

BILL ANALYSIS

C.S.H.B. 1764
By: Hunter
Government Transparency & Operation
Committee Report (Substituted)

BACKGROUND AND PURPOSE

Interested parties point out that when a string of government officials began conducting official business through private e-mail accounts in an attempt to circumvent the public information laws, the legislature codified the substance of an attorney general opinion that held it is the content, not the communication device, that determines whether a communication is subject to state public information law. The parties contend that the attorney general has consistently ruled that if a public official is conducting official business on a private device, such official communication is public information and that a recent court decision confirmed the status of such communications.

These interested parties have expressed concern that some public officials have responded to the new law by claiming that the governmental agency is not the custodian of their private communication devices and cannot order them to release documents that are subject to state public information law if the documents are held on those devices. Likewise, the parties report that some governmental agencies have responded to the new law by claiming that they cannot obtain documents stored on the private computing device of a government official who is conducting business on the device because the agency does not have custody and control of the device from which the e-mails can be accessed. C.S.H.B. 1764 seeks to address this loophole, which has been identified by a Texas appeals court in a recent court case.

CRIMINAL JUSTICE IMPACT

It is the committee's opinion that this bill expressly does one or more of the following: creates a criminal offense, increases the punishment for an existing criminal offense or category of offenses, or changes the eligibility of a person for community supervision, parole, or mandatory supervision.

RULEMAKING AUTHORITY

It is the committee's opinion that this bill does not expressly grant any additional rulemaking authority to a state officer, department, agency, or institution.

ANALYSIS

C.S.H.B. 1764 amends the Government Code to include among the duties of a governmental body's officer for public information the requirement to make reasonable efforts to obtain public information from a temporary custodian if the information has been requested from the governmental body; the officer for public information is aware of facts sufficient to warrant a reasonable belief that the temporary custodian has possession, custody, or control of the information; the officer for public information is unable to comply with the duties imposed by state public information law without obtaining the information from the temporary custodian; and the temporary custodian has not provided the information to the officer for public information of the governmental body or the officer's agent. The bill defines "temporary custodian" as an officer or employee of a governmental body who, in the transaction of official

business, creates or receives public information that the officer or employee has not provided to the officer for public information of the governmental body or the officer's agent. The bill specifies that the term includes a former officer or employee of a governmental body who created or received public information in the officer's or employee's official capacity that has not been provided to the officer for public information of the governmental body or the officer's agent.

C.S.H.B. 1764 establishes that a current or former officer or employee of a governmental body does not have, by virtue of the officer's or employee's position or former position, a personal or property right to public information the officer or employee created or received while acting in an official capacity. The bill requires a temporary custodian with possession, custody, or control of public information to surrender or return the information to the governmental body not later than the 10th day after the date the officer for public information of the governmental body or the officer's agent requests the temporary custodian to surrender or return the information. The bill requires the officer for public information of the governmental body, if a temporary custodian fails to surrender or return public information to a governmental body, to notify the attorney general in writing of the facts related to the failure and send a copy of the written notice to the requestor not later than the 10th business day after the deadline to surrender or return the information. The bill authorizes the attorney general, on receipt of written notice from an officer for public information, to sue for an injunction or writ of mandamus to compel a temporary custodian with possession, custody, or control of public information to surrender or return the information. The bill requires such a suit to be filed in a district court for the county in which the main offices of the governmental body are located and requires the attorney general to send a copy of the filed petition to the requestor. The bill prohibits such a suit from proceeding, and process from being issued, until the court enters a written finding that the petition sets forth facts sufficient to warrant probable cause that the current or former officer or employee against whom the action is filed is in possession, custody, or control of public information that has not been made available to the governmental body that owns the information. The bill requires such a suit to be dismissed with prejudice if the current or former officer or employee files an answer containing a general denial supported by a sworn affidavit stating that the officer or employee is not in possession, custody, or control of public information responsive to the request at issue. The bill establishes that a suit dismissed for this reason is dismissed without prejudice and may be refiled by the attorney general if the current or former officer or employee, in providing the affidavit, engaged in conduct constituting perjury or aggravated perjury and is arrested, charged, or indicted for that offense. The bill exempts such a refiled suit from the bill's requirement that certain suits be dismissed with prejudice.

