SUBJECT: Public access to certain law enforcement and prosecutor records

COMMITTEE: State Affairs — favorable, without amendment

VOTE: 13 ayes — Wolens, Turner, Alvarado, Brimer, Carter, Counts, Craddick, Danburg, Jones, Longoria, McCall, Ramsay, Stiles

1 nays — Hunter

1 absent — Hilbert

WITNESSES: For — Carole Kneeland and Paul Watler, Freedom of Information Foundation of Texas; Rob Wiley, Freedom of Information Foundation; Keith S. Hampton, Texas Criminal Defense Lawyers Association

Against — None

On — Bill Delmore representing John B. Holmes, Jr., Harris County District Attorney

BACKGROUND: Government Code sec. 552.021, the Public Information (formerly Open Records) Act, requires public information to be available, at a minimum, during the normal business hours of a governmental body. The code has the certain exceptions to this requirement, including:

• information held by a law enforcement agency or prosecutor that deals with the detection, investigation or prosecution of a crime and internal records or notations of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution (sec. 552.108);

• information considered to be confidential by law, either constitutional, statutory, or by judicial decision (sec. 552.101); and

• information relating to civil or criminal litigation or settlement negotiations to which the state or a political subdivision is, or may be, a party or to which an officer or employee of the state or a political subdivision, as a part of their office or employment, is or may be a party if the attorney general or the

attorney of the political subdivision has determined that it should be withheld (sec. 552.103).

DIGEST:

HB 1002 would qualify the current exception to the public access requirement for information held by law enforcement and prosecutors. The exception concerning information about detection, investigation or prosecution of a crime would only apply if the release of the information would unduly interfere with the detection, investigation or prosecution of a crime. Internal records or notations of law enforcement agencies or prosecutors that are held for internal use would be excepted from the release requirement only if release would unduly interfere with law enforcement or prosecution.

These changes would apply to information, records and notations collected, made, assembled or maintained on before or after the bill's effective date. HB 1002 would take immediate effect if finally approved by a two-thirds record vote of the membership in each house.

SUPPORTERS SAY:

HB 1002 would return the law to what it was prior to a 1996 Texas Supreme Court decision that limited public access to information held by prosecutors and law enforcement agencies. HB 1009 would fulfill the ideals of the Open Records Act and allow access to information in closed criminal files. This access is a necessary component for an open society.

In 1996 the Texas Supreme Court ruled in *Holmes v. Morales*, 924 S.W.2d 920, that because the law did not make a distinction between open and closed prosecutors' files, closed case files did not have to be released under the Public Information Act. This decision was based on a literal interpretation of the open records law and did not consider a long-standing practice in which closed files were released.

The policy of open government records should not be eroded. This policy helps ensure that government officials are accountable to the public and that the free flow of information is not inhibited. This allows the public to evaluate the work of their elected prosecutors. Because the work of prosecutors deals with public safety and the liberty of individuals, it is especially important that it be open to public access, as long as public access does not unduly interfere with their essential work.

The media and defense attorneys have utilized this information to investigate claims of innocence or prosecutorial misconduct. The importance of access to these records is illustrated by the well-known cases of Lionel Jeter and Randall Adams (the subject of the documentary film,*The Thin Blue Line)* in which these types of files were used to clear innocent defendants. Information in closed case files can be especially important for defense attorneys challenging death penalty cases in the post-conviction*habeas corpus* appeals process. In these cases — with someone's life in the balance — attorneys may need information that was not brought up or adequately investigated at the trial or that was not transferred of information to the attorney handling the appeal. Attorneys need access to closed case files through the open records law because they have no statutory right to these files through discovery in *habeas corpus* appeals.

HB 1002 would not affect any active criminal cases. HB 1002 would apply only to closed cases that have been completed or dismissed. In addition, the bill would allow release only if it would not unduly interfere with the detection, investigation or prosecution of a crime.

Any burden that prosecutors may experience as a result of HB 1002 would be an acceptable price for public servants to pay in an open society. All governmental agencies have to deal with open records requests, and prosecutors should be no different. There is no evidence that prosecutors or others would censor case files just because the remote possibility exists that years later some of the closed records could be accessed by the public Also, HB 1002 would not affect current law on the privacy of juvenile records.

OPPONENTS SAY:

HB 1002 would place an inappropriate burden on prosecutors and law enforcement agencies that could interfere with the way police and prosecutors do their jobs to protect the public. The Texas Supreme Court ruling is proper and should be left alone.

Recent increases in requests for information from closed case files brought this problem to a crisis point that prompted a lawsuit by Harris County District Attorney John Holmes. A large urban prosecutor’s office can routinely receive from ten to 15 requests per week for information from closed case files. In each case, an attorney must comb through the hundreds

or thousands of pages in the files to cleanse them of specific information that is confidential under other statutes. HB 1002 also would require prosecutors to determine if the release of information would unduly interfere with detection, investigation or prosecution of a crime.

Requests for information from closed files are generally from civil and criminal attorneys on fishing expeditions and not from the public or the media. These attorneys often try and take advantage of the law to use these files as a kind of one-stop shopping to look for information. Information needed by attorneys can be accessed through the discovery process or through court records, medical records, or the parts of police records that are public. HB 1002 is not necessary for post-conviction habeas corpus appeals in death penalty cases because judges can order files disclosed upon a showing of need. If prosecutors or the police hinder justice by denying access to information, the public can hold them accountable.

Prosecutors' work product should be treated like other attorneys' work products and should not be subject to public scrutiny. These files can include notes about trial strategy, witness statements, or other information that could easily be misinterpreted. Making this information public could lead prosecutors and police to censor what they put in their files and witnesses to be less candid for fear that the information would later become public. This could chill the ability of police and prosecutors to enforce the law and protect the public.

NOTES:

The companion bill, SB 1101 by Wentworth, was reported favorably by the Senate State Affairs Committee on April 4.