

SUBJECT: Prohibitions against identity theft

COMMITTEE: Criminal Jurisprudence — favorable, as amended

VOTE: 7 ayes — Keel, Riddle, Pena, Denny, Escobar, Raymond, Reyna
0 nays
2 absent — Hodge, P. Moreno

WITNESSES: For — Mance Bowden, Texas Credit Union League; Luke Metzger, Texas Public Interest Research Group (TEXPIRG) ; David Mintz, Texas Apartment Association
Against — None
On — Everette Jobe, Texas Department of Banking

BACKGROUND: Penal Code, sec. 32.51, makes it a state-jail felony (180 days to two years in a state jail and an optional fine of up to \$10,000) to obtain, possess, transfer, or use identifying information of another without the other's consent and with intent to harm or defraud another.

DIGEST: HB 1321, as amended, would require peace officers to make written reports about criminal identity theft, place a prohibition in the Business and Commerce Code to prohibit persons from obtaining certain personal identifying information, require businesses to safeguard personal information, require businesses to give victims information about a transaction involved in identity theft in some situations, establish a procedure for courts to declare a victim of identity theft, and add penalties for violations of the bill.

The bill would take effect September 1, 2005.

Crime report. HB 1321 would require peace officers who receive reports of criminal violations involving the fraudulent use or possession of identifying information to make a written report. The report would have to include the victim's name, the name of the suspect, the type of identifying information obtained, possessed, or transferred in violation of the law, and

the results of the investigation. Upon request of the victim, peace officers would have to provide the report to the victim with any confidential information redacted.

This provision would apply only to investigations of offenses committed on or after September 1, 2005.

Prohibition against ID theft. HB 1321 would place in the Business and Commerce Code a prohibition against people obtaining, possessing, transferring, or using the personal identifying information of another without the other's consent and with intent to obtain a good, service, insurance, extension of credit, or any other thing of value.

Personal identifying information would mean information that alone or in conjunction with other information identified an individual, including a name; social security number; birth date; government-issued identification number; mother's maiden name; unique electronic identification number, address, or routing code; telecommunication access device; and unique biometric data which would include fingerprint, voice print, and retina or iris image.

A victim would be defined as a person whose identifying information was used by an unauthorized person.

Requirements on businesses. Businesses would be required to protect and safeguard personal identifying information that they collect or maintain. Businesses would be required to implement and maintain procedures to prevent the unlawful use of personal identifying information that they collect. These provisions would not apply to financial institutions. Businesses would be required to destroy customer records that contain personal identifying information and that they are not retaining.

Providing information to victims, order declaring a victim. Upon presentation of certain information by a victim, a person who did business with someone who allegedly used another's identifying information without authorization would be required to give the victim or a peace officer a copy of information about a transaction that violated the criminal offense of identity theft and, to the extent possible, the personal identifying information that was used without authorization.

To be eligible to receive this information, victims would have to provide a copy of a DPS record of identity theft or a police or investigative report or a complaint and identifying information of the type used to commit the offense. Victims could be required to submit authorization for information about the offense to be released to a peace officer.

Persons injured by a violation of HB 1321 or who had filed a criminal complaint alleging a violation of the criminal identity theft law could file an application with a district court for a court order declaring the person a victim of identity theft. After a hearing, courts that were satisfied that a person was a victim would be required to issue an order declaring the person a victim under the bill's provisions or of the Penal Code identity theft offense. HB 1321 would detail what must be in the order, which would have to be sealed because of the confidential nature of some of the information it contained.

HB 1321 would allow the order to be opened and the information released only in certain legal situations or to the victim for certain purposes relating to the offense. Any orders that would be released also would be subject to certain restrictions on their release.

Civil penalties and violations. Those violating these provisions would be liable to the state for civil penalties of between \$2,000 to \$50,000 for each violation. The attorney general could bring suit to recover the penalty.

The attorney general would be authorized to bring suit for a temporary restraining order or permanent or temporary injunction if it appeared to the attorney general that a person was, or was about to, violate the bill. The court could grant any other equitable relief that it considered appropriate to prevent additional harm to a victim or a further violation of the bill or to satisfy a judgment.

Violations of HB 1321, except for violations of requirements that certain information be provided to a victim or a peace officer, would be considered a violation of the deceptive trade practices act. Financial institutions would be given an affirmative defense to an action brought under the bill if they had good faith reliance on a consumer credit report.

SUPPORTERS
SAY:

Crime reports. HB 1321 would address a problem some victims encounter in obtaining police reports from law enforcement. Without these reports, it can be difficult for victims to convince creditors that they

should not be held responsible for unauthorized purchases. HB 1321 would address this by requiring law enforcement authorities to make a written report about a crime and to provide the victim with a copy. Police reports are often necessary to trigger other actions or protections for victims.

