SUBJECT: Open records law revisions

COMMITTEE: State Affairs — favorable, without amendment

VOTE: 13 ayes — Wolens, S. Turner, Bailey, Brimer, Counts, Craddick, Danburg, Hilbert, Hunter, Longoria, Marchant, McCall, Merritt

0 nays

2 absent — Alvarado, D. Jones

SENATE VOTE: On final passage, April 28 — voice vote

WITNESSES: For — Rob Schneider, Consumers Union

Against — Shannon Kackley, City of Garland

BACKGROUND: The Public Information Act (Government Code, chapter 552) ensures public access to records and other material maintained by governmental bodies, including local governments. The act provides exceptions for certain types of records, including personnel information, litigation or settlement negotiations, private communications, trade secrets, student records, and audit working papers.

Under current law, when a record is requested of a governmental body and that body believes that the record may contain material that is not a public record, the agency must request an opinion from the Attorney General's Office. The attorney general has 60 days to render an opinion, but may extend that time by an additional 20 days. If the attorney general determines that the information is public, the agency may sue the attorney general to keep the information from being disclosed.

DIGEST: SB 1851 would make extensive changes to the Public Information Act.

Open records decisions and opinions. SB 1851 would shorten the time the attorney general has to render an opinion to 45 days and would allow the attorney general to extend that time by only 10 days. Opinion requests made to the attorney general would have to include a signed statement as to the date

on which the request was received.

Any government body that requested an opinion of the attorney general would have to inform the person requesting the information about the opinion request within 10 days of receiving the open records request and would have to provide the requestor with a copy of the communication sent to the attorney general, edited, if necessary, to avoid disclosure. Failure to request the attorney general's opinion or to disclose that request to the open records requestor would require the subject of the request to be disclosed unless there was a "compelling reason" to withhold the information.

If the attorney general asked for additional information in regard to the opinion request and if that information were not provided within seven days, as provided by current law, SB 1851 would require the information to be disclosed unless there was a compelling reason to withhold the information.

A governmental body would be prohibited from asking the attorney general for an opinion and would have to release the information requested if the attorney general or a court previously had ruled that the precise information at issue was public information.

Under current law, when the information requested includes a third party's proprietary information, the governmental body may request an attorney general's opinion, and that third party may submit reasons for not disclosing that information. SB 1851 would require the attorney general to make a good-faith attempt to contact third parties and to inform them of their right to submit reasons to withhold the information. The notice would have to be sent within 10 days of the information request, and the written reasons to withhold the information would have to be received within 10 days of the receipt of notice. The third party would have to send a copy of the written reasons to withhold the information, edited if necessary, to the person who requested the information.

Suits by a governmental body challenging an attorney general's opinion to release information would have to be brought within 30 days of the receipt of the attorney general's decision. If a governmental body failed to raise an exception to the Public Information Act in its request for an attorney general's opinion, that exception could not be raised in a later suit challenging the decision unless that exception were based on federal law or on the property or

privacy rights of a third party.

SB 1851 would require the attorney general to maintain uniformity in performing the duties required under the Public Information Act.

Exceptions to the Public Information Act. SB 1851 would establish that information related to the judiciary is governed by rules adopted by the Texas Supreme Court.

The bill would clarify that the categories of information contained in the Public Information Act as public information would have to be disclosed unless expressly made confidential under law. A court could not require a governmental body to withhold information in a public information category unless the information was made expressly confidential under law.

The litigation exception would exclude settlement negotiations. In order for the litigation exception to apply, the litigation would have to be pending or reasonably anticipated on the date the written request for public information was made.

The commercial or financial information exception would be limited to information for which it was demonstrated that disclosure would cause substantial competitive harm to the person from whom the information was obtained.

The audit working paper exception would be defined to include intra-agency or interagency communications and drafts or portion of drafts of the audit report. However, if the information in an audit working paper was maintained in another record, that other record would not be excepted from disclosure simply because it contained the information contained in an audit working paper.

