

BILL ANALYSIS

Senate Research Center
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S.B. 1526
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AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

Currently, under Article 39.14 (Discovery), Code of Criminal Procedure, the personal information for victims and witnesses does not have the same protection as that of jurors.

Information contained in criminal files many times consists of information that is confidential by law, such as medical information restricted under the Health Insurance Portability and Accountability Act statutes and often contains person identifying information such as Social Security numbers and home addresses.

In recent years, there have been cases across Texas where witnesses to crimes have been intimidated and even murdered in order to prevent their testimony in a case, putting into jeopardy a case built by the state. Proponents of discovery reform claim these events may have been avoided by keeping personal information confidential.

As proposed, S.B. 1526 amends current law relating to discovery in a criminal case.

RULEMAKING AUTHORITY

This bill does not expressly grant any additional rulemaking authority to a state officer, institution, or agency.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends Article 39.14, Code of Criminal Procedure, as follows:

Art. 39.14. DISCOVERY

Sec. 1. DISCLOSURE BY STATE. (a) Requires the attorney representing the state, subject to the restrictions provided by Article 39.15 (Discovery of Evidence that Constitutes Child Pornography), as soon as practicable after receiving a timely request from the defendant, to disclose to the defendant's counsel and permit inspection, photocopying, and photographing of the following materials and information in the possession, custody, or control of the state or any of its agencies:

- (1) any exculpatory or impeachment evidence material to the defendant's guilt or punishment;
- (2) any written or recorded statements that are made by the defendant or by any witness the attorney representing the state intends to call at the trial and that are related to the case charged, including offense reports by law enforcement personnel and electronically recorded statements, if any;
- (3) any written record containing the substance of any oral statement that is made by the defendant and that is related to the case charged, whether made before or after the defendant's arrest, in response to interrogation by any person whom the defendant believed to be a peace officer;
- (4) the defendant's prior criminal record;

(5) any record of a criminal conviction admissible for impeachment under Rule 609, Texas Rules of Evidence, of a witness the attorney representing the state intends to call at the trial;

(6) any affidavit, warrant, or return pertaining to a search or seizure in connection with the case;

(7) any physical or documentary evidence that was obtained from or that belongs to the defendant or that the attorney representing the state intends to use at the trial and, on a showing of materiality by the defendant, the opportunity to test that evidence;

(8) the names and addresses of the witnesses called to present evidence under Rules 702, 703, and 705, Texas Rules of Evidence, and the names of all other witnesses the attorney representing the state intends to call at the trial;

(9) any report produced by or for an expert witness the attorney representing the state intends to call at the trial; and

(10) any plea agreement, grant of immunity, or other agreement for testimony issued by the attorney representing the state in connection with the case.

Deletes existing text requiring the court in which an action is pending, upon motion of the defendant showing good cause thereafter and upon notice to the other parties, except as provided by Article 39.15, to order the state before or during trial of a criminal action therein pending or on trial to produce and permit the inspection and copying or photographing by or on behalf of the defendant of any designated documents, papers, written statement of the defendant, (except written statements of witnesses and except the work product of counsel in the case and their investigators and their notes or report), books, accounts, letters, photographs, objects or tangible things not privileged, which constitute or contain evidence material to any matter involved in the action and which are in the possession, custody or control of the state or any of its agencies. Deletes existing text requiring that the order specify the time, place and manner of making the inspection and taking the copies and photographs of any of the aforementioned documents or tangible evidence; provided, however, that the rights herein granted shall not extend to written communications between the state or any of its agents or representatives or employees. Deletes existing text providing that nothing in this Act shall authorize the removal of such evidence from the possession of the state, and any inspection shall be in the presence of a representative of the state.

(b) Requires the attorney representing the state, if the defendant gives notice of a defense under Section 2(b), to disclose to the defendant's counsel as soon as practicable the names of the witnesses of whom the state has knowledge and whom the state intends to use to rebut the defense or the testimony of any of the defendant's witnesses called to establish that defense.

Deletes existing text authorizing the court in which an action is pending, on motion of a party and on notice to the other parties, to order one or more of the other parties to disclose to the party making the motion the name and address of each person the other party may use at trial to present evidence under Rules 702, 703, and 705, Texas Rules of Evidence. Deletes existing text requiring the court to specify in the order the time and manner in which the other party must make the disclosure to the moving party, but in specifying the time in which the other party is required to make disclosure the court shall require the other party to make the disclosure not later than the 20th day before the date the trial begins.

