

SUBJECT: Excepting certain budgetary working papers from public disclosure

COMMITTEE: Government Reform — committee substitute recommended

VOTE: 4 ayes — Swinford, Allen, Callegari, Casteel,

1 nay — R. Cook

1 present not voting — T. Smith

1 absent — Gallego

WITNESSES: For — None

Against — Kathy Mitchell, Consumers Union; Ken Whalen, Texas Daily Newspaper Association and Texas Press Association

On — Wayne Roberts, Governor's Office

BACKGROUND: Government Code, sec. 552.021 requires that public information be available to the public at a minimum during a governmental body's normal business hours. Sec. 552.022(a) lists 18 types of public information that is not excepted from required disclosure unless confidential under another law. This list includes all working papers, research material, and information used to estimate the need for or expenditure of public funds or taxes by a government body, on completion of the estimate.

Under sec. 552.106, drafts or working papers involved in preparing proposed legislation are excepted from disclosure requirements, as is an internal bill analysis or working paper prepared by the Governor's Office for the purpose of evaluating proposed legislation.

On April 8, 2003, Attorney General Greg Abbott determined in an Open Records letter opinion (OR2003-2330) that "all working papers, research material and information used to estimate the need for or the expenditure of public funds or taxes by a governmental body, on completion of the estimate" are subject to mandatory public disclosure. The ruling also determined that

the open records law mandated the release of working papers prepared in conjunction with the governor's fiscal 2004-05 budget.

DIGEST:

CSHB 54 would state that working papers and materials used to prepare a draft or introduced version of the general appropriations bill or another document or proposal prepared by the governor as part of his proposed budget are not public information under Government Code, sec. 552.002(a) or by the Legislative Budget Board (LBB) as part of the introduced version of the general appropriations bill.

The bill also would add to the items excepted from disclosure requirements under Government Code, sec. 552.106, drafts or working papers involved in preparation of a document or proposal by the governor as part of his proposed budget by the LBB as part of the introduced version of the general appropriations bill.

The bill would take immediate effect if finally passed by a two-thirds record vote of the membership of each house. Otherwise, it would take effect on the 91st day after the final day of the special session.

**SUPPORTERS
SAY:**

CSHB 54 would facilitate the development of a state budget by allowing the governor and LBB to write budget proposals without fear that their internal working documents would become public and be misconstrued or that information that would damage people or entities would become public.

The bill would not make a major change in state law but would clarify what state officials and others always have perceived as the intent of current law: that Government Code, sec. 552.022(a)(5), under which working papers dealing with the expenditure of public funds or taxes are public information, applies to government agencies' budgets and expenditures and that the exception from disclosure under sec. 552.106(a) for draft and working papers involving proposed legislation applies to the governor's and LBB's preparations for the general appropriations bill. The attorney general's overly broad opinion changed what many thought these sections meant, and CSHB 54 would restore the common interpretation of these statutes.

CSHB 54 would not interfere with the public's right to government information, as it would apply only to items used to prepare a draft of the

budget, not to the budget itself. The bill's exemption from disclosure would be similar to an existing exemption allowing draft or working papers used in the preparation of proposed legislation not to be disclosed. The appropriations bill's working papers should be no different from those used for other pieces of legislation.

When the attorney general issued his opinion in April, the governor's budget office was forced to disclose internal working papers, some of which the press and public misconstrued as proposals supported by the governor. CSHB 54 would address this problem by allowing the governor's draft budget documents to be exempt from disclosure requirements and by applying the same protections to the LBB's draft budget.

Working papers relating to the state budget reveal only snapshots of ideas or deliberations and do not necessarily represent the views or ideas of a governor or the LBB. These papers represent the budget as a work in progress and are not written for public consumption and can be misleading. If internal budget working papers could be made public, as the attorney general's opinion would require, frank discussions and creativity could be stifled. Knowing that their work could be disclosed to the public, staff might hesitate to explore different budget scenarios or to write down ideas. The political implications of an idea could become more important than policy considerations. The public is served better by seeing the final product, not all the proposals and ideas that arise during the process.

CSHB 54 also would help prevent incidents that could damage a person or agency unfairly from becoming public. For example, in the course of preparing a budget, allegations could be made about how a person or agency spent money, and the matter might be investigated. Allowing internal documents to be made public could lead to those allegations being publicized, whereas a subsequent investigation might find no wrongdoing.

CSHB 54 would not result in the appropriations process being "cloaked in secrecy." Hearings would remain public, with public votes recorded and public testimony taken. Official budget proposals, along with many other documents outlining spending and other information, would remain available to the press and the public. The bill would in no way cut legislators out of the appropriations process.

OPPONENTS
SAY:

CSHB 54 would chip away at Texans' right to public information by allowing certain papers that now are public to be excluded from public disclosure. The public has a right to know how decisions about the state budget are reached, not simply the final budget numbers. The budget is the public's business and is developed by state elected leaders and state employees using taxpayer dollars. Papers detailing the development of the budget are important in understanding the priorities and decisions of state leaders in finalizing the budget. Public access to this information is important to ensure the accountability of state leaders.

Texans are intelligent enough to know the difference between "working papers" and a final decision. Debate and deliberations have not been stifled under current law that gives the public access to budget documents. CSHB 54 could allow budget writers to cloak part of the appropriations process in secrecy, and some information could be kept from legislators themselves. The governor's staff and the LBB are professionals who should not be let political implications of proposals overshadow the need for frank discussions about the budget.

While an exemption now exists for working papers for other types of legislation, budget working papers are fundamentally different, since they involve the expenditure of public funds. Also, the governor's budget is not necessarily laid out in committee for debate and public comment, making disclosure an important way for the public to find out about the proposal. The attorney general correctly ruled that this information should be disclosed.

There is no compelling reason to make a dramatic change in public disclosure requirements by closing off information that now is open. The situation that during the 2003 regular session most likely will not occur often. No lasting harm done when the governor's budget documents eventually were released. The governor simply explained that a proposal that had been attributed to him was a proposal of a staff member identifying budget options, and attention to the issue faded. The press and the public understood the explanation, and the story had a one-day news life. Legislators commonly have to explain their positions, one of the prices of an open, free government.

**OTHER
OPPONENTS
SAY:**

Better ways exist to address concerns about budgetary working papers being misconstrued by the public. For example, working papers simply could be stamped “draft” or “working paper,” or budget documents could be exempted from disclosure only until the appropriations bill had been filed.

NOTES:

As filed, HB 54 would have exempted from disclosure under the open records law or any other law the “budgetary working papers” of the governor, lieutenant governor, House speaker, comptroller, LBB, Senate Finance and State Affairs committees, and House Appropriations and Ways and Means committees. It would have defined “budgetary working papers” as any information, other than a uniform budget estimate form, used by a governmental body in estimating revenues or in preparing a draft or the final biennial state budget or appropriations bill. The term would have included drafts, working papers, supporting and research material, and internal or external communications relating to the budget or appropriations bill.