The bill would establish a new exception for economic development negotiation information involving a business prospect the governmental body sought to locate, stay, or expand in or near the territory of the governmental body. Information relating to a trade secret of the business prospect or commercial or financial information that would cause substantial competitive harm if released would be excepted from disclosure. Until an agreement was reached with the business prospect, information about financial or other

incentives being offered would be excepted from disclosure. After an agreement was reached, such information would have to be disclosed. SB 1851 also would exempt deliberations regarding economic development negotiations from the requirements of the Open Meetings Act (Government Code, chapter 551).

The bill would create a new exception for crime victim information that would allow a person receiving compensation from the crime victims compensation fund to elect to limit public access to information about that person. Such election would have to be made in writing and filed within three years of the application for compensation. If an election were made to withhold information, all information except the name of the crime victim and the amount of the award would be excepted from disclosure. If an election were not made or if the victim elected to disclose the information, it would have to be disclosed.

Charges for copies or examination of records and cost estimates. SB 1851 would specify that labor costs could not be included for providing 50 or fewer pages of material unless the information was located at two or more separate buildings not connected in any way, including by a walkway or underground passageway.

If the request for a copy of or access to information would result in charge of more than $40, the governmental body would have to prepare an itemized estimate of the total cost of providing the information. The estimate would have to include alternative, less costly methods of accessing the information. An estimate also would have to inform the requestor that unless the estimate was responded to within 10 days of its receipt, the request would be considered automatically withdrawn. The requestor could respond by accepting the charges or by modifying the request.

If the governmental body determined that actual charges to produce the information would exceed the estimate by 20 percent or more, the governmental body would have to submit an updated estimate. The requestor would have to respond to such an estimate within 10 days or the request would be withdrawn automatically. If the actual costs exceeded 20 percent and the governmental body failed to submit an update itemized statement to the requestor, the governmental body would be prohibited from charging more than 20 percent above the original estimate.

SB 1851 would include procedures for calculating deadlines required for submission and return of estimates.

The bill would allow a governmental body to charge a requestor for personnel costs associated with making information available for inspection. For governmental bodies with more than 15 employees, personnel costs could be charged when the information was more than five years old, filled six or more archival boxes, and would take more than five hours to make the information available for inspection. Governmental bodies with fewer than 16 employees could charge for associated personnel costs when the information requested was older than three years, filled three or more archival boxes, or would take more than two hours to compile.

SB 1851 would allow the governmental body to require a deposit or bond for payment of anticipated costs for the preparation of public information that would exceed $50 for a governmental body with fewer than 16 employees or $100 for a governmental body with more than 15 employees. A public information officer could require a deposit or bond for the payment of unpaid amounts for previous open records requests that exceeded $100. If a bond or deposit was not paid for such unpaid amounts, the governmental body would not have to provide a copy of other information requested by the requestor.

Repeated requests. A governmental body that previously had furnished to the requestor copies of the information requested after payment of applicable fees would not have to comply with a request for the same information by the same requestor. The governmental body would have to certify to the requestor that all copies previously were furnished and to include a description of the information, the date the information was made available, and a certification that no subsequent additions, deletions, or corrections had been made.

A governmental body still could provide copies of or access to the information made by the same requestor and would not have to certify previous compliance if the information was furnished or made available again.

Notice of the Public Information Act. Effective January 3, 2000, the public information officer for each governmental body would have to display prominently a sign developed by the General Services Commission (GSC) containing basic information about the rights of a requestor, the

responsibilities of a governmental body, and procedures for inspecting or obtaining a copy of public information under the Public Information Act. The sign would have to made visible to members of the public and to employees responsible for receiving or responding to public information requests.

Open records steering committee. SB 1851 would establish an open records steering committee composed of one representative each from the Attorney General's Office, the Comptroller's Office, the Department of Public Safety, the Department of Information Resources, the State Library and Archives Commission, and GSC. The committee also would include five public members appointed by GSC and three members representing a county, a municipality, and a school district, appointed by GSC. The committee would advise GSC on the performance of its duties under the Public Information Act.

The public and state agency members periodically would have to review the types of information that would be useful to the public or cost-effective if that information were made available by means of the Internet or other electronic format and would have to report such findings to the governor, the lieutenant governor, the House speaker, and the chairs of the appropriations, finance, and state affairs committees.

