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BILL ANALYSIS



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Senate Bill 85
Sponsor: Senator William Van Regenmorter
Committee: Judiciary

Date Completed: 2-6-95

SUMMARY OF SENATE BILL 85 as introduced 1-17-95:

The bill would add Chapter VIIA to the Code of Criminal Procedure to allow a prosecuting attorney to issue an investigative demand that would compel a person to appear and testify, if the prosecutor were investigating a crime punishable by imprisonment for life, a felony drug offense, breaking and entering, joyriding, unauthorized use of a motor vehicle, or a chop shop offense; provide that witnesses would be entitled to legal counsel; require the provision of testimony to defendants; provide for immunity for witnesses; generally prohibit the disclosure of testimony or exhibits obtained or used during inquiries conducted under the bill; and prescribe penalties for contempt and perjury.

Investigative Demand

The bill would allow a prosecuting attorney (the Attorney General or the prosecuting attorney for a county) to issue an investigative demand for a person to appear and testify under oath before the prosecuting attorney if the prosecutor were investigating a crime described above, within his or her jurisdiction, and the prosecutor had probable cause to believe the person could provide relevant evidence regarding that crime. A person served with an investigative demand would have to appear before the prosecuting attorney and answer questions concerning the crime under investigation. An investigative demand also could require a person to produce any book, record, paper, document, or thing related to the investigation. During the examination of documentary material pursuant to an investigative demand, the prosecuting attorney could require any person having knowledge of the documentary material, or any matter contained it, to attend and give testimony under oath or acknowledgment with respect to the material.

An investigative demand would have the same force, and would have to be obeyed in the same manner, as a subpoena issued by the clerk of the court or by a magistrate. An investigative demand would have to do all of the following:

- State the time and place for the taking of testimony or the examination, and the name and, if known, the address, of the person to be examined. If the name of the person were not known, the notice would have to give a general description sufficient to identify the person or the particular class or group to which the person belonged.
- Refer to the bill's provisions concerning an investigative demand and the general subject matter under investigation.
- Describe any documentary material to be produced with reasonable specificity so as to indicate fairly the material demanded.
- Prescribe a return date within which the documentary material would have to be produced.

- Identify the members of the prosecuting attorney's staff to whom the documentary material would have to be made available.
- State that the person to be examined had the right to have legal counsel present at all times.

An investigative demand would have to be served in the manner provided and subject to the provisions that apply to service of process upon a defendant in a civil action commenced in the circuit court. An investigative demand would have to be served not less than five days before the date of the taking of testimony or examination unless, for good cause shown, the circuit court shortened the period of time.

A prosecuting attorney could petition for an order to force compliance with an investigative demand and notice served pursuant to the bill. The petition would have to be filed in the circuit court of the county having jurisdiction over the crime under investigation.

At any time before the date specified in the subpoena and notice, upon motion and for good cause shown, the chief judge of the circuit court could extend the reporting date, or modify or set aside the notice and investigative demand.

Witnesses/Testimony

A prosecuting attorney could administer oaths and affirmations, in the manner prescribed by law, to witnesses who appeared before him or her to testify in a matter being investigated pursuant to the bill.

A witness at all times would be entitled to legal counsel not involving delay. Further, a witness could discuss fully with his or her legal counsel any matter relating to the witness's part in the inquiry without being subject to citation for contempt. The witness would have the right to have legal counsel present in the room in which the inquiry was being held.

If a criminal charge were filed by the prosecuting attorney based upon information obtained pursuant to the bill, upon the defendant's motion made within 20 days after the defendant was arraigned on the charge, the trial judge would have to require the prosecuting attorney to furnish to the defendant the testimony the defendant gave regarding the crime with which he or she was charged. The court also could direct the prosecuting attorney to give the defendant the testimony that any witness who would be testifying at the trial gave to the prosecuting attorney regarding that crime, except those portions that were irrelevant or immaterial, or that were excluded for other good cause shown. If the defendant requested the testimony of a witness and the trial judge directed the prosecuting attorney to give a copy of it to the defendant, the prosecuting attorney would have to furnish the copy not later than 10 days before the trial. If the prosecuting attorney failed or refused to give a copy of the witness's testimony to the defendant, the prosecuting attorney would be barred from calling that witness to testify at the defendant's trial. If the trial judge had not directed the prosecuting attorney to give a copy of a witness's testimony to the defendant before trial, the prosecuting attorney, upon the defendant's request, would have to furnish a copy of that testimony to the defendant after direct examination of that witness at trial had been completed.