(c) Provides that this article does not authorize the removal of physical evidence from the possession of the state, and any inspection of physical evidence is required to be conducted in the presence of a representative of the state.

Sec. 2. DISCLOSURE BY DEFENDANT. (a) Requires the defendant, as soon as practicable after receiving the initial disclosure under Section 1 from the attorney representing the state, to disclose to the attorney representing the state and permit inspection, photocopying, and photographing of the following materials and information:

(1) any written or recorded statement by a witness, other than the defendant, that is related to the offense charged, if the defendant intends to call the witness at the trial;

(2) any record of a criminal conviction admissible for impeachment under Rule 609, Texas Rules of Evidence, of a witness, other than the defendant, the defendant intends to call at the trial, if that information is known to the defendant;

(3) any physical or documentary evidence that the defendant intends to use at the trial and, on a showing of materiality by the attorney representing the state, the opportunity to test that evidence;

(4) the names and addresses of the witnesses called to present evidence under Rules 702, 703, and 705, Texas Rules of Evidence, and the names of all other witnesses, other than the defendant, the defendant intends to call at the trial; and

(5) any report produced by or for an expert witness the defendant intends to call at the trial.

(b) Requires a defendant planning to offer evidence of one or more defenses listed in Chapter 8 (General Defenses to Criminal Responsibility) or 9 (Justification Excluding Criminal Responsibility), Penal Code, or evidence of an alibi defense, on a request by the state, to file a good faith notice of intent to raise the defense with the court and the attorney representing the state not later than the 30th day before the date the trial begins or as soon as practicable after the date the defendant receives a disclosure under Section 1 to which the defense is responsive, whichever is later. Requires that the notice, if the defendant intends to raise an alibi defense, include the place at which the defendant claims to have been at the time of the alleged offense and the names of the witnesses the defendant intends to use to establish the alibi. Provides that any notice provided under this subsection is for purposes of discovery only and is not admissible at trial unless the court finds that the contents of the notice were not made in good faith.

(c) Authorizes the court, after the filing of the indictment or information, to require the defendant to submit nontestimonial evidence to the state. Provides that this subsection does not limit any law enforcement agency or prosecutor's office from seeking or obtaining nontestimonial evidence to the extent permitted by law.

Sec. 3. EXCEPTIONS TO DISCLOSURE. (a) Provides that neither the attorney representing the state nor the defendant is required to disclose materials or information that is:

(1) recorded proceedings of a grand jury, except as provided by Rule 615, Texas Rules of Evidence;

(2) a work product other than an offense report by law enforcement personnel, including a report, memorandum, or other internal document of

the attorney representing the state, the attorney representing the defendant, or an investigator or other agent of the attorney representing the state or the attorney representing the defendant that is made in connection with the investigation, prosecution, or defense of the case; or

(3) privileged under a rule of evidence, an express statutory provision, the Texas Constitution, or the United States Constitution.

(b) Provides that this article does not authorize disclosure of the name, address, or telephone number of a victim in violation of Chapter 57 (Confidentiality of Identifying Information of Sex Offense Victims).

(c) Provides that a victim impact statement is subject to disclosure before the testimony of the victim is taken only if the court determines that the statement contains exculpatory material.

Sec. 4. CONTINUING DUTY TO DISCLOSE. Requires a party, if, before a trial begins, but subsequent to compliance with this article or a relevant court order, the party discovers additional material or information subject to disclosure, to immediately notify the other party's counsel of the existence of the additional material or information.

Sec. 5. EXCISION. (a) Provides that, except as provided by Subsection (b), if a portion of material or information is subject to discovery under this article and a portion is not subject to discovery, only the portion that is subject to discovery must be disclosed. Requires the disclosing party to inform the other party's counsel that the portion of material or information that is not subject to discovery has been excised and withheld. Requires the court, on request, to conduct a hearing to determine whether the reasons for excision are justifiable. Requires that material or information excised pursuant to judicial order be sealed and preserved in the records of the court and be made available to an appellate court in the event of an appeal.

(b) Provides that excision of a witness statement produced in accordance with Rule 615, Texas Rules of Evidence, is governed by that rule.

