

BILL ANALYSIS

Senate Research Center

S.B. 295
By: Perry
Jurisprudence
6/14/2021
Enrolled

AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

Currently when a survivor of sexual assault visits a crisis center, the communications between an advocate and a survivor can be subject to disclosure. During these sessions, survivors often discuss very private and traumatic experiences and the lack of assurance that these conversations will remain confidential often prevents survivors from fully disclosing the trauma they experienced.

The proposed legislation amends Chapter 420 of the Government Code to provide that any communication or record that is made during the course of a survivor seeking assistance from an advocate shall be kept confidential.

(Original Author's/Sponsor's Statement of Intent)

S.B. 295 amends current law relating to the confidential and privileged communications and records of victims of certain sexual assault offenses.

RULEMAKING AUTHORITY

This bill does not expressly grant any additional rulemaking authority to a state officer, institution, or agency.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends the heading to Subchapter D, Chapter 420, Government Code, to read as follows:

SUBCHAPTER D. CONFIDENTIAL COMMUNICATIONS AND RECORDS

SECTION 2. Amends the heading to Section 420.071, Government Code, to read as follows:

Sec. 420.071. CONFIDENTIAL COMMUNICATIONS AND RECORDS; PRIVILEGE.

SECTION 3. Amends Section 420.071, Government Code, by amending Subsections (a), (b), and (c) and adding Subsection (c-1), as follows:

(a) Provides that any communication, including an oral or written communication, between an advocate and a survivor of certain sexual assault offenses that is made in the course of advising, counseling, or assisting the survivor, rather than in the course of providing sexual assault advocacy services to the survivor, is confidential. Deletes existing text providing that a communication between an advocate and a person claiming to be a survivor is confidential and is prohibited from being disclosed except as provided by Subchapter D. Makes a nonsubstantive change.

(b) Provides that any record created by, provided to, or maintained by an advocate is confidential if the record relates to the services provided to a survivor or contains the identity, personal history, or background information of the survivor or information concerning the victimization of the survivor. Deletes existing text providing that information concerning the victimization of a survivor that is created by or provided to an advocate or maintained by a sexual assault program is confidential and is prohibited from being disclosed except as provided by Subchapter D. Makes nonsubstantive changes.

(c) Provides that in any civil, criminal, administrative, or legislative proceeding, subject to Section 420.072, a survivor has a privilege to refuse to disclose and to prevent another from disclosing, for any purpose, a communication or record that is confidential under this section. Deletes existing text prohibiting a person who receives information from a confidential communication or record described by Subchapter D from disclosing that information except to the extent that the disclosure is consistent with the authorized purposes for which the information was obtained.

(c-1) Provides that, except as provided by this subsection, the unauthorized disclosure of a portion of a confidential communication or record does not constitute a waiver of the privilege provided by Subsection (c). Authorizes a party to the relevant court or administrative proceeding, if a portion of a confidential communication or record is disclosed, to make a motion requesting that the privilege be waived with respect to the disclosed portion. Authorizes the court or administrative hearing officer, as applicable, to determine that the privilege has been waived only if the disclosed portion is relevant to a disputed matter at the proceeding, and if a waiver is necessary for a witness to be able to respond to questioning concerning the disclosed portion.

SECTION 4. Amends Section 420.072, Government Code, as follows:

Sec. 420.072. New heading: DISCLOSURE OF CONFIDENTIAL COMMUNICATION OR RECORD. (a) Authorizes a communication or record that is confidential under Section 420.071 to only be disclosed if:

- (1) the communication or record is relevant to the claims or defense of an advocate or sexual assault program in the proceeding brought by the survivor against the advocate or program;
- (2) the survivor has waived the privilege established under Section 420.071(c) with respect to the communication or record;
- (3) creates this subdivision from existing text and makes a nonsubstantive change;
- (4) an advocate determines that, unless the disclosure is made, there is a probability of imminent physical danger to any person or of immediate mental or emotional injury to the survivor;
- (5) the disclosure is necessary to comply with Chapter 261 (Investigation of Report of Child Abuse or Neglect), Family Code, or Chapter 48 (Investigations and Protective Services for Elderly Persons and Persons With Disabilities), Human Resources Code, or is necessary for a management audit, a financial audit, a program evaluation, or research, except that a report of the audit, evaluation, or research is prohibited from directly or indirectly identifying a survivor;
- (6) the disclosure is made to an employee or volunteer of the sexual assault program after an advocate or person under the supervision of a counseling supervisor who is participating in the evaluation or counseling of or the provision of services to, rather than advocacy for, the survivor determines that the disclosure is necessary to facilitate the provision of services to the survivor; or
- (7) the communication or record is in the possession, custody, or control of the state and a court, after conducting an in camera review of the communication or record, determines the communication or record is exculpatory, provided that the disclosure is limited to the specific portion of the communication or record that was determined to be exculpatory in relation to a defendant in a criminal case.

Makes conforming and nonsubstantive changes.

(b) Prohibits a person from disclosing a communication or record that is confidential under Section 420.071 to a parent or legal guardian of a survivor who

is a minor or to certain appointed guardians of an adult survivor, regardless of whether written consent has been given by a parent or legal guardian under Section 420.073(a) (relating to consent for the release of confidential information other than evidence contained in an evidence collection kit) if the person knows or has any reason to believe that the parent or guardian is a suspect or accomplice in the sexual assault of the survivor. Makes conforming and nonsubstantive changes.

(c) Provides that the Texas Rules of Evidence, notwithstanding Subsections (a) and (b), govern the disclosure of a communication or record that is confidential under Section 420.071 in a criminal or civil proceeding by an expert witness who relies on facts or data from the communication or record to form the basis of the expert's opinion.

SECTION 5. Amends Section 420.074, Government Code, as follows:

Sec. 420.074. New heading: DISCLOSURE OF PRIVILEGED COMMUNICATIONS OR OTHER INFORMATION IN CRIMINAL PROCEEDING. (a) Authorizes a defendant in a criminal proceeding, subject to the provisions of Chapter 420 (Sexual Assault Prevention and Crisis Services), not later than the 30th day before the date of the trial, to make a motion for disclosure of a communication or record that is privileged under Chapter 420. Requires that the motion include a supporting affidavit showing reasonable grounds to believe the privileged communication or record contains exculpatory evidence.

(b) Requires the defendant to serve the motion on the attorney representing the state and the person who holds the privilege with regard to the communication or record at issue.

(c) Requires the court to order the privileged communication or record to be produced for the court under seal and to examine the communication or record in camera if the court finds by a preponderance of the evidence that:

(1) there is a good-faith, specific, and reasonable basis for believing that the privileged communication or record is relevant, material, and exculpatory upon the issue of guilt for the offense charged; and

(2) the privileged communication or record would not be duplicative of other evidence or information available or already obtained by the defendant.

(d) Requires the court to disclose to the defendant and to the state only the evidence that the court finds to be exculpatory on the issue of guilt for the offense charged.

Deletes existing text requiring a person, notwithstanding any other provision of Chapter 420, to disclose a communication, a record, or evidence that is confidential under this chapter for use in a criminal investigation or proceeding in response to a subpoena issued in accordance with law.

SECTION 6. Provides that the change in law made by this Act applies to any communication or record described by Section 420.071, Government Code, as amended by this Act, regardless of the date the communication is made or the record is created.

SECTION 7. Effective date: September 1, 2021.