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Public Health Legal Preparedness
Briefing Memorandum # 5[1]

State FOIA Exemptions to Combat Terrorism[2]

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ISSUE: How can states protect security-sensitive information through FOIA exceptions while also recognizing the public's right to know?

RESPONSE: Many states have exempted emergency preparedness and infrastructure information from disclosure under state FOIA provisions. While the structure and scope of these exemptions vary, exemptions that provide for the disclosure of some of the exempted information under appropriate circumstances provide the best opportunity to balance the protection of sensitive information and the value of transparency to the public. It remains to be seen how broadly the states will construe these exemptions as they are implemented.

All fifty states and the District of Columbia have enacted constitutional or statutory Freedom of Information Act ("FOIA") provisions that allow the disclosure of certain broadly defined types of public records to any requesting member of the public.

[1] On December 11, 2002, the CDC Public Health Law Program, the Association of State and Territorial Health Officials, and the National Association of County and City Health Officials sponsored a peer consultation workshop on selected legal and policy issues related to public health legal preparedness for bioterrorism. The *Center for Law and the Public's Health* hosted the workshop. This memorandum was prepared in response to an issue of shared interest to workshop participants.

[2] This Memorandum is intended as a guide for use by public health attorneys and practitioners attending the Workshop. It is not intended to be, and cannot be relied upon to offer, specific legal advice.

Most states have also codified exceptions or exclusions from FOIA provisions, exempting certain categories of records from disclosure ("Exempted Information").

In the aftermath of the September 11, 2001, many state legislators reevaluated the wisdom of allowing public access to certain records, especially records that could inadvertently provide potential terrorists with sufficient information to plan future attacks. Many states modified their FOIA provisions, exempting critical materials related to security, emergency planning, and public infrastructure from disclosure to the public.

These FOIA modifications vary in scope, but generally strive to prevent the disclosure of any document potentially useful in planning a terrorist attack. Most of these exemptions fall within two main categories:

1) exemptions for information relating to **terrorism preparedness plans and risk evaluations**; and
2) exemptions for information relating to **infrastructure** of public buildings, important public utilities, and other vital public facilities.[3]

Exemptions for terrorism preparedness plans and risk evaluations

States that have exempted written materials concerning terrorism preparedness plans from FOIA disclosure have attempted to broadly cover a significant amount of information, including documents related to the vulnerability of a particular facility or area to attack, plans to prevent and respond to specific types of attacks, emergency response and evacuation procedures, sheltering arrangements, security training manuals and tactics, and information on personnel deployment.

Several states have implemented detailed provisions exempting extensive lists of materials. **Delaware**, for example, broadly exempts "[r]esponse procedures or plans prepared to prevent of respond to emergency situations, the disclosure of which would reveal vulnerability assessments, specific tactics, specific emergency procedures or specific security procedures."[4] **Delaware** also protects records prepared to prevent, mitigate, or respond to criminal acts or related to pharmaceutical supplies, storage, or distribution capabilities.[5] Further, the State will not disclose records created by federal or international agencies, if these records would not be disclosed under federal law.[6]

Florida protects "security system plans" from disclosure, which include all records and other material revealing information about the security of a facility, emergency procedures and evacuation plans, security training manuals, and other emergency equipment.[7] **South Carolina** will not disclose "[i]nformation relating to

[3] Most states have not specifically delineated separate exemption provisions for preparedness plans and infrastructure information. Rather, they combine both categories in their exemption provisions.
[4] 29 Del. C. § 10002(d)(16)(a)(1) (2002).
[5] 29 Del. C. §§ 10002(d)(16)(a)(3), (5A) (2002).
[6] 29 Del. C. § 10002(d)(16)(a)(5B) (2002).
[7] Fl. Rev. Stat. § 119.071 (2002).

security plans and devices proposed, adopted, installed, or utilized by a public body" under its FOIA act.[8]

On the contrary, **California** opted for a narrower approach, exempting vulnerability assessment documents prepared for distribution or consideration in a closed session.[9]

