



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

## RESTORE FOIA PREAMBLE LANGUAGE

House Bill 4339 as introduced  
First Analysis (3-5-97)

Sponsor: Rep. Greg Kaza  
Committee: House Oversight and Ethics

### THE APPARENT PROBLEM:

Public Act 553 (enrolled House Bill 4849) of 1996 made a number of changes to the Freedom of Information Act (FOIA). As originally introduced, House Bill 4339 would simply have provided for an administrative appeal in addition to the existing remedy of a circuit court review of FOIA denials. The House passed an amended Substitute H-2 on September 19, 1995, that (in addition to the proposed administrative appeal) also would have subjected to FOIA requests "writings or public documents that had either originated in or were possessed by a public body," whether or not those writings or public documents were in the possession of the governor, lieutenant governor, or their respective staffs or employees. Upon passage by the House, the bill was sent to the Senate, where it was referred to the Senate Committee on Government Operations. Over a year later, on December 3, 1996, the Senate committee reported the bill favorably in the form of Senate Substitute S-1, which was identical to the House Substitute H-2 (that is, S-1 was identical to the H-2 without the amendment narrowing the executive branch's current exemption).

On December 12, 1996, the last day of the legislative session, the S-1 substitute for House Bill 4849 was defeated, and replaced with an amended S-5 substitute that contained a number of amendments that reportedly came from the governor's office. Among these amendments were those eliminating a person's ability to make oral FOIA requests for public records, requiring public bodies to have FOIA "coordinators," eliminating the requirement that the public body respond "immediately" (but not less than within five business days after the day the request is received) to FOIA requests, eliminating the requirement that ten-day extensions by the public body to FOIA requests be made only "under unusual circumstances," and adding a time limit (within 180 days after a public body's final determination to deny a request) to a person's ability to go to the circuit court when a public body denied a FOIA request. In addition, the S-5 version of House Bill 4849 also added several exemptions to the Freedom of Information Act (to exempt, for example, records of a public body's security measures, records or information

relating to a civil action involving both the requesting party and the public body, records of information that would disclose anyone's Social Security number, computer software, and certain records regarding applicants for university president positions), effectively increased the fees public bodies could charge for FOIA requests, and changed the language in the Freedom of Information Act's public policy statement. When the House received the Senate substitute for House Bill 4849, reportedly sometime after midnight during that 23-hour final legislative session, it amended the Senate version to remove a provision that would have allowed public bodies to deny FOIA requests from persons who had "inspected, copied, or received copies of that public record under [the] act twice within the one-year period immediately preceding the request." The House then concurred in the amended Senate substitute, and retransmitted it to the Senate, which suspended its rules for immediate consideration and concurred in the House amendments to the Senate substitute. The bill then was returned to the House and ordered enrolled. On January 7, 1997, the bill was presented to the governor, who signed it on January 15, 1997. That same day, the bill was filed with the secretary of state and assigned Public Act number 553 of 1996.

A storm of controversy has erupted over why the FOIA public policy statement was amended and just what significance the amendment will have. The sponsor of the original House Bill 4849 has introduced legislation that would restore the original FOIA preamble language.

### THE CONTENT OF THE BILL:

The bill would restore language in the Freedom of Information Act that was changed last session by Public Act 553 of 1996 (enrolled House Bill 4849). Public Act 553 amended the FOIA, in part to change language in the act that describes the state's public policy. Prior to Public Act 553, the act said that, "It is the public policy of this state that all persons, except those persons incarcerated in state or local correctional facilities, are entitled to full and complete information regarding the

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affairs of government and the official acts of those who represent them as public officials and public employees, consistent with this act." (Emphasis added.) Public Act 553 deleted the phrase "the affairs of government and the official acts of those who represent them as public officials and public employees," and replaced it with the phrase "governmental decision making."

The bill would delete the phrase "governmental decision making" and restore the original language of the act.

MCL 15.2311

#### FISCAL IMPLICATIONS:

Fiscal information is not available.

#### ARGUMENTS:

For:  
Public Act 533 of 1996, among other things, changed the policy statement of the Freedom of Information Act from allowing FOIA requests for information regarding "the affairs of government and the official acts of public officials and public employees" to allowing information regarding "governmental decision-making." The governor's office, which reportedly requested this change, has argued that the change in the wording of this statement is merely "stylistic" and has no legal significance or distinction. However, a memorandum (dated January 22, 1997) summarizing a "legal institute" held in conjunction with the annual Michigan Townships Association convention, says that the amendment to the FOIA policy statement "seems to be less broad than the prior statement of public policy." Some people believe that this particular amendment to the FOIA could be interpreted to significantly restrict the amount of information to which the people would have access, and could be used as basis for a claim that certain records did not relate to governmental decision-making and therefore were not subject to disclosure. The determination of whether a particular public record is exempt or not from FOIA requests is not always crystal clear, and questions often arise in which a particular record could be argued to fit either category, exempt or not exempt. Furthermore, the original language was cited in a number of court cases, including the recent Booth Newspapers, Inc. v University of Michigan Board of Regents case, as a statement of the broad openness intended by the legislature. As a result, it seems likely that the change in the wording could lead to litigation over the meaning of the term "governmental decision-making". It is possible that a court could determine that the change in language was intended to restrict the type of records that public bodies would be required to disclose. Of course, a court also could also determine that the language change was intended to

broaden the openness of the act. By restoring the original language, however, the bill would eliminate the need for litigation to determine whether or not the language change to the FOIA public policy statement made by Public Act 553 of 1996 was merely stylistic or substantial.

#### POSITIONS:

The Common Cause of Michigan supports the bill. (3-3-97)

The Michigan Freedom of Information Committee supports the bill. (3-3-97)

The Michigan Christian Coalition supports the bill. (3-3-97)

The American Civil Liberties Union supports the bill. (3-5-97)

The Michigan Association of Broadcasters supports the bill. (3-5-97)

The Michigan Press Association favors openness but does not have a formal position on the bill. (3-4-97)

The governor's legal counsel testified that the governor neither supports or opposes the bill. (3-3-97)

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Analyst: S. Ekstrom

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their deliberations, and does not constitute an official statement of legislative intent.