

SUBJECT: Disclosure exception for electronic communications of SOAH judges

COMMITTEE: State Affairs — favorable, without amendment

VOTE: 6 ayes — Swinford, Paxton, Christian, Flynn, Parker, Veasey
1 nay — Farrar
2 absent — Van Arsdale, B. Cook

SENATE VOTE: On final passage, March 14 — 30-0, on Local and Uncontested Calendar

WITNESSES: (*On House companion bill, HB 1077 by Rose:*)
For —None
Against —Ken Whalen, Texas Daily Newspaper Association, Texas Press Association
On — Shelia Bailey Taylor, State Office of Administrative Hearings; Cyrus Reed, Lone Star Chapter of Sierra Club

BACKGROUND: Government Code, ch. 2003 prescribes the duties and functions of the State Office of Administrative Hearings (SOAH), an agency that serves as an independent forum for the conduct of adjudicative hearings in the executive branch of government. The office may conduct, for a fee and under a contract, administrative hearings or mediations in matters referred voluntarily to the office by a governmental entity. More than 70 state agencies and local political subdivisions refer cases to SOAH, including the Texas Department of Public Safety, the Texas Commission on Environmental Quality, and the Public Utility Commission of Texas.

As part of the Public Information Act, Government Code, ch. 552, sec. 552.021 requires that public information be available to the public during the normal governmental body's business hours. Secs. 552.027 to 552.137 provide exceptions to the disclosure rule governing public information.

In an Open Records letter opinion, OR2002-5059, the attorney general determined that the records maintained by SOAH in connection with hearings on a permit application were public information because SOAH is not a court and contested case proceedings are not lawsuits. However, the opinion excepted from disclosure certain notes taken by the administrative law judge in connection with the hearing and the judge's draft proposal for deciding the case because they were "agency memoranda," under sec. 552.111.

The 78th Legislature in 2003 enacted SB 1147 by Shapleigh (sec. 552.144), which excepted from disclosure as public information the working papers of a SOAH administrative law judge, including notes recording the judge's observations, thoughts, or impressions; drafts of proposals for decision; drafts of orders made in connection with conducting contested case hearings; and drafts of orders made in connection with conducting alternative dispute resolution procedures.

DIGEST: SB 178 would amend Government Code, sec. 552.144 to except from disclosure under the Public Information Act the electronic communications of SOAH judges that recorded the judge's observations, thoughts, or impressions. The bill also would except from disclosure a judge's questions and deliberations represented in working papers or electronic communications.

The bill would take immediate effect if finally passed by a two-thirds record vote of the membership of each house. Otherwise, it would take effect September 1, 2007.

SUPPORTERS SAY: SB 178 exception for electronic communications would be in line with previous exceptions from disclosure for communications of SOAH judges. The bill's exception for electronic communications merely would include in the exceptions to disclosure the electronic versions of the notes of SOAH judges recording their observations, thoughts, and impressions. District court and other judges who also rule on complex issues with significant consequences already enjoy document privacy. However, SOAH judges perform their judicial function as part of a state agency subject to the Public Information Act, and current law remains unclear about whether communications on pending cases must be disclosed. SB 1147 in 2003 codified a sensible rule for administrative law judges that properly exempted from public disclosure a SOAH judge's working notes as well as drafts of orders and proposals for decisions on case hearings and

dispute resolutions. SB 178 would clarify that notes and e-mails containing questions and deliberations also would be exempted from disclosure.

OPPONENTS
SAY:

SB 178 would introduce more unneeded exemptions restricting the public's access to information. The attorney general has determined that notes and drafts prepared by administrative law judges are public information. Researchers and journalists should be able to access these documents after the conclusion of cases to improve public policy. For example, defendants offering large settlements in tire tread separation cases have required the sealing of evidence, a stipulation that has hindered government and parties injured by the defendants from researching the wrongdoers' conduct. Access to a judge's notes and draft decisions could provide an alternative for learning facts that otherwise would remain unknown. Allowing more exemptions only would further weaken the Public Information Act and create another hurdle for members of the public seeking access to information.