Prohibition against ID theft. A specific provision prohibiting identity theft and placing requirements on businesses is needed in the Business and Commerce Code so that identity theft can be battled on all fronts. It is not unusual for the state to prohibit in the civil codes something that is also a crime. This helps to serve as an additional deterrent and gives enforcement of the laws more teeth.

Requirements on businesses. HB 1321 would help protect individuals by specifically requiring businesses to safeguard personal information and to destroy certain information. A state law to do this is necessary to ensure that all businesses understand their obligation and meet it. The prevalence of identity theft makes it essential that all businesses, even small ones, safeguard personal information. HB 1321 may prompt some businesses that do not need personal information but ask for it out of tradition to stop gathering this information. HB 131 would be reasonable and would not burden businesses or significantly increase their costs.

The bill would set the parameters for what businesses must do by requiring that information be protected, but would not require a specific method of protection. Any business that does not now safeguard information should do so. Most large businesses already do this, and for either large or small business that do not, several models for safeguarding and privacy policies could be adopted without excessive expense or effort.

HB 1321 would not result in new or excessive costs to consumers. Consumers who are victims of identity theft carry a far larger burden than any cost that may be passed on to them due to provisions in HB 1321. Businesses also accrue costs due to identity theft and already pass these on to consumers.

HB 1321 would hold businesses accountable if they did not adequately safeguard personal information by allowing fines to be imposed on them.

Providing information to victims; court order declaring a victim. By requiring businesses to give victims certain information, HB 1321 would

give victims with the information they need to untangle a web of identity theft and to prove to others that they were not responsible for certain financial transactions. In some cases, refusals by businesses to disclose this information to victims and peace officers has thwarted investigations of identity theft. Victims are entitled to this information since it is about them and their financial accounts, and concerns about the abuse of the information by victims are unfounded since the information is about the victim. HB 1321 would ensure that information was given only to victims by setting requirements that victims would have to meet to qualify to receive the information.

HB 1321 also would establish procedures so that victims could receive a court order naming them as victims. This would make it easier for people to prove they were victims of identity theft, which would help them in challenging financial transactions and in establishing their identity for criminal law purposes.

HB 1321 would establish a definition of victim so that individuals would have more standing with law enforcement authorities, credit bureaus, and others involved with personal information. In some cases, individuals have reported difficulties in having these entities consider them victims because the businesses or law enforcement entities tend to consider merchants that have been defrauded as the only victims.

Civil penalties and violations. HB 1321 would help deter identity theft by allowing the attorney general to go after identity thieves, something generally done now only on request of local law enforcement authorities. By imposing fines on identity thieves and businesses that mishandle personal information and allowing injunctions to be issued to stop their actions, the bill could help punish the thieves and help stop the crime from continuing once it had been detected.

Centralizing this civil authority dealing with identity theft also could make the state's laws more effective and more uniformly enforced. The authority given to the attorney general in HB 1321 is similar to the authority to enforce other penalties. HB 1321 includes a wide range of penalties, from \$2,000 to \$50,000, so courts have the flexibility to assess an appropriate penalty based on several factors, such as the nature of a violation and the size of a business.

OPPONENTS
SAY:

Crime reports. HB 1321 should not dictate decisions about when to generate police reports because this is best left to the discretion of officers who can determine the merits of each case.

Prohibition against ID theft. It is unnecessary to place in the Business and Commerce Code what is already a crime in the Penal Code — obtaining, possessing, transferring, or using another's information without authorization. HB 1320 would impose a different intent requirement – to obtain a thing of value in the other person's name – instead of the intent to harm or defraud that is used in the Penal Code.

Requirements on businesses. The requirements that would be imposed on businesses by HB 1321 could be interpreted by some businesses as a new mandate that could increase business costs, which in the long run would be borne by consumers. New mandates especially burden small businesses.

Providing information to victims; court order declaring a victim. The provisions in HB 1321 that would allow certain information about a crime to be given to victims could lead to misuse of information. Reports of transactions or other business information could include some information about an alleged perpetrator of a crime that might not be appropriate for victims to have.

Civil penalties and violations. The penalties that would be authorized by HB 1321 could be too onerous in some situations. The range for the penalties is large and the imposition of a large penalty on a small business for what could be an honest oversight could be too harsh.

NOTES:

The committee amendment would add the provision requiring businesses to destroy customer records that are not to be retained by the business.

The companion bill, SB 122 by Hinojosa, passed the Senate on April 21 on the Local and Uncontested Calendar and has been referred to the House Criminal Jurisprudence Committee.