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H.B. No. 4267

A BILL TO BE ENTITLED

AN ACT

relating to the Texas Free Enterprise and Antitrust Act of 1983.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Section 15.03, Business & Commerce Code, is amended by adding Subdivision (2-a) to read as follows:

(2-a) The term "investigative file" means any documentary materials or information collected, assembled, or maintained by or on behalf of the attorney general with respect to an investigation or litigation conducted under this chapter. The term includes:

(A) interagency or intra-agency communications or memoranda;

(B) notes;

(C) reports;

(D) products of discovery;

(E) records of internal or external meetings;

(F) civil investigative demands; and

(G) other documents and communications with the attorney general that are relevant to the investigation or litigation.

SECTION 2. Section 15.10, Business & Commerce Code, is amended by amending Subsections (b), (c), (e), (g), (h), (i), and (k) to read as follows:

(b) Authority to Issue Demand. Whenever the attorney

1 general has reason to believe that any person may be in possession,
2 custody, or control of any documentary material or may have any
3 information relevant to a civil antitrust investigation, the
4 attorney general may, prior to the institution of a civil
5 proceeding, issue in writing and serve upon such person a civil
6 investigative demand requiring the person to produce or make
7 available such documentary material for inspection and copying, to
8 answer in writing written interrogatories, to give oral testimony,
9 or to provide any combination of such material, answers, and
10 testimony; provided, however, that the attorney general may not
11 issue and serve a demand for documentary material upon a
12 proprietorship or partnership whose annual gross income does not
13 exceed \$5 million.

14 (c) Contents of Demand.

15 (1) Each demand shall describe the nature of the
16 activities that are the subject of the investigation and shall set
17 forth each statute and section of that statute that may have been or
18 may be violated as a result of such activities. Each demand shall
19 advise the person upon whom the demand is to be served that
20 objections [~~the person has the right to object~~] to the demand may be
21 made in accordance with [~~as provided for in~~] this chapter
22 [~~section~~].

23 (2) Each demand for production of documentary material
24 shall:

25 (A) describe the class or classes of material to
26 be produced with reasonable specificity so that the material
27 demanded is fairly identified;

1 (B) prescribe a return date or dates which will
2 provide a reasonable period of time within which the material is to
3 be produced; and

4 (C) identify the individual or individuals
5 acting on behalf of the attorney general to whom the material is to
6 be produced or made available for inspection and copying.

7 (3) Each demand for answers to written interrogatories
8 shall:

9 (A) propound the interrogatories with
10 definiteness and certainty;

11 (B) prescribe a date or dates by which answers to
12 interrogatories shall be submitted; and

13 (C) identify the individual or individuals
14 acting on behalf of the attorney general to whom the answers should
15 be submitted.

16 (4) Each demand for the giving of oral testimony
17 shall:

18 (A) prescribe a reasonable date, time, and place
19 at which the testimony shall begin; and

20 (B) identify the individual or individuals
21 acting on behalf of the attorney general who will conduct the
22 examination.

23 (5) No demand for any product of discovery may be
24 returned until 20 days after the attorney general serves a copy of
25 the demand upon the person from whom the discovery was obtained.

26 (e) Service; Proof of Service.

27 (1) Service of any demand or of any petition filed

1 under Subsection (f) or (h) of this section may be made upon any
2 natural person by delivering a duly executed copy of the demand or
3 petition to the person to be served or by mailing such copy by
4 registered or certified mail, return receipt requested, to such
5 person at his or her residence or principal office or place of
6 business.

7 (2) Service of any demand or of any petition filed
8 under Subsection (f) or (h) of this section may be made upon any
9 person other than a natural person by delivering a duly executed
10 copy of the demand or petition to a person to whom delivery would be
11 appropriate under state law if the demand or petition were process
12 in a civil suit.

13 (3) A verified return by the individual serving any
14 demand or any petition filed under Subsection (f) or (h) setting
15 forth the manner of service shall be proof of such service. In the
16 case of service by registered or certified mail, the return shall be
17 accompanied by the return post office receipt of delivery of the
18 demand or petition.