Exemptions for infrastructure plans

States have also exempted from disclosure information describing the infrastructure of public facilities, buildings, utilities, bridges, telecommunications systems, and other significant structures that could be targets for a terrorist attack. Again, some states have compiled exhaustive lists of protected infrastructure targets while others have opted for a more general exemption. **Delaware**, for instance, exempts "[b]uilding plans, blueprints, schematic drawings, diagrams, operational manuals or other records of mass transit facilities, bridges, tunnels, emergency response facilities or structures, buildings where hazardous materials are used or stored, arenas, stadiums, waste and water systems, electric transmission lines and substations, high-pressure natural gas pipelines and compressor stations, and telecommunications networks facilities and switching equipment" from discovery.[10]

By contrast, **Idaho** more concisely exempts "[r]ecords of buildings, facilities, infrastructures and systems held by or in the custody of any public agency only when the disclosure of such information would jeopardize the safety of persons or the public safety."[11] In practice, both of these approaches remove public accessibility to substantial amounts of material.

Other Specific Exemptions

Other FOIA exemptions address specific information related to a particular industry or area of concern. **Iowa**, for example, enacted a specific exemption for "security procedures or emergency preparedness information related to schools if disclosure could reasonably be expected to jeopardize student, staff, or visitor safety."[12] **Maine** permits a state commission to designate specific information about public utility technical operations as confidential, thereby preventing disclosure of the information to the public.[13] **Virginia** added a provision exempting disclosure of information related to a specific railway safety system.[14]

Release of Exempt Information

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[8] S.C. Bill 4416 §17 (2001).
[9] Cal Gov Code § 6254 (aa) (2003).
[10] 29 Del. C. § 10002(d)(16)(a)(2) (2002).
[11] Idaho Code § 9-340B (3)(b) (2002).
[12] Iowa Code § 22.7 (43) (2002).
[13] 35-A M.R.S. § 1311-B (2001).
[14] Va. Code Ann. § 2.2-3705 (65) (2002). Virginia implemented its terrorism-related FOI exemptions prior to September 11, 2001.

Some state provisions allow for disclosure of Exempted Information if certain conditions are met. **Florida** allows for infrastructure information otherwise exempted from disclosure to be disclosed to other governmental entities; to architects, contractors, and engineers performing work on the structure; or in court upon a showing of good cause.[16] **South Carolina** permits the release of otherwise exempt structural bridge plans or designs for purposes of procurement or if the plans or designs are the subject of a negligence lawsuit.[17] Similarly, **Iowa** sanctions the disclosure of a critical asset protection plan by the emergency management division to other governmental agencies if the agencies have a reasonable use for the information.[18] **Iowa** also allows members of the public to view (but not copy) a list of protected assets during working hours.[19]

Finally, **Michigan** uses a balancing test to assess whether information regarding emergency preparedness plans or infrastructure should be released.[20] If disclosure does not impair the public body's ability to protect the security and safety of persons or property, or if the public interest in disclosure outweighs the public interest in nondisclosure, then the information shall be disclosed. This balancing approach provides a useful mechanism for the state to measure the security risk of each specific disclosure and determine on a case by case basis whether the requested information should be disclosed. However, this approach also leaves complete discretion to the state official and could be applied in an arbitrary, or even discriminatory, manner.

Subsequent Disclosure by Requesters

States have also attempted to extend the confidentiality of covered information to third parties that receive the information. Several states mandate that specified information released to authorized parties may not be redisclosed by those parties to anyone without approval from the original disclosing agency.[21]

Conclusion

In summary, many states have taken steps to prevent the disclosure of information to the public related to emergency preparedness and infrastructure of buildings and utilities through the expansion of FOIA exemptions. These exemptions may be extremely broad, preventing media and the public from accessing or monitoring domestic emergency preparedness plans or information. This precautionary approach to information release is motivated by the need to avert future terrorist attacks by denying potential terrorist access to information necessary to plan such attacks.

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16 Fl. Rev. Stat. § 119.07 (2002).
17 S.C. Bill 4416 §19 (2001).
18 Iowa Code § 22.7 (43) (2002).
19 *Id*.
20 MCL § 15.243(13)(1)(y) (2002).
21 See, e.g. Fl. Rev. Stat. § 119.07 (2002); Iowa Code § 22.7 (43) (2002).