Each state agency would have to report to the Legislative Budget Board (LBB) information on the number of open records requests and costs in capital and personnel in responding to such requests or in making information available on the Internet or other electronic formats. LBB would have to phase in reporting requirements to minimize the burden on agencies. Reporting would have to be done in a way that would allow the Legislature to determine the cost-effectiveness of making information available via the Internet or other electronic format. Reports submitted to LBB would have to be shared with the open records steering committee.

Suits against governmental bodies. SB 1851 would allow declaratory judgment or injunctive relief claims, brought by a county or district attorney acting on behalf of the attorney general, against a state agency or governmental body for violating the Public Information Act. Such actions would be in addition to other civil, administrative, or criminal actions authorized by law. The bill would establish venue for such actions in Travis County for state agencies or in the county where the administrative offices of

another governmental body were located. Complaints would have to be filed with the district or county attorney of the county where the suit would be located. The attorney would have to determine whether an action would be brought within 31 days of receiving the complaint and would have to notify the complainant.

If the district or county attorney's office decided not to pursue a complaint, it would have to include the reasons for that decision and return the complaint. The complainant could file that complaint with the attorney general within 31 days of receiving notice from the district or county attorney. The attorney general would have to issue a decision within 31 days.

The attorney bringing an action would have to notify the governmental body and to allow that body four days to cure the violation.

In all actions brought against a governmental body to require disclosure or for declaratory or injunctive relief, a court would have to assess costs of litigation and reasonable attorney fees incurred by the plaintiff who substantially prevailed. A court could not assess fees and costs against a governmental body if it had acted in reasonable reliance on a judgment or order applicable to that body, on an appellate court decision, or on a written attorney general's opinion.

Other provisions. Other changes made by SB 1851 would include:

- allowing an agency to meet timeliness requirements by sending information via interagency mail, so long as there was evidence sufficient to establish that the information was deposited in interagency mail within the time allowed by law;
- establishing venue for claims against a state agency or local governmental body that had refused to release information determined by the attorney general to be public;
- requiring the Sunset Advisory Commission to examine the records management practices of an agency;
- requiring state agencies to submit their open-records cost reports to GSC by December 1 rather than by September 1 of each odd-numbered year;
- requiring GSC to provide each state agency an updated copy of an open-records charges report by March 1 of each even-numbered year; and
- specifying that a discovery request or subpoena duces tecum (requiring

production of documents for a deposition) is not considered a request for information under the Public Information Act.

SB 1851 would take effect September 1, 1999.

SUPPORTERS SAY:

SB 1851 is the result of an extensive study by the Senate Interim Committee on Public Information and is a carefully constructed compromise that represents various interests. The bill contains many provisions that one group or another would prefer to see removed or modified, but to preserve the compromise, the bill should be passed in substantially the same form as that adopted by the Senate.

Among the provisions that would expand and ensure access to public information are those that would clarify that the categories of public information in the Public Information Act are subject to disclosure unless specifically excepted by law. The bill would limit the expansive litigation exception to matters in which litigation was pending or reasonably anticipated at the time the request was filed. Such a limitation would prevent governmental bodies from withholding information without a reasonable anticipation of litigation. Likewise, the bill would limit the exception for financial and commercial information to items that would cause substantial competitive harm to the person about whom information was being requested. Without such a limitation, this exception could be read to cover any information about a business in a competitive market.

SB 1851 would ensure that persons requesting information would be informed of their rights by requiring the posting of a sign detailing the rights of the public and responsibilities of governmental bodies under the Public Information Act. It also would require governmental bodies to provide estimates for expensive open records requests and updated estimates if necessary. This would ensure that the person making the request would be informed before it was completed of the total cost and of less expensive methods of receiving or examining the same information.

Providing a shorter time frame for attorney general decisions would allow a quicker turnaround time on requests and would prevent governmental bodies from using an opinion request to delay the release of information. Also, the bill would prohibit a governmental body from withholding information when the attorney general previously had issued an opinion that required disclosure.