C.S.H.B. 1764 establishes, for purposes of the application of state public information law relating to attorney general decisions to information surrendered or returned to a governmental body by a temporary custodian or as a result of a suit under the bill's provisions, the governmental body is considered to receive the request for information on the date the information is surrendered or returned to the governmental body. The bill makes it a misdemeanor punishable by a fine, confinement, or both for a temporary custodian who has possession, custody, or control of public information responsive to a request to, with criminal negligence, fail to surrender or return the information to the governmental body on request of the officer for public information or the officer's agent.

EFFECTIVE DATE

September 1, 2015.

COMPARISON OF ORIGINAL AND SUBSTITUTE

While C.S.H.B. 1764 may differ from the original in minor or nonsubstantive ways, the following comparison is organized and formatted in a manner that indicates the substantial differences between the introduced and committee substitute versions of the bill.

INTRODUCED

SECTION 1. Section 552.002(a), Government Code, is amended to read as follows:

(a) In this chapter, "public information" means:

- (1) a state record;
- (2) a local government record; or
- (3) information that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:
 - (A) ~~[(4)]~~ by a governmental body;
 - (B) ~~[(2)]~~ for a governmental body and the governmental body:
 - (i) ~~[(A)]~~ owns the information;
 - (ii) ~~[(B)]~~ has a right of access to the information; or
 - (iii) ~~[(C)]~~ spends or contributes public money for the purpose of writing, producing, collecting, assembling, or maintaining the information; or
 - (C) ~~[(3)]~~ by an individual officer or employee of a governmental body ~~[in the officer's or employee's official capacity and the information pertains to official business of the governmental body].~~

SECTION 2. Section 552.003, Government Code, is amended by amending Subdivision (1) and adding Subdivisions (1-a), (1-b), and (7) to read as follows:

- (1) "Custodian" means a public officer or employee who:
 - (A) by law, ordinance, or administrative policy is in charge of an office that creates or receives a state record or local government record; or
 - (B) in the transaction of official business, creates or receives public information that the public officer or employee has not provided to the records management officer or the officer for public information of the governmental body.

(1-a) "Governmental body":

- (A) means:
 - (i) a board, commission, department, committee, institution, agency, or office that is within or is created by the executive or legislative branch of state government and that is directed by one or more elected or appointed members;

HOUSE COMMITTEE SUBSTITUTE

No equivalent provision.

SECTION 1. Section 552.003, Government Code, is amended by adding Subdivision (7) to read as follows:

- (7) "Temporary custodian" means an officer or employee of a governmental body who, in the transaction of official business, creates or receives public information that the officer or employee has not provided to the officer for public information of the governmental body or the officer's agent. The term includes a former officer or employee of a governmental body who created or received public information in the officer's or employee's official capacity that has not been provided to the officer for public information of the governmental body or the officer's agent.

- (ii) a county commissioners court in the state;
 - (iii) a municipal governing body in the state;
 - (iv) a deliberative body that has rulemaking or quasi-judicial power and that is classified as a department, agency, or political subdivision of a county or municipality;
 - (v) a school district board of trustees;
 - (vi) a county board of school trustees;
 - (vii) a county board of education;
 - (viii) the governing board of a special district;
 - (ix) the governing body of a nonprofit corporation organized under Chapter 67, Water Code, that provides a water supply or wastewater service, or both, and is exempt from ad valorem taxation under Section 11.30, Tax Code;
 - (x) a local workforce development board created under Section 2308.253;
 - (xi) a nonprofit corporation that is eligible to receive funds under the federal community services block grant program and that is authorized by this state to serve a geographic area of the state; and
 - (xii) the part, section, or portion of an organization, corporation, commission, committee, institution, or agency that spends or that is supported in whole or in part by public funds; and
- (B) does not include the judiciary.
- (1-b) "Local government record" has the meaning assigned by Section 441.151.
- (7) "State record" has the meaning assigned by Section 441.031.