Immunity

A prosecuting attorney could apply to the chief judge of the circuit court for an order granting immunity to any person, designated by name and address in the application, whom the prosecuting attorney intended to require to give testimony concerning any matter under investigation pursuant to the bill. The application would have to be accompanied by a verified petition of the prosecuting

attorney setting forth the facts upon which the application was based. If the judge were satisfied that it was in the interest of justice that immunity be granted, he or she would have to enter an order granting immunity to the person if the person appeared before the prosecuting attorney and testified under oath concerning any matter under investigation and set forth in the prosecutor's petition.

A true copy of an order granting immunity would have to be delivered to the person before he or she answered any questions asked by the prosecuting attorney. The immunity order would extend to all related questions asked of the person. No testimony or other information compelled under the order, or any information directly or indirectly derived from that testimony or other information, could be used against the person in any criminal case, except for impeachment purposes, a prosecution for perjury, or otherwise failing to comply with the order granting immunity.

An order granting immunity to a person would continue in effect until the judge or his or her successor, in his or her discretion and upon application by the prosecuting attorney, entered an order terminating the order granting immunity as to questions asked of the person, and the prosecuting attorney advised the witness of the order of termination.

A person granted immunity could have legal counsel present whenever he or she was being questioned concerning any matter included within the order granting immunity.

Disclosure

Except as otherwise provided by law, a person would be prohibited from disclosing to any other person any testimony or exhibit obtained or used, or any proceeding conducted, in connection with an inquiry conducted under the bill. A person who violated these provisions would be guilty of a misdemeanor punishable by imprisonment for up to one year, or by a fine of up to \$1,000, or both. These nondisclosure provisions would apply to an application or petition for immunity, an order of immunity, or a transcript of testimony delivered to a witness pursuant to a grant of immunity, except that the witness could disclose the application, petition, order, or transcript to his or her attorney. These nondisclosure provisions, however, would not apply to communications between prosecuting authorities for the purpose of reviewing evidence for prospective prosecution, or between prosecuting authorities and other law enforcement agencies for any other purpose involving the execution of a public duty.

Documentary material and other information obtained by a prosecuting attorney pursuant to an investigation under the bill would be confidential. It would not be available for public inspection or copying and could not be divulged to any person except as otherwise provided in the bill. Material and information obtained under the bill would be exempt from disclosure under the Freedom of Information Act.

A reporter or other person who was involved in the gathering or preparation of news for broadcast or publication would not be required to disclose the identity of an informant, or any unpublished matter or documentation, in whatever manner recorded, relating to a communication with an informant, in any inquiry conducted under the bill, unless all of the following circumstances existed:

- The inquiry was for a crime punishable by imprisonment for life.
- The prosecuting attorney established that the information was essential to the purpose of the inquiry.
- Other available sources for the information had been exhausted.

A communication between an attorney and his or her client, between a member of the clergy and a member of his or her respective church, or between a physician and his or her patient would be privileged and confidential if the communication were necessary to enable the attorney, member of the clergy, or physician to serve in that capacity.

Penalties

A witness would be guilty of contempt if he or she neglected or refused to appear to testify in response to an investigative demand issued by a prosecuting attorney, or to answer any question concerning any matter or thing of which he or she had knowledge concerning a matter under investigation after he or she was served with a true copy of an order granting the witness immunity as to that matter. A witness who neglected or refused to appear in response to a subpoena and notice, or neglected or refused to answer any proper question the chief judge of the circuit court considered relevant to an inquiry under the bill, also would be guilty of contempt. Contempt would be punishable by imprisonment for up to one year, a fine up to \$10,000, or both. If the witness appeared before the court to purge himself or herself of that contempt, he or she would have to be allowed to appear before the prosecuting attorney to answer any proper question concerning the matter under investigation. After an appearance and upon transcript of the testimony, the witness would have to be brought before the court, which after examination, would have to determine whether the witness had purged himself or herself of the contempt. The court would have to commute the sentence if it found that the witness had purged himself or herself.

A person who willfully swore falsely under oath in an examination conducted pursuant to the bill would be guilty of perjury, punishable by imprisonment:

- For life or for any term of years, if the perjury were committed during the investigation of a crime punishable by imprisonment for life.
- In the State prison for up to 15 years, if the perjury were committed in a case other than an investigation of a crime punishable by imprisonment for life.

Legislative Analyst: P. Affholter

FISCAL IMPACT

The bill would have an indeterminate fiscal impact. Costs and savings would depend on the frequency and success of investigative demands. Costs would include the issuance of demands, enforcement of contempt provisions, and legal counsel for indigents (if required). Savings could result from reduced investigative costs and a reduced need for grand juries.

Fiscal Analyst: B. Bowerman

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.