19 (4) Service of any demand may be made upon any person
20 by e-mail or other electronic means if the person being served has
21 consented to the electronic service in writing. Electronic service
22 is complete upon sending, but electronic service is not effective
23 if the attorney general learns that the demand did not actually
24 reach the person to be served. Written confirmation of receipt
25 through electronic service by the person being served constitutes
26 proof of the service.

27 (g) Compliance With Demand.

1 (1) A person on whom a demand is served shall comply
2 with the terms of the demand unless otherwise provided by court
3 order.

4 (2) The time for compliance with the demand in whole or
5 in part shall not run during the pendency of any petition filed
6 under Subsection (f) of this section; provided, however, that the
7 petitioner shall comply with any portions of the demand not sought
8 to be modified or set aside.

9 (3) Documentary Material.

10 (A) Any person upon whom any demand for the
11 production of documentary material has been duly served under this
12 section shall produce or make such material available to the
13 attorney general for inspection and copying during normal business
14 hours on the return date specified in the demand at the person's
15 principal office or place of business or as otherwise may be agreed
16 upon by the person and the attorney general. The attorney general
17 shall bear the expense of any copying. The person may substitute
18 copies for originals of all or part of the requested documents so
19 long as the originals are made available for inspection. The person
20 shall indicate in writing which if any of the documents produced
21 contain trade secrets or confidential information.

22 (B) The production of documentary material in
23 response to any demand shall be made under a sworn certificate in
24 such form as the demand designates by a natural person having
25 knowledge of the facts and circumstances relating to such
26 production to the effect that all of the requested material in the
27 possession, custody, or control of the person to whom the demand is

1 directed has been produced.

2 (4) Interrogatories.

3 (A) Each interrogatory in any demand duly served
4 under this section shall be answered separately and fully in
5 writing, unless it is objected to, in which case the basis for the
6 objection shall be set forth in lieu of an answer. The person shall
7 indicate in writing which if any of the answers contain trade
8 secrets or confidential information.

9 (B) Answers to interrogatories shall be
10 submitted under a sworn certificate in such form as the related
11 demand designates by a natural person having knowledge of the facts
12 and circumstances relating to the preparation of the answers to the
13 effect that all of the requested information in the possession,
14 custody, control, or knowledge of the person to whom the demand is
15 directed has been set forth fully and accurately.

16 (5) Oral Examination.

17 (A) The examination of any person pursuant to a
18 demand for oral testimony duly served under this section shall be
19 taken before any person authorized to administer oaths and
20 affirmations by the laws of Texas or the United States. The person
21 before whom the testimony is to be taken shall put the witness on
22 oath or affirmation and shall personally or by someone acting under
23 his or her direction and in his or her presence record the witness's
24 testimony. At the expense of the attorney general, the testimony
25 shall be taken stenographically and may be transcribed.

26 (B) The oral testimony of any person taken
27 pursuant to a demand served under this section shall be taken in the

1 county where the person resides, is found, transacts business, or
2 in such other place as may be agreed upon by the person and the
3 attorney general.

4 (C) Any person compelled to appear under a demand
5 for oral testimony under this section may be accompanied,
6 represented, and advised by counsel. Counsel may advise such
7 person in confidence, either upon the request of such person or upon
8 counsel's own initiative, with respect to any question arising in
9 connection with the examination.

10 (D) The individual conducting the examination on
11 behalf of the attorney general shall exclude from the place of
12 examination all other persons except the person being examined, the
13 person's counsel, the counsel of the person to whom the demand has
14 been issued, the person before whom the testimony is to be taken,
15 any stenographer taking the testimony, and any persons assisting
16 the individual conducting the examination.