SECTION 3. Section 552.203, Government Code, is amended to read as follows:
 Sec. 552.203. GENERAL DUTIES OF OFFICER FOR PUBLIC INFORMATION. Each officer for public information, subject to penalties provided in this chapter, shall:

- (1) make public information available for public inspection and copying;
- (2) carefully protect public information from deterioration, alteration, mutilation, loss, or unlawful removal; ~~and~~
- (3) repair, renovate, or rebind public information as necessary to maintain it properly; and
- (4) obtain information from a custodian who has access to public information being requested from the governmental body.

SECTION 2. Section 552.203, Government Code, is amended to read as follows:
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- (1) make public information available for public inspection and copying;
- (2) carefully protect public information from deterioration, alteration, mutilation, loss, or unlawful removal; ~~and~~
- (3) repair, renovate, or rebind public information as necessary to maintain it properly; and
- (4) make reasonable efforts to obtain public information from a temporary custodian if:

(A) the information has been requested from the governmental body;

SECTION 4. Subchapter E, Chapter 552, Government Code, is amended by adding Section 552.233 to read as follows:

Sec. 552.233. OWNERSHIP OF PUBLIC INFORMATION. (a) A current or former officer or employee of a governmental body does not have, by virtue of the officer's or employee's position or former position, a personal or property right to public information the officer or employee created or received in the performance of the officer's or employee's duties.

(b) A current or former officer or employee with possession, custody, or control of public information shall surrender or return that public information to the governmental body on request or demand by the custodian or officer for public information of the governmental body.

(c) A requestor, custodian, or officer for public information may sue in district court for an injunction or mandamus to compel a current or former officer or employee of a governmental body with possession, custody, or control of public information to surrender or return the public information as

(B) the officer for public information is aware of facts sufficient to warrant a reasonable belief that the temporary custodian has possession, custody, or control of the information;

(C) the officer for public information is unable to comply with the duties imposed by this chapter without obtaining the information from the temporary custodian; and

(D) the temporary custodian has not provided the information to the officer for public information of the governmental body or the officer's agent.

SECTION 3. Subchapter E, Chapter 552, Government Code, is amended by adding Section 552.234 to read as follows:

Sec. 552.234. OWNERSHIP OF PUBLIC INFORMATION. (a) A current or former officer or employee of a governmental body does not have, by virtue of the officer's or employee's position or former position, a personal or property right to public information the officer or employee created or received while acting in an official capacity.

(b) A temporary custodian with possession, custody, or control of public information shall surrender or return the information to the governmental body not later than the 10th day after the date the officer for public information of the governmental body or the officer's agent requests the temporary custodian to surrender or return the information.

(c) If a temporary custodian fails to surrender or return public information to a governmental body as required by Subsection (b), the officer for public information of the governmental body shall, not later than the 10th business day after the deadline to surrender or return information under Subsection (b), notify the attorney general in writing of the facts related to the failure and send a copy of the written notice to the requestor. On receipt of written notice from an officer for public information as provided by this subsection, the attorney general may sue for an injunction or writ of mandamus to compel a temporary custodian with possession, custody, or control of public information to surrender or return the information as required by Subsection (b). A suit filed under this subsection:

required by Subsection (b).

(1) must be filed in a district court for the county in which the main offices of the governmental body are located;

(2) may not proceed, and process may not be issued, until the court enters a written finding that the petition sets forth facts sufficient to warrant probable cause that the current or former officer or employee against whom the action is filed is in possession, custody, or control of public information that has not been made available to the governmental body that owns the information; and

(3) shall be dismissed, with prejudice except as provided by Subsection (e), if the current or former officer or employee files an answer containing a general denial supported by a sworn affidavit stating the current or former officer or employee is not in possession, custody, or control of public information responsive to the request at issue.

