87R5019 MWC-F

By:  Creighton S.B. No. 1247

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

(c)  Contents of Demand.

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

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

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

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

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

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

(A)  propound the interrogatories with definiteness and certainty;

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

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

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

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

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

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

(e)  Service; Proof of Service.

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

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

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

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

(g)  Compliance With Demand.

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

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

(3)  Documentary Material.

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

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

(4)  Interrogatories.

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

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

(5)  Oral Examination.

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

(B)  The oral testimony of any person taken pursuant to a demand served under this section shall be taken in the county where the person resides, is found, transacts business, or in such other place as may be agreed upon by the person and the attorney general.

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

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

(E)  During the examination, the person being examined or his or her counsel may object on the record to any question, in whole or in part, and shall briefly state for the record the reason for the objection. An objection may properly be made, received, and entered upon the record when it is claimed that such person is entitled to refuse to answer the question on grounds of any constitutional or other legal right or privilege, including the privilege against self-incrimination. Neither such person nor his or her counsel shall otherwise object to or refuse to answer any question or interrupt the oral examination. If the person refuses to answer any question, the attorney general may petition the district court in the county where the examination is being conducted for an order compelling the person to answer the question.

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

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

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

(h)  Failure To Comply With Demand.

(1)  Petition for Enforcement. Whenever any person fails to comply with any demand duly served on such person under this section, the attorney general may file in the district court in Travis County or in the county in which the person resides, is found, or transacts business and serve on the person a petition for an order of the court for enforcement of this section. [~~If the person transacts business in more than one county, the petition shall be filed in the county of the person's principal office or place of business in the state or in any other county as may be agreed upon by the person and the attorney general.~~]

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

(i)  Disclosure and Use of Material and Information.

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

(A)  by court order for good cause shown;

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

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

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

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

(D)  as provided elsewhere in this section.

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

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

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

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

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

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

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

(B)  the attorney general has decided after completing an examination and analysis of such material not to institute any case or proceeding before a court in connection with the investigation.

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

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

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

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

SECTION 4.  Subchapter B, Chapter 15, Business & Commerce Code, is amended by adding Section 15.14 to read as follows:

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

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

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