

SUBJECT: Creating defense to prosecution related to recording peace officers on duty

COMMITTEE: Homeland Security and Public Safety — committee substitute recommended

VOTE: 8 ayes — White, Bowers, Goodwin, Harless, Hefner, E. Morales, Patterson, Tinderholt

1 nay — Schaefer

WITNESSES: For — Scott Henson, Just Liberty; Rick Briscoe, Open Carry Texas; Marco Puente; (*Registered, but did not testify:* Chas Moore, Austin Justice Coalition; Faith Bussey and Kathy Mitchell, Just Liberty; Julie Campbell; Dee Chambless; Thomas Parkinson; Jason Vaughn)

Against — (*Registered, but did not testify:* Jennifer Szimanski and Charley Wilkison, Combined Law Enforcement Associations of Texas; Frederick Frazier, Dallas Police Association/FOP716 State FOP Director; Ray Hunt, HPOU; Jimmy Rodriguez, San Antonio Police Officers Association; Mitch Landry, Texas Municipal Police Association; Justin Berry; Sarah Murphy)

BACKGROUND: Under Penal Code sec. 38.15, a person commits an offense if the person with criminal negligence interrupts, disrupts, impedes, or otherwise interferes with a peace officer while the officer is performing a duty or exercising authority imposed or granted by law.

Transportation Code sec. 542.501 prohibits a person from willfully failing or refusing to comply with a lawful order or direction of a police officer.

Penal Code sec. 37.09 makes it a crime to tamper with or fabricate physical evidence if the person knows that an investigation or official proceeding is pending or in progress. It also is a crime for a person, knowing that an offense has been committed, to tamper with any record with intent to impair its verity, legibility, or availability as evidence in any subsequent investigation of or official proceeding related to the offense.

An offense generally is a third-degree felony (two to 10 years in prison and an optional fine of up to \$10,000).

DIGEST:

CSHB 1757 would create a defense to prosecution to the Penal Code offense of interfering with a peace officer performing a duty that the conduct engaged in by the defendant consisted only of filming, recording, photographing, documenting, or observing a peace officer if, before or while engaging in the conduct, the defendant obeyed any reasonable and lawful order by the officer to change the defendant's proximity or position.

Under the bill, the Transportation Code prohibition on willfully failing or refusing to comply with a lawful order or direction of a peace officer would not apply to an order or direction to cease filming, recording, photographing, documenting, or observing an officer performing official duties. This provision would not prohibit a peace officer from giving the person a reasonable and lawful order or direction to change proximity or position relative to the officer engaged in official duties.

The bill would make it a crime for a peace officer or other employee of a law enforcement agency to alter, destroy, or conceal another person's audio, visual, or photographic recording of a peace officer's performance of official duties without obtaining the other person's written consent. An offense would be a third-degree felony.

The bill would take effect September 1, 2021, and would apply to an offense committed on or after or a prosecution of an offense that commenced before, on, or after the effective date. A final conviction for an offense that existed on the effective date would be unaffected.

SUPPORTERS
SAY:

CSHB 1757 would increase transparency and accountability by protecting individuals' rights to record their interactions with peace officers. Bystander videos of police activity have created positive change in Texas in recent years. However, recent incidents have shown that current statutes are not strong enough to protect an individual's rights and have highlighted the need for additional reform to ensure officers are respecting citizens' rights to record these interactions.

The bill would balance the rights of individuals to record such interactions with the duty of peace officers to protect public safety. Under the bill, a peace officer could give a reasonable order to a person to change proximity or position if needed to maintain a scene and preserve public safety. However, if an officer gave an unreasonable order to change proximity to a position that impeded a person from observing or recording the officer performing duties, and in effect altering or concealing a recording, the officer would be facing a possible third-degree felony under the bill. This penalty would act as a deterrent to bad actors that infringed on individuals' rights.

The bill could be amended to add a culpable mental state to the offense relating to a peace officer or law enforcement agency employee that altered, destroyed, or concealed a recording of an officer performing official duties. Adding a mental state would be in line with similar offenses under current law.

CRITICS
SAY:

CSHB 1757 could have a chilling effect on police accountability and transparency by giving peace officers the discretion to broadly interpret what constitutes a reasonable order for a person to change proximity or position. In some cases, police officers have told citizens and journalists they can film but move them to an area or position that effectively blocks or hinders their ability to observe and produce useful video and audio recordings. People exercising their rights should not be subject to additional restrictions.

The bill should define a reasonable order by establishing certain distance parameters. Such a definition could mitigate the potential for bad actors to circumvent accountability and reduce transparency by moving people away from scenes to a distance where they cannot see, hear, or record the activities effectively.

OTHER
CRITICS
SAY:

CSHB 1757 should include a culpable mental state for the offense created for a peace officer or law enforcement agency employee who destroyed, altered, or concealed a recording of an officer performing duties. By not

including a culpable mental state, the bill inadvertently could criminalize a mistake or action that unintentionally altered, destroyed, or concealed a recording. Including a culpable mental state would ensure that the bill did not result in unintended consequences, especially given the high level of penalty associated with the offense.

NOTES:

The bill's author intends to offer a floor amendment that would include an additional requirement for the offense created under the bill that the peace officer or other law enforcement agency employee altered, destroyed, or concealed another person's audio, visual, or photographic recording of a peace officer's performance of official duties with the intent to impair the recording's verity, intelligibility, or availability as evidence in any subsequent investigation of or official proceeding related to the peace officer's performance of official duties.

According to the Legislative Budget Board, the creation of a criminal offense would be expected to result in additional demands on state or county correction resources; however, the fiscal impact of the bill could not be determined due to a lack of information on peace officers and law enforcement agency employees who engage in evidence tampering.