

SUBJECT: Restricting the release of personnel records of commissioned DPS officers

COMMITTEE: Law Enforcement — committee substitute recommended

VOTE: 6 ayes — Driver, Latham, Allen, Frost, Ortiz, West

0 nays

1 absent — Vo

WITNESSES: For — Jason Hester, Department of Public Safety Officers Association;
(*Registered, but did not testify*: Tom Gaylor, Texas Municipal Police
Association; Chris Jones, Combined Law Enforcement Association of
Texas)

Against — David Gonzalez, Texas Criminal Defense Lawyers
Association; (*Registered, but did not testify*: Dominic Gonzales, Texas
Criminal Justice Coalition)

On — Paula Logan, Texas Department of Public Safety

BACKGROUND: Personnel files maintained by the Department of Public Safety (DPS) are
subject to open records requests under the Texas Public Information Act
(Government Code, ch. 552).

Government Code, sec. 411.0072(a)(1) defines “disciplinary action” as
discharge, suspension, or demotion. Sec. 411.007(f) instructs the Public
Safety Commission to establish necessary policies and procedures for the
appointment, promotion, reduction, suspension, and discharge of all
employees. A discharged officer or employee is entitled to a public
hearing before the commission, which affirms or sets aside the discharge
on the basis of the evidence presented.

DIGEST: CSHB 1422 would add Government Code, sec. 411.00755 to prohibit
DPS, in response to an open records request or otherwise, from disclosing
or making available personnel records of commissioned officers with the
exception of:

- any letter, memorandum, or document relating to a commendation, congratulation, or honor bestowed on the officer for an action, duty, or activity that related to the officer's official duties;
- a letter, memorandum, or document relating to misconduct that resulted in disciplinary action;
- the state employment application submitted by the officer, excluding attachments;
- the officer's reference letters, letters of recommendation, and employment contract;
- periodic evaluations of the officer by a supervisor and documents recording a promotion or demotion;
- requests for leave or requests for transfer of shift or duty assignment;
- documents presented at a public hearing held by the Public Safety Commission related to an officer's appointment, promotion, reduction, suspension, or discharge ;
- the officer's name, age, dates of employment, positions held, and gross salary; and
- information about the location of the officer's department duty assignments.

Information subject to release could be exempted from required disclosure by future statutory amendments.

DPS would be charged with releasing any personnel records of commissioned officers if such records were:

- requested as part of a subpoena or court order, including a discovery order;
- for use by the DPS in an administrative hearing; or
- provided with the written consent of the subject officer.

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:**

CSHB 1422 would protect the professional credibility and integrity of DPS officers who testify in court by restricting access to certain information in their personnel files.

Commissioned DPS officers perform numerous law enforcement services, including traffic enforcement, border security, counterterrorism activities, narcotics investigations, and other criminal investigations. These enforcement activities result in thousands of arrests and convictions each year in Texas and frequently require officers involved in these cases to testify in court. A defense attorney or public defender can file discovery orders for review by a court to retrieve an officer's personnel file relevant to a trial. Courts are empowered to determine which types of materials are germane to the case at hand and call for their release.

In addition, the Texas Public Information Act allows individuals to submit requests for information to governmental agencies and departments. Public attorneys and defenders often use open records requests to obtain a variety of information from personnel files about DPS officers who testify in court. DPS has rigorous application and hiring guidelines for officers. As such, personnel files can contain a variety of documents, including school transcripts, financial information, family information, the results of background checks, polygraph test results, driving records, any documents or letters containing a complaint against the officer, and many other documents that are required for employment or accumulate over time. Such records can be used to discredit or embarrass officers testifying in court, including documents that have no bearing on the case at hand. For example, school transcripts, written complaints about unrelated incidents, reference letters, and other personal and family information can be obtained by a defense team and presented in court in an attempt to create a false impression of an officer's incompetence or unreliability.

CSHB 1422 would address this vulnerability by establishing standards for which an officer's personnel documents could be released. The bill would require the release of documents relevant to the officer's professional performance, such as any documentary materials related to honors or commendations awarded the officer or documentation of any misconduct that resulted in disciplinary action. Distinguishing between personnel materials that had public pertinence and those that were personal and private would protect officers on the witness stand from common and conspicuous examples of character abuse and enhance the state's ability to successfully prosecute criminals.