The above discussion has focused on several types of exemptions implemented by specific states. The *Center for Law and the Public's Health* does not endorse any of these examples as a "model" approach or take any position on whether such FOIA exemptions are desirable or not. Further, in order to present this information on a relatively expedited schedule, research was limited to a small number of states. Thus, the above examples present a sampling of how various states have expanded their FOIA exemptions and do not attempt to comprehensively examine or analyze all state laws on this issue.

APPENDIX – Sample Text of State FOI Exemptions Related to Terrorism Prevention

State	Citation	Text
CA	Cal Gov Code § 6254 (aa) (2003).	"A document prepared by a local agency that assesses its vulnerability to terrorist attack or other criminal acts intended to disrupt the public agency's operations and that is for distribution or consideration in a closed session."
DE	29 Del. C. § 10002(d)(16) (2002). Del. Laws, c. 354, effective July 3, 2002, added (d)(16).	"a. The following records, which, if copied or inspected, could jeopardize the security of any structure owned by the State or any of its political subdivisions, or could facilitate the planning of a terrorist attack, or could endanger the life or physical safety of an individual: 1. Response procedures or plans prepared to prevent or respond to emergency situations, the disclosure of which would reveal vulnerability assessments, specific tactics, specific emergency procedures or specific security procedures. 2. Building plans, blueprints, schematic drawings, diagrams, operational manuals or other records of mass transit facilities, bridges, tunnels, emergency response facilities or structures, buildings where hazardous materials are used or stored, arenas, stadiums, waste and water systems, electric transmission lines and substations, high-pressure natural gas pipelines and compressor stations, and telecommunications networks facilities and switching equipment, the disclosure of which would reveal the building's or structure's internal layout, specific location, life, safety and support systems, structural elements, surveillance techniques, alarm or security systems or technologies, operational and transportation plans or protocols, or personnel deployments. Records that disclose the substances being used or stored on a given piece of property are public records; however, records which disclose the specific location on that property of the substances being used or stored may be disclosed only if the chief administrative officer of the agency from which the record is requested determines that disclosure will not jeopardize the security of any structure owned by the State or any of its political subdivisions, or will not facilitate the planning of a terrorist attack, or will not endanger the life or physical safety of an individual. 3. Records of any building or structure operated by the State or any of its political subdivisions, the disclosure of which would reveal the building's or structure's life, safety and support systems, surveillance techniques, alarm or security systems or technologies, operational and evacuation plans or protocols, or personnel deployments. 4. Records prepared to prevent or respond to emergency situations identifying or describing the name, location, pharmaceutical cache, contents, capacity, equipment, physical features or capabilities of individual medical facilities, storage facilities, or laboratories established, maintained or regulated by the State or any of its political subdivisions. 5. Those portions of records assembled, prepared or maintained to prevent, mitigate or respond to criminal acts, the public disclosure of which would have a substantial likelihood of threatening public safety. The only items that are protected from disclosure by this paragraph are: A. Specific and unique vulnerability assessments or specific and unique response or deployment plans, including compiled underlying data collected in preparation of or essential to the assessments or to the response or deployment plans; and B. Records not subject to public disclosure under federal law that are shared by federal or international agencies and information prepared from national security briefings provided to state or local government officials related to domestic preparedness for criminal acts against United States citizens or targets.

