SUBJECT: Revision of open records law

COMMITTEE: State Affairs — committee substitute recommended

VOTE: 14 ayes — Seidlits, S. Turner, Alvarado, Black, Bosse, Carter, Craddick, Hilbert, Hochberg, B. Hunter, D. Jones, McCall, Ramsay, Wolens

0 nays

1 absent — Danburg

WITNESSES: For — Robert E. Lett; John Cranfill, Dallas Morning News and Open Records Steering Committee-Texas Media; Laura Peterson, Freedom of Information Foundation of Texas

Against — Donald Lee, Conference of Urban Counties

On — Jill Urban and Cathy Cunningham, City of Irving; Rebecca L. Payne, Office of the Attorney General; Hadassah M. Schloss, Open Records Steering Committee - General Services Commission.

BACKGROUND: The Open Records Act was enacted in 1973 to provide the broadest possible access to public information maintained or generated by governmental bodies in this state. In an effort to ensure that the governmental body was not overly burdened with the cost of producing these records to the public, the act allowed the governmental body to charge reasonable fees for information provided.

The act established a number of exceptions to what records would not be subject to public access. Whenever a question arises concerning the confidentiality of a particular record, the attorney general is the arbiter of the dispute and will determine whether a record may be released.

DIGEST: CSHB 1718 would change the Open Records Act to the Public Information Act and change all references from records to information.

Public information would be redefined to include information stored or produced through electronic means rather than simply physical or paper

records. When the information exists in an electronic medium, the requestor could request a copy by either that medium or on paper. So long as the governmental body has the technological capability to produce the information, has the software and hardware to do so, and would not violate copyright laws, the governmental body would have to provide the information in the form requested. The governmental body would be allowed to charge reasonable fees (set by General Service Commission rules) for programming, manipulation and processing of the records as well as the cost of the transfer or storage medium on which the material is placed.

If a governmental body determined that programming, manipulation or processing services were necessary to provide information by electronic means, it would have to give the requestor of the information an estimate regarding the cost of the records and the anticipated time needed to complete the request before proceeding with the information retrieval. If the cost of the request was greater than $100, the governmental body could request a bond or deposit be placed by the requestor before the information is retrieved.

The General Services Commission (GSC) would be directed to develop rules regarding the cost of providing information to the public. These rules would establish charges for any form of request as well as reasonable charges for personnel and overhead. All governmental bodies would be subject to the rules established by the GSC unless it petitioned to be exempted from the GSC rules and such an exemption was granted.

CSHB 1718 would also update rules relating to the confidentiality of material prepared in anticipation of litigation, and establish permanent confidentiality for attorney work product materials. CSHB 1718 would also incorporate the provisions of SB 360 by Armbrister, which became effective September 1, 1993, prohibiting general public access to library records that identify a person who requests specific information.

CSHB 1718 would permit a governmental body to ask a requestor to further specify what information is being requested or try to suggest ways of narrowing the requested amount, but the governmental body could not ask what the purpose of the information might be.

When a person only requests access to the information, not an actual copy of the information, CSHB 1718 provides for such access free of charge so long as the material does not need to be redacted to protect confidential information or processed, programmed or manipulated by electronic means.

If a member of the public felt that a governmental body had overcharged for copies of records, the person could complain of the overcharge to the GSC, which could investigate the problem. If it determined that the person was overcharged and the mistake was not made in good faith, the governmental body would be required to return the overcharge to the requestor of the information.

When a municipality collected Geographic Information System (GIS) data, it could charge a fee for access to such information related to the system operation costs, data collection costs, and the value of the information or it could provide the information free to the public. CSHB 1718 would establish a study to be conducted by the General Services Commission regarding GIS data services to be completed by September 30, 1996.

When a governmental body filed suit to retain the confidentiality of information requested, the suit would have to be filed against the attorney general. The requestor of the information would be given the right to intervene in the suit, but would not have to do so.

This bill would take effect September 1, 1995.

SUPPORTERS SAY:

Public access to information maintained by the government is an essential right in an open democracy. The public must have the ability to obtain information from their government in a convenient way and at a reasonable cost. Taxpayers have a right to this information because they paid to have information created or collected. New technologies have emerged over the last ten years, and many continue to emerge daily that make the public's ability to process and receive information much easier. Such technology has increased the public's appetite for access to all sorts of information.

The primary problem with the current Open Records Act is that is was created in a time when the transmission and storage of records through electronic media was not the standard method used. Now that almost every

record that a governmental body has is kept in some form on electronic media, the Open Records Act must be updated to conform with these changes. To that end, an interim subcommittee was established to review and revise the Open Records Act. The subcommittee included members of the media, the Attorney General's Office, State Comptroller's Office, GSC, and the Freedom of Information Foundation as well as others. That committee recommended most of the revisions that would be made by CSHB 1718.

Pursuant to HB 1009, enacted by the 73rd Legislature, the General Services Commission promulgated a set of rules for determining the cost of providing information to the public. The problem is that these rules are being used only as a guideline and only for state governmental bodies. The interim committee suggested making these rules mandatory for all governmental units in order to standardize the costs for open records requests. Currently, a person seeking information that is held by several different governmental bodies may be forced to pay radically different costs depending on where the information is located. The rules developed by the GSC are not based solely on the cost for state government to produce records, but represent an average between how much it costs for the government to produce such records and what the cost is through private companies.

At the request of members of the media, all requestors of information are treated equally regarding access to public information and the cost of receiving such information. CSHB 1718 would not establish any categories for classes of requestors or make any distinctions based on how they might be using the information.

A great deal of attention was given to how these records, especially when on electronic media, might be used for commercial purposes. Several proposals were made to find a way to ensure that those using the records for commercial purposes were set apart from those using the records for informational purposes. However, the privacy problems associated with asking requestors the purpose of the information that they request left only one option: treating everyone equally.

CSHB 1718 incorporates provisions of SB 636 by Henderson which passed the Senate on March 8. SB 636 relates to the ability of a governmental body to sue the requestor of the information. This legislation was prompted by an incident in which the parent of a student requested information regarding a teacher's evaluations of his child. After an unfavorable ruling by the Attorney General's Office, the district sued the parent to establish the confidentiality of the records. The requestor of a public record should never have to defend such a suit.

OPPONENTS SAY:

Counties and cities should not be subjected to the same rules adopted by the GSC for state agencies regarding the costs of open records. These rules should be only guidelines for non-state governmental bodies. The GSC has no experience with local governments and no representatives of local government were involved in the process of making the rules for costs.

The problem with the rate-setting process is that the costs for creating such records, especially computer records, varies greatly from one governmental body to another. For example, in one large metropolitan county, the records may already be on a sophisticated database system and the county may already employ a full-time programmer or data assembler who can manipulate the records very easily. In more rural counties, however, the records might placed into a computerized database, but in order to manipulate the data to remove confidential information, or to simply put it into a form that the requestor can use, might involve contracting out to commercial programmers or having the people who work with the system learn the procedures. Either way, the actual cost of fulfilling the request will be substantially higher than the charge allowed by the GSC.

NOTES:

The committee substitute clarified the confidentiality of records maintained in anticipation of litigation, makes corrective changes to conform with changes made to the Open Records Act by the 73rd Legislature, and adds the language concerning GIS data.

SB 1373 by Wentworth, an identical bill to HB 1718, is pending in the Senate State Affairs committee. SB 636 by Henderson, containing the provision prohibiting suits by governmental bodies against individual requestors, passed the Senate on March 8 and was left pending in the House State Affairs Committee.