(d) The attorney general shall send a copy of a petition filed under Subsection (c) to the requestor.

(e) A suit dismissed under Subsection (c)(3) is dismissed without prejudice and may be refiled by the attorney general if the current or former officer or employee, in providing the affidavit authorized under Subsection (c)(3), engaged in conduct that is an offense under Section 37.02 or 37.03, Penal Code, and is arrested, charged, or indicted for that offense. Subsection (c)(3) does not apply to a suit refiled under this subsection.

(f) For purposes of the application of Subchapter G to information surrendered or returned to a governmental body by a temporary custodian under Subsection (b) or as a result of a suit under Subsection (c), the governmental body is considered to receive the request for that information on the date the information is surrendered or returned to the governmental body.

(d) A governmental body, custodian, or officer for public information shall obtain possession, custody, or control of public information from a current or former officer or employee to the extent necessary to comply with the governmental body's obligations under this chapter to produce public information for inspection or copying. A governmental body, custodian, or officer for public information who fails to

No equivalent provision.

comply with this subsection may be included in a suit under Subsection (c).

SECTION 5. Section 552.321(a), Government Code, is amended to read as follows:

(a) A requestor or the attorney general may file suit for a writ of mandamus compelling a governmental body or its officer for public information to obtain and ~~[to]~~ make information available for public inspection if the governmental body or its officer for public information fails ~~[refuses]~~ to request an attorney general's decision as provided by Subchapter G, fails to promptly ~~[or refuses to]~~ supply public information, or fails to promptly supply information that the attorney general has determined is public information that is not excepted from disclosure under Subchapter C.

SECTION 6. The heading to Section 552.353, Government Code, is amended to read as follows:

Sec. 552.353. FAILURE OR REFUSAL OF OFFICER FOR PUBLIC INFORMATION OR CUSTODIAN TO PROVIDE ACCESS TO OR COPYING OF PUBLIC INFORMATION.

SECTION 7. Sections 552.353(a) and (b), Government Code, are amended to read as follows:

(a) An officer for public information, ~~[or]~~ the officer's agent, or the custodian of the records at issue commits an offense if, with criminal negligence, the officer, ~~[or]~~ the officer's agent, or the custodian fails or refuses to give access to, or to permit or provide copying of, public information to a requestor as provided by this chapter.

(b) It is an affirmative defense to prosecution under Subsection (a) that the officer for public information or the custodian reasonably believed that public access to the requested information was not required and that:

(1) the officer or custodian acted in reasonable reliance on a court order or a written interpretation of this chapter contained in an opinion of a court of record or of the attorney general issued under

No equivalent provision.

SECTION 4. The heading to Section 552.353, Government Code, is amended to read as follows:

Sec. 552.353. FAILURE OR REFUSAL OF OFFICER FOR PUBLIC INFORMATION OR TEMPORARY CUSTODIAN TO PROVIDE ACCESS TO OR COPYING OF PUBLIC INFORMATION.

SECTION 5. Section 552.353, Government Code, is amended by adding Subsection (a-1) to read as follows:

(a-1) A temporary custodian who has possession, custody, or control of public information responsive to a request commits an offense if, with criminal negligence, the temporary custodian fails to surrender or return the information to the governmental body on request of the officer for public information or the officer's agent, as required by Section 552.234(b).

No equivalent provision.

Subchapter G;

(2) the officer or custodian requested a decision from the attorney general in accordance with Subchapter G, and the decision is pending; or

(3) not later than the 10th calendar day after the date of receipt of a decision by the attorney general that the information is public, the officer, the custodian, or the governmental body for whom the defendant is the officer for public information filed a petition for a declaratory judgment against the attorney general in a Travis County district court seeking relief from compliance with the decision of the attorney general, as provided by Section 552.324, and the cause is pending.

SECTION 8. This Act takes effect September 1, 2015.

SECTION 6. Same as introduced version.