		6. Nothing in this subsection shall be deemed to prohibit the disclosure of information necessary to comply with the requirements of Chapter 8 of Title 26, the Underground Utility Damage Prevention and Safety Act. b. Nothing in this paragraph shall interfere with the right of any committee of the General Assembly to hear information in the committee at the request of the committee chair or, if appropriate, to hear information in an executive session of the committee, or to subpoena information pursuant to § 705 of this title."
FL	Fl. Rev. Stat. § 119.07(3)(ee) (2002).	"Building plans, blueprints, schematic drawings, and diagrams, including draft, preliminary, and final formats, which depict the internal layout and structural elements of a building, arena, stadium, water treatment facility, or other structure owned or operated by an agency as defined in s. 119.011 are exempt from the provisions of subsection (1) and s. 24(a), Art. I of the State Constitution. This exemption applies to building plans, blueprints, schematic drawings, and diagrams, including draft, preliminary, and final formats, which depict the internal layout and structural elements of a building, arena, stadium, water treatment facility, or other structure owned or operated by an agency before, on, or after the effective date of this act. Information made exempt by this paragraph may be disclosed to another governmental entity if disclosure is necessary for the receiving entity to perform its duties and responsibilities; to a licensed architect, engineer, or contractor who is performing work on or related to the building, arena, stadium, water treatment facility, or other structure owned or operated by an agency; or upon a showing of good cause before a court of competent jurisdiction. The entities or persons receiving such information shall maintain the exempt status of the information. This paragraph is subject to the Open Government Sunset Review Act of 1995 in accordance with s. 119.15, and shall stand repealed on October 2, 2007, unless reviewed and reenacted by the Legislature."
FL	Fl. Rev. Stat. § 119.071 (2002).	"General exemptions from inspection or copying of public records.--A security system plan or portion thereof for: (1) Any property owned by or leased to the state or any of its political subdivisions; or (2) Any privately owned or leased property which plan or portion thereof is in the possession of any agency, as defined in s. 119.011, is confidential and exempt from the provisions of s. 119.07(1) and s. 24(a), Art. I of the State Constitution. As used in this section, the term a "security system plan" includes all records, information, photographs, audio and visual presentations, schematic diagrams, surveys, recommendations, or consultations or portions thereof relating directly to the physical security of the facility or revealing security systems; threat assessments conducted by any agency as defined in s. 119.011 or any private entity; threat response plans; emergency evacuation plans; sheltering arrangements; or manuals for security personnel, emergency equipment, or security training. This exemption is remedial in nature and it is the intent of the Legislature that this exemption be applied to security system plans received by an agency before, on, or after the effective date of this section. Information made confidential and exempt by this section may be disclosed by the custodial agency to another state or federal agency to prevent, detect, guard against, respond to, investigate, or manage the consequences of any attempted or actual act of terrorism, or to prosecute those persons who are responsible for such attempts or acts, and the confidential and exempt status of such information shall be retained while in the possession of the receiving agency. This section is subject to the Open Government Sunset Review Act of 1995, in accordance with s. 119.15, and shall stand repealed on October 2, 2006, unless reviewed and saved from repeal through reenactment by the Legislature."
IA	Iowa Code §	"Sec. 53. Section 22.7, Code Supplement 2001, is amended by adding the following new