17 (E) During the examination, the person being
18 examined or his or her counsel may object on the record to any
19 question, in whole or in part, and shall briefly state for the
20 record the reason for the objection. An objection may properly be
21 made, received, and entered upon the record when it is claimed that
22 such person is entitled to refuse to answer the question on grounds
23 of any constitutional or other legal right or privilege, including
24 the privilege against self-incrimination. Neither such person nor
25 his or her counsel shall otherwise object to or refuse to answer any
26 question or interrupt the oral examination. If the person refuses
27 to answer any question, the attorney general may petition the

1 district court in the county where the examination is being
2 conducted for an order compelling the person to answer the
3 question.

4 (F) If and when the testimony has been fully
5 transcribed, the person before whom the testimony was taken shall
6 promptly transmit the transcript of the testimony to the witness
7 and a copy of the transcript to the attorney general. The witness
8 shall have a reasonable opportunity to examine the transcript and
9 make any changes in form or substance accompanied by a statement of
10 the reasons for such changes. The witness shall then sign and
11 return the transcript, unless he or she is ill, cannot be found,
12 refuses to sign, or in writing waives the signing. If the witness
13 does not sign the transcript within 15 days of receiving it, the
14 person before whom the testimony has been given shall sign it and
15 state on the record the reason, if known, for the witness's failure
16 to sign. The officer shall then certify on the transcript that the
17 witness was duly sworn and that the transcript is a true record of
18 the testimony given by the witness and promptly transmit a copy of
19 the certified transcript to the attorney general.

20 (G) Upon request, the attorney general shall
21 furnish a copy of the certified transcript to the witness.

22 (H) The witness shall be entitled to the same
23 fees and mileage that are paid to witnesses in the district courts
24 of Texas.

25 (h) Failure To Comply With Demand.

26 (1) Petition for Enforcement. Whenever any person
27 fails to comply with any demand duly served on such person under

1 this section, the attorney general may file in the district court in
2 Travis County or in the county in which the person resides, is
3 found, or transacts business and serve on the person a petition for
4 an order of the court for enforcement of this section. [~~If the~~
5 ~~person transacts business in more than one county, the petition~~
6 ~~shall be filed in the county of the person's principal office or~~
7 ~~place of business in the state or in any other county as may be~~
8 ~~agreed upon by the person and the attorney general.~~]

9 (2) Deliberate Noncompliance. Any person, who, with
10 intent to avoid, evade, or prevent compliance in whole or part with
11 a demand issued under this section, removes from any place,
12 conceals, withholds, destroys, mutilates, alters, or by any other
13 means falsifies any documentary material or otherwise provides
14 inaccurate information is guilty of a misdemeanor and on conviction
15 is punishable by a fine of not more than \$5,000 or by confinement in
16 county jail for not more than one year or by both.

17 (i) Disclosure and Use of Material and Information.

18 (1) No [~~Except as provided in this section or ordered~~
19 ~~by a court for good cause shown, no~~] documentary material, answers
20 to interrogatories, or transcripts of oral testimony, or copies or
21 contents thereof, shall be available for examination or used by any
22 person other than by an authorized official, employee, or agent of
23 the attorney general, except:

24 (A) by court order for good cause shown;

25 (B) with [~~without~~] the consent of:

26 (i) the person who produced the material,
27 answers, or testimony; and

1 (ii) [~~7~~] in the case of any product of
2 discovery, [~~of~~] the person from whom the discovery was obtained;

3 (C) to an agency of this state, the United
4 States, or another state or territory for official law enforcement
5 purposes; or

6 (D) as provided elsewhere in this section.

7 (2) The attorney general may make available for
8 inspection or prepare copies of documentary material, answers to
9 interrogatories, or transcripts of oral testimony in his or her
10 possession as he or she determines may be required by the state in
11 the course of any investigation or a judicial proceeding in which
12 the state is a party.