Law enforcement officers are a special class of public employee because they are subject to an unusual degree of personal and professional scrutiny through their employment. Many municipalities in Texas recognize this

distinction and have adopted civil service agreements that regulate which fire and police officer personnel documents are subject to release as public information. CSHB 1422 would extend this protection offered by many of Texas' largest municipalities to commissioned DPS officers. The bill would set forth a more expansive list of personnel materials to be released than is required by local civil service agreements.

The bill would balance the value of open records and public information with protection of law enforcement officers. Professionally relevant documents would be summarily released upon request, and all personnel materials would be subject to disclosure under subpoena or a discovery order from a court or by the officer's written permission. Creating separate public and private personnel folders for DPS officers would not curtail the availability of public information, but appropriately would restrict disclosed information to that which is professionally relevant or germane to cases that involve the officer.

The disclosure restrictions established by the bill would be adopted as part of the legislative process and as such would be sanctioned by the public indirectly through their elected representatives. Any necessary amendments could be adopted in the future through similar legislative processes.

**OPPONENTS
SAY:**

The ability to access open records and other information about public employees is critical to democratic governance. The Public Information Act states that public servants do not have the privilege of determining what the people ought to know and what ought to be kept secret. Any erosion of the public's ability to access information about public servants, including law enforcement officers, should be permitted only if absolutely necessary for the maintenance of law and order.

CSHB 1422 would deny the release of important records that might be germane to public investigations or reporting but were not egregious enough to fit in the bill's narrow definition of "disciplinary action." Complaints do not always result in discharge, suspension, or demotion. Frequently, sustained complaints lead to some lesser form of punishment, such as a written reprimand, forced reassignment, mandatory counseling, restricted overtime, or other results that do not technically qualify as disciplinary action. The bill summarily would exclude these documents that could be relevant to the purpose of an open records request.

The only real recourse the bill would provide to acquire personnel documents that were not specifically listed as subject to release would be a court subpoena or a discovery order. This would place a lot of power in the hands of courts to decide what documents were relevant to a case. It also would provide very limited options for public information requests conducted as part of investigative reporting or other legitimate purposes not directly related to court proceedings. Important information about an officer's professional history would be denied with no clear means of gaining access except by the officer's written consent, which he or she would have little incentive to grant.

Civil service agreements under Local Government Code, ch. 143 require a public vote to be adopted. A public vote in this case is an expression of popular will regarding what types of information the public deems it should be able to access. CSHB 1422 would codify an important restriction on public information by means of a statutory amendment. It would establish no process enabling the public to support or refute a restriction on the accessibility of information.

CSHB 1422 would establish restrictions on access to public information that are not sufficiently warranted by circumstance. The vast majority of municipal and county law enforcement departments in Texas — more than 2,400 in total — do not have civil service agreements. Only 73 municipalities have records restriction policies in place through civil service agreements, and many of these were established before the restrictions on personnel records were added. The restrictions proposed in CSHB 1422 would apply only to DPS commissioned officers. If protection from public access to records were really so important, then the restrictions should apply to all other state enforcement officers, and perhaps to all state employees.

NOTES:

The committee substitute modified language in the original bill to require DPS to release certain elements of an officer's personnel file in response to an open records request. The substitute also would require the release of documents related to misconduct that resulted in disciplinary action, rather than "department decisions on the merits of any written complaint against the officer," as in the original. Finally, the substitute would require the release of following materials:

- documents related to honors and commendations;
- the officer's state employment application, excluding attachments;

- reference letters, letters of recommendation, and the officer's employment contract;
- periodic evaluations by a supervisor, and documents recording a promotion or demotion; and
- any requests for leave or requests for transfers of shift or duty assignment.

The companion bill, SB 740 by Whitmire, passed the Senate on the Local and Uncontested Calendar on April 12 and was reported favorably, without amendment, the House Law Enforcement Committee on April 16, making it eligible to be considered in lieu of HB 1422.