	22.7 (43)(2002).	subsection: NEW SUBSECTION. 43. The critical asset protection plan or any part of the plan prepared pursuant to section 29C.8 and any information held by the emergency management division that was supplied to the division by a public or private agency or organization and used in the development of the critical asset protection plan to include, but not be limited to, surveys, lists, maps, or photographs. However, the adminis trator shall make the list of assets available for examination by any person. A person wishing to examine the list of assets shall make a written request to the administrator on a form approved by the administrator. The list of assets may be viewed at the division's offices during normal working hours. The list of assets shall not be copied in any manner. Communications and asset information not required by law, rule, or procedure that are provided to the administrator by persons outside of government and for which the administrator has signed a nondisclosure agreement are exempt from public disclosures. The emergency management division may provide all or part of the critical asset plan to federal, state, or local governmental agencies which have emergency planning or response functions if the administrator is satisfied that the need to know and intended use are reasonable. An agency receiving critical asset protection plan information from the division shall not redisseminate the information without prior approval of the administrator." "Sec. 2. Section 22.7, Code Supplement 2001, is amended by adding the following new subsection: NEW SUBSECTION. 43. Records of a public airport, municipal corporation, municipal utility, jointly owned municipal utility, or rural water district organized under chapter 357A, where disclosure could reasonably be expected to jeopardize the security or the public health and safety of the citizens served by a public airport, municipal corporation, municipal utility, jointly owned municipal utility, or rural water district organized under chapter 357A. Such records include but are not limited to vulnerability assessments and information included within such vulnerability assessments; architectural, engineering, or construction diagrams; drawings, plans, or records pertaining to security measures such as security and response plans, security codes and combinations, passwords, passes, keys, or security or response procedures; emergency response protocols; and records disclosing the configuration of critical systems or infrastructures of a public airport, municipal corporation, municipal utility, jointly owned municipal utility, or rural water district organized under chapter 357A. This subsection is repealed effective June 30, 2007." "Section 1. Section 22.7, Code Supplement 2001, is amended by adding the following new subsection: NEW SUBSECTION. 43. Information concerning security procedures or emergency preparedness information regarding a school corporation if disclosure could reasonably be expected to jeopardize student, staff, or visitor safety. This subsection is repealed effective June 30, 2007."
ID	Idaho Code § 9-340B (3)(b) (2002).	"Records of buildings, facilities, infrastructures and systems held by or in the custody of any public agency only when the disclosure of such information would jeopardize the safety of persons or the public safety. Such records may include emergency evacuation, escape or other emergency response plans, vulnerability assessments, operation and security manuals, plans, blueprints or security codes. For purposes of this section "system" shall mean electrical, heating, ventilation, air conditioning and telecommunication systems."
ME	35-A M.R.S. § 1311-B (2001).	"DESIGNATION OF INFORMATION AS CONFIDENTIAL. If the commission, on its own motion or on petition of any person or entity, determines that public access to specific information about public utility technical operations in the State could

		compromise the security of public utility systems to the detriment of the public interest, the commission shall issue an order designating that information as confidential. Information designated as confidential pursuant to this section may include, but is not limited to, emergency response plans and network diagrams. Information designated as confidential under this section is not a public record under Title 1, section 402, subsection 3."
MI	MCL § 15.243(13)(1)(y), enacted by H.B. 5349, May 1, 2002.	"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, building, public works, and public water supply designs to the extent that those designs relate to the ongoing security measures of a public body, capabilities and plans for responding to a violation of the Michigan anti-terrorism act, chapter LXXXIII-A of the Michigan penal code, 1931 PA 328, MCL 750.543 to 750.543z, emergency response plans, risk planning documents, threat assessments, and domestic preparedness strategies, 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."
SC		Definitions for the FOI Act SECTION 17. Section 30-4-20(c) of the 1976 Code is amended by adding a new sentence at the end of the subitem to read: "Information relating to security plans and devices proposed, adopted, installed, or utilized by a public body, other than amounts expended for adoption, implementation, or installation of these plans and devices, is required to be closed to the public and is not considered to be made open to the public under the provisions of this act." Matters exempt from FOI disclosure SECTION 19. Section 30-4-40(a) of the 1976 Code is amended by adding an appropriately numbered item to read: "( ) Structural bridge plans or designs unless: (a) the release is necessary for procurement purposes; or (b) the plans or designs are the subject of a negligence action, an action set forth in Section 15-3-530, or an action brought pursuant to Chapter 78 of Title 15, and the request is made pursuant to a judicial order."
VA	Va. Code Ann. § 2.2-3705 (2002).	"57. Plans to prevent or respond to terrorist activity, to the extent such records set forth specific tactics, or specific security or emergency procedures, the disclosure of which would jeopardize the safety of governmental personnel or the general public, or the security of any governmental facility, building, structure, or information storage system…. 65. Information that would disclose the security aspects of a system safety program plan adopted pursuant to 49 C.F.R. Part 659 by the Commonwealth's designated Rail Fixed Guideway Systems Safety Oversight agency; and information in the possession of such agency, the release of which would jeopardize the success of an ongoing investigation of a rail accident or other incident threatening railway safety…. 69. Engineering and architectural drawings, operational, procedural, tactical planning or training manuals, or staff meeting minutes or other records, the disclosure of which would reveal surveillance techniques, personnel deployments, alarm or security systems or technologies, or operational and transportation plans or protocols, to the extent such disclosure would jeopardize the security of any governmental facility, building or structure or the safety of persons using such facility, building or structure."