(c) Authorizes the attorney representing the state, notwithstanding any other provision of this article, without a protective court order or a hearing before the court, to excise from an offense report or other report any information related to the victim of an offense that is listed under:

(1) Section 3g (prohibiting a judge from denying community supervision to a defendant based solely on the defendant's inability to speak, read, write, hear, or understand English), Article 42.12; or

(2) Article 62.001(5) (defining "reportable conviction or adjudication").

Sec. 6. PROTECTIVE ORDERS. Authorizes the court at any time, on a showing of good cause, to enter an appropriate protective order that a specified disclosure be denied, restricted, or deferred. Defines "good cause," for purposes of this section.

Sec. 7. IN CAMERA PROCEEDINGS. Authorizes the court, on request, to permit to be made in camera an excision hearing under Section 5(a), a showing of good cause for denial or regulation of a disclosure under Section 6, or any portion of a proceeding. Requires that a verbatim record be made of a proceeding in camera. Requires that the entire record, if the court excises a portion of the material or information or enters an order granting relief following a showing of good cause, be sealed and preserved in the records of the court and be made available to an appellate court in the event of an appeal.

Sec. 8. CONFERENCE. Requires the court, on request of the attorney representing the state or the defendant, to hold a discovery hearing under Section 1(8), Article 28.01, not later than the 10th day before the date the trial begins, to:

(1) ensure that the parties are fully aware of their respective disclosure obligations under this article; and

(2) verify compliance by each party with this article.

Sec. 9. COMPLIANCE; SANCTIONS. (a) Authorizes the disclosures required under this article to be performed in any manner that is mutually agreeable to the attorney representing the state and the attorney representing the defendant or that is ordered by the court in accordance with this article. Authorizes the order issued by the court to specify the time, place, and manner of making the required disclosures.

(b) Authorizes the court, on a showing that a party has not made a good faith effort to comply with this article or a relevant court order, to make any order the court finds necessary under the circumstances, including an order related to immediate disclosure, contempt proceedings, delay or prohibition of the use of a defense or the introduction of evidence, or continuance of the matter. Authorizes the court to also inform the jury of any failure or refusal to disclose or any untimely disclosure under this article.

(c) Authorizes the court to prohibit the use of a defense or the introduction of evidence under Subsection (b) only if all other sanctions have been exhausted or the discovery violation amounts to wilful misconduct designed to obtain a tactical advantage that would minimize the effectiveness of cross-examination or the ability to adduce rebuttal evidence. Prohibits the court from dismissing a charge under Subsection (b) unless authorized or required to do so by other law.

(d) Provides that the failure of the attorney representing the state or the defendant to comply with this article is not a ground for a court to set aside the conviction or sentence of the defendant, unless the court's action is authorized or required by other law.

Sec. 10. COSTS. (a) Requires that all reasonable and necessary costs related to a disclosure required under this article, including the photocopying of materials, be paid by the requesting party.

(b) Prohibits the commissioners court of the county in which the indictment, information, or complaint is pending from, as a result of any payment by the defendant of the costs required by this article, reducing the amount of money provided by the county to the office of the attorney representing the state.

Sec. 11. DISCLOSURE TO THIRD PARTIES. Prohibits the attorney representing the defendant, or an investigator, expert, or other agent for the attorney representing the state or the attorney representing the defendant, before the date on which the trial begins, from disclosing, without obtaining approval of the trial court, information or witness statements received from the opposing party to any third party, other than to an investigator, expert, or other agent for the attorney representing the state or the attorney representing the defendant, as applicable. Prohibits information or witness statements received under this article from being made available to the public.

Sec. 12. PRO SE DEFENDANTS. Provides that this article, including the provisions regarding the nondisclosure of a witness statement or an offense report by law enforcement personnel, applies to a defendant who has elected to proceed pro se only to the extent approved by the court.

Sec. 13. CONFLICT OF LAW. Provides that, to the extent of any conflict, this article prevails over Chapter 552 (Public Information), Government Code.

SECTION 2. Provides that the change in law made by this Act applies to the prosecution of an offense committed on or after the effective date of this Act. Provides that the prosecution of an

offense committed before the effective date of this Act is covered by the law in effect when the offense was committed, and the former law is continued in effect for this purpose. Provides that, for purposes of this section, an offense is committed before the effective date of this Act if any element of the offense occurs before the effective date.

SECTION 3. Effective date: September 1, 2011.