability company.

### ***FISCAL IMPLICATIONS:***

The fiscal impact of House Bill 5832 is indeterminate, according to the House Fiscal Agency. (Fiscal note dated 5-6-96)

### ***ARGUMENTS:***

#### ***For:***

The legislation addresses the new arena of "enhanced access" to government information. It specifically authorizes governmental units to provide enhanced access to public records, after first adopting a policy on the subject. However, there is a grandfathering of sorts for existing arrangements. It authorizes "reasonable fees." It allows for contracts with third-party vendors and specifies some of the provisions that any such contract must contain. It requires open, competitive bidding for the selection of any such vendor. It protects rights under the Freedom of Information Act. It specifies that the ownership of public records remains with the public body and contains provisions to protect public records from alteration and destruction. It aims at protecting computer programming and software from being treated as a public record, so that all of the work and expense that a governmental unit puts into developing a special enhanced access program is not simply available for commercial exploitation by paying a simple copying fee. Other features of the legislation include a provision aimed at protecting the privacy of public employees by specifically citing personnel records and medical records as information a public body can exempt from disclosure and an improved method of calculating labor costs in establishing FOIA fees.

Advocates of enhanced access say that such programs are a service to the public that are in addition to the fundamental kind of access to information required under the Freedom of Information Act. Traditional means of inspecting and copying public records will still be available to the public. Fees for enhanced access is not, they say, a way of denying or rationing public information, but is justified as a way to recapture the investment and expenses associated with providing an additional service to the public.

#### ***Response:***

There are a number of concerns about the issue of enhanced access generally that will continue to require monitoring as technology changes and as programs grow. There are concerns about the use of an exclusive "gatekeeper" to public information; about the impact of fees for enhanced access and whether certain kinds of information will ultimately be available only to an elite group of technologically sophisticated users; about whether traditional means of obtaining information will disappear and only enhanced access be available, at a cost; about whether governments will use access fees as a revenue generating measure to provide a basic service that ought to be funded through its general revenues; about whether new technology will be used as an excuse to increase the cost of obtaining information that

government really only holds in trust for its citizens. These matters will no doubt require re-visiting over time.

***Against:***

Some people would question whether it is necessary to amend the Freedom of Information Act at all in order to achieve the main purposes of this legislation. The new act that would be created by House Bill 5832 might be sufficient to address enhanced access programs. Further, the amendment to the act regarding the privacy of personnel files and similar materials is troubling for some who believe in the availability of public records. It is not clear what the implications of the amendment are. FOIA, it is said, is about providing access to information, and about when government cannot deny access to information. It is not a good vehicle for denying information or for defining privacy rights. (For example, FOIA says a public body "may exempt" certain kinds of information from disclosure; it doesn't say a public body is prohibited from disclosing the information.) Other legislation should do that.

***POSITIONS:***

The Michigan Association of Counties strongly supports the bills as drafted. (5-20-96)

A representative of Oakland County had indicated support for the legislation. (5-20-96)

The Michigan Press Association is not opposed to the bills, with the exception of the amendment to the Freedom of Information Act regarding privacy, which raises concerns. (5-15-96)

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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.