13 (3) The attorney general may make available for
14 inspection or prepare copies of documentary material, answers to
15 interrogatories, or transcripts of oral testimony in his or her
16 possession as he or she determines may be required for official use
17 by any officer of the State of Texas, [~~or of~~] the United States, or
18 another state or territory charged with the enforcement of the laws
19 of the State of Texas, [~~or~~] the United States, or that state or
20 territory, as applicable; provided that any material disclosed
21 under this subsection may not be used for criminal law enforcement
22 purposes.

23 (3-a) The attorney general may make available for
24 inspection or prepare copies of documentary material, answers to
25 interrogatories, or transcripts of oral testimony in the attorney
26 general's possession as may be required for official use by any
27 authorized official, employee, or agent of the attorney general.

1 (4) Upon request, the attorney general shall make
2 available copies of documentary material, answers to
3 interrogatories, and transcripts of oral testimony for inspection
4 by the person who produced such material or information and, in the
5 case of a product of discovery, the person from whom the discovery
6 was obtained or by any duly authorized representative of the
7 person, including his or her counsel.

8 (5) Not later than 15 days prior to making public
9 [~~disclosing~~] any documentary material or answers to written
10 interrogatories designated as containing trade secrets or
11 confidential information under this subsection, the attorney
12 general shall notify the person who produced the material of the
13 attorney general's intent to make the information public [~~such~~
14 ~~disclosure~~]. The person who produced the documentary material or
15 answers to written interrogatories may petition a district court in
16 any county of this state in which the person resides, does business,
17 or maintains its principal office for a protective order limiting
18 the terms under which the attorney general may use the [~~disclose~~
19 ~~such~~] trade secrets or confidential information in public,
20 including in public court filings.

21 (6) Upon written request, the attorney general shall
22 return documentary material produced under this section in
23 connection with an antitrust investigation to the person who
24 produced it whenever:

25 (A) any case or proceeding before any court
26 arising out of the investigation has been completed; or

27 (B) the attorney general has decided after

1 completing an examination and analysis of such material not to
2 institute any case or proceeding before a court in connection with
3 the investigation.

4 (k) Nonexclusive Procedures. Nothing in this section shall
5 preclude the attorney general from using procedures not specified
6 in the section in conducting an antitrust investigation; provided,
7 however, that in conducting such an investigation, the attorney
8 general shall use the procedures set forth in this section in lieu
9 of those set forth in Article 1302-5.01 through Article 1302-5.06,
10 Texas Miscellaneous Corporation Laws Act. Information, documentary
11 materials, and communication with the attorney general provided
12 under a procedure not specified in this section is confidential but
13 may be used in a judicial proceeding at the attorney general's
14 discretion.

15 SECTION 3. Section 15.12, Business & Commerce Code, is
16 amended to read as follows:

17 Sec. 15.12. ADDITIONAL PROCEDURES. (a) In addition to the
18 procedures set forth in this subchapter, the attorney general and
19 any other party to a suit brought by the attorney general to enforce
20 any of the prohibitions in Section 15.05 of this Act may request
21 discovery and production of documents and other things, serve
22 written interrogatories, and subpoena and depose witnesses in
23 accordance with the applicable provisions of the Texas Rules of
24 Civil Procedure and other state law relating to discovery.

25 (b) Documents and other information discovered or produced
26 under Subsection (a) are confidential.

27 SECTION 4. Subchapter B, Chapter 15, Business & Commerce

1 Code, is amended by adding Section 15.14 to read as follows:

2 Sec. 15.14. CONFIDENTIALITY OF INVESTIGATIVE FILES AND
3 OTHER INFORMATION. The attorney general's investigative file,
4 wholly or partly, and any other information or documentary material
5 provided to the attorney general under this chapter are
6 confidential and not subject to disclosure under Chapter 552,
7 Government Code.

8 SECTION 5. The changes in law made by this Act apply only to
9 a cause of action that accrues on or after the effective date of
10 this Act. A cause of action that accrues before the effective date
11 of this Act is governed by the law applicable to the cause of action
12 immediately before that date, and that law is continued in effect
13 for that purpose.

14 SECTION 6. This Act takes effect September 1, 2021.