New provisions also would protect the privacy rights of third parties whose information was being requested by requiring the attorney general to make an effort to inform those third parties and give them an opportunity to oppose the release of the information.

Other provisions of this bill address specific issues raised by governmental bodies. The bill includes specific exceptions needed for crime victims and economic development negotiations. Both exceptions are crafted narrowly to apply to particular situations. The crime victims exception would apply only when the victim requested that that information not be released. The economic development negotiation exception would apply only when there could be substantial competitive harm and only until a final agreement was eventually reached.

SB 1851 would, for the first time, allow a governmental body to charge for access to public records when a significant amount of effort was involved in preparing the records for examination. It would apply only to requests that took more than five hours of work to compile, to records that were more than five years old and would fill six or more boxes. Smaller limits would apply to governmental bodies with fewer than 16 employees. These charges are necessary to allow governmental bodies to recoup some of the personnel costs of fulfilling information requests that take a substantial amount of time. The purpose of the change is not to discourage voluminous requests for information but to prevent the governmental body from having to pay for the entire personnel and labor costs associated with fulfilling such requests. The bill also would allow the posting of a bond for anticipated costs of preparing such information for inspection and would lower the amount of costs that would allow a small governmental body to require a bond or deposit to be posted.

If a requestor had not paid for previous open records requests, this bill would allow the governmental body to require a payment of a deposit or bond for unpaid previous requests of more than $100 before filling a new request. The bill would allow a governmental body to refuse an identical request made by the same requestor. The governmental body would have to provide the requestor with information about the previous request and would not be prohibited from providing that information again.

The Legislature and governmental bodies would receive additional information and would have greater ability to examine the cost-effectiveness of providing certain information to the public on the Internet or in other electronic formats. Such reviews would provide expanded access to public information as more and more information became available to all citizens through electronic means.

OPPONENTS SAY:

Many changes proposed in SB 1851 would increase burdens on governmental bodies related to open records requests and would limit access to certain public records.

While this bill includes many recommendations of the Senate interim committee, some recommendations, such as imposing civil penalties against governmental bodies that fail to provide public information, were not included. Such penalties could strengthen enforcement of the Public Information Act. Rules developed by the judiciary should be reviewed by the Legislature in order to ensure that the spirit of the Public Information Act was embodied in such rules.

Expanding exceptions for crime victim information and for economic development negotiations would limit access to information about how the government is spending or intends to spend public money. This is precisely the type of information that should be made available. Current exceptions to the law already address legitimate concerns about confidentiality, privacy, or trade secrets.

Limiting the litigation exception to litigation pending or anticipated at the time the request was made would hamper the ability of the governmental body to retain information that could be involved in litigation eventually but, at the time the request was made, might not be anticipated to be in litigation. If the information subject to the request were involved in litigation the day after a request were made, that information still would have to be released.

Requiring a governmental body that failed to request an attorney general's opinion within 10 days to demonstrate a compelling reason would override the opinion of a Texas court of appeals in *City of Garland v. Dallas Morning News*, 969 S.W.2d 548 (Tex. App. — Dallas, 1998), which held that a compelling demonstration is not required when the governmental body fails to make a request within the time allowed. Requiring all governmental bodies to

submit opinion requests to the attorney general within 10 days could increase costs for many small governmental bodies. Many governmental bodies would be burdened with provisions that establish venue in Travis County for certain actions relating to open records.

Allowing charges for the inspection of public records would be a significant change in open records policy. Under current law, there is never a charge to a person who does not wish a copy of public information but wants to examine the information. Allowing charges, even in the limited circumstances that SB 1851 would permit, would make it harder for people seeking information to have any low-cost option to review the information. Taxpayers are already paying for the personnel that fulfill these requests and now they would be paying twice for that service.

NOTES:

SB 1851 includes some provisions contained in other bills, including:

- SB 57 by Harris, passed by the Senate on March 18 on the Local and Uncontested Calendar and pending in the House State Affairs Committee;
- SB 277 by Carona, passed by the Senate on March 18 by voice vote and pending in the House State Affairs Committee; and
- SB 1047 by Wentworth, reported favorably as substituted by the Senate State Affairs Committee on April 6.