

1-1 By: Creighton S.B. No. 1247
 1-2 (In the Senate - Filed March 9, 2021; March 18, 2021, read
 1-3 first time and referred to Committee on State Affairs;
 1-4 April 27, 2021, reported favorably by the following vote: Yeas 7,
 1-5 Nays 1; April 27, 2021, sent to printer.)

1-6 COMMITTEE VOTE

	Yea	Nay	Absent	PNV
1-7				
1-8	X			
1-9			X	
1-10	X			
1-11	X			
1-12	X			
1-13	X			
1-14	X			
1-15	X			
1-16		X		

1-17 A BILL TO BE ENTITLED
 1-18 AN ACT

1-19 relating to the Texas Free Enterprise and Antitrust Act of 1983.
 1-20 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:
 1-21 SECTION 1. Section 15.03, Business & Commerce Code, is
 1-22 amended by adding Subdivision (2-a) to read as follows:
 1-23 (2-a) The term "investigative file" means any
 1-24 documentary materials or information collected, assembled, or
 1-25 maintained by or on behalf of the attorney general with respect to
 1-26 an investigation or litigation conducted under this chapter. The
 1-27 term includes:
 1-28 (A) interagency or intra-agency communications
 1-29 or memoranda;
 1-30 (B) notes;
 1-31 (C) reports;
 1-32 (D) products of discovery;
 1-33 (E) records of internal or external meetings;
 1-34 (F) civil investigative demands; and
 1-35 (G) other documents and communications with the
 1-36 attorney general that are relevant to the investigation or
 1-37 litigation.
 1-38 SECTION 2. Section 15.10, Business & Commerce Code, is
 1-39 amended by amending Subsections (b), (c), (e), (g), (h), (i), and
 1-40 (k) to read as follows:
 1-41 (b) Authority to Issue Demand. Whenever the attorney
 1-42 general has reason to believe that any person may be in possession,
 1-43 custody, or control of any documentary material or may have any
 1-44 information relevant to a civil antitrust investigation, the
 1-45 attorney general may, prior to the institution of a civil
 1-46 proceeding, issue in writing and serve upon such person a civil
 1-47 investigative demand requiring the person to produce or make
 1-48 available such documentary material for inspection and copying, to
 1-49 answer in writing written interrogatories, to give oral testimony,
 1-50 or to provide any combination of such material, answers, and
 1-51 testimony; provided, however, that the attorney general may not
 1-52 issue and serve a demand for documentary material upon a
 1-53 proprietorship or partnership whose annual gross income does not
 1-54 exceed \$5 million.
 1-55 (c) Contents of Demand.
 1-56 (1) Each demand shall describe the nature of the
 1-57 activities that are the subject of the investigation and shall set
 1-58 forth each statute and section of that statute that may have been or
 1-59 may be violated as a result of such activities. Each demand shall
 1-60 advise the person upon whom the demand is to be served that
 1-61 objections [~~the person has the right to object~~] to the demand may be

2-1 made in accordance with [as provided for in] this chapter
2-2 [section].

2-3 (2) Each demand for production of documentary material
2-4 shall:

2-5 (A) describe the class or classes of material to
2-6 be produced with reasonable specificity so that the material
2-7 demanded is fairly identified;

2-8 (B) prescribe a return date or dates which will
2-9 provide a reasonable period of time within which the material is to
2-10 be produced; and

2-11 (C) identify the individual or individuals
2-12 acting on behalf of the attorney general to whom the material is to
2-13 be produced or made available for inspection and copying.

2-14 (3) Each demand for answers to written interrogatories
2-15 shall:

2-16 (A) propound the interrogatories with
2-17 definiteness and certainty;

2-18 (B) prescribe a date or dates by which answers to
2-19 interrogatories shall be submitted; and

2-20 (C) identify the individual or individuals
2-21 acting on behalf of the attorney general to whom the answers should
2-22 be submitted.

2-23 (4) Each demand for the giving of oral testimony
2-24 shall:

2-25 (A) prescribe a reasonable date, time, and place
2-26 at which the testimony shall begin; and

2-27 (B) identify the individual or individuals
2-28 acting on behalf of the attorney general who will conduct the
2-29 examination.

2-30 (5) No demand for any product of discovery may be
2-31 returned until 20 days after the attorney general serves a copy of
2-32 the demand upon the person from whom the discovery was obtained.

2-33 (e) Service; Proof of Service.

2-34 (1) Service of any demand or of any petition filed
2-35 under Subsection (f) or (h) of this section may be made upon any
2-36 natural person by delivering a duly executed copy of the demand or
2-37 petition to the person to be served or by mailing such copy by
2-38 registered or certified mail, return receipt requested, to such
2-39 person at his or her residence or principal office or place of
2-40 business.

2-41 (2) Service of any demand or of any petition filed
2-42 under Subsection (f) or (h) of this section may be made upon any
2-43 person other than a natural person by delivering a duly executed
2-44 copy of the demand or petition to a person to whom delivery would be
2-45 appropriate under state law if the demand or petition were process
2-46 in a civil suit.

2-47 (3) A verified return by the individual serving any
2-48 demand or any petition filed under Subsection (f) or (h) setting
2-49 forth the manner of service shall be proof of such service. In the
2-50 case of service by registered or certified mail, the return shall be
2-51 accompanied by the return post office receipt of delivery of the
2-52 demand or petition.

2-53 (4) Service of any demand may be made upon any person
2-54 by e-mail or other electronic means if the person being served has
2-55 consented to the electronic service in writing. Electronic service
2-56 is complete upon sending, but electronic service is not effective
2-57 if the attorney general learns that the demand did not actually
2-58 reach the person to be served. Written confirmation of receipt
2-59 through electronic service by the person being served constitutes
2-60 proof of the service.

2-61 (g) Compliance With Demand.

2-62 (1) A person on whom a demand is served shall comply
2-63 with the terms of the demand unless otherwise provided by court
2-64 order.

2-65 (2) The time for compliance with the demand in whole or
2-66 in part shall not run during the pendency of any petition filed
2-67 under Subsection (f) of this section; provided, however, that the
2-68 petitioner shall comply with any portions of the demand not sought
2-69 to be modified or set aside.

3-1 (3) Documentary Material.

3-2 (A) Any person upon whom any demand for the
3-3 production of documentary material has been duly served under this
3-4 section shall produce or make such material available to the
3-5 attorney general for inspection and copying during normal business
3-6 hours on the return date specified in the demand at the person's
3-7 principal office or place of business or as otherwise may be agreed
3-8 upon by the person and the attorney general. The attorney general
3-9 shall bear the expense of any copying. The person may substitute
3-10 copies for originals of all or part of the requested documents so
3-11 long as the originals are made available for inspection. The person
3-12 shall indicate in writing which if any of the documents produced
3-13 contain trade secrets or confidential information.

3-14 (B) The production of documentary material in
3-15 response to any demand shall be made under a sworn certificate in
3-16 such form as the demand designates by a natural person having
3-17 knowledge of the facts and circumstances relating to such
3-18 production to the effect that all of the requested material in the
3-19 possession, custody, or control of the person to whom the demand is
3-20 directed has been produced.

3-21 (4) Interrogatories.

3-22 (A) Each interrogatory in any demand duly served
3-23 under this section shall be answered separately and fully in
3-24 writing, unless it is objected to, in which case the basis for the
3-25 objection shall be set forth in lieu of an answer. The person shall
3-26 indicate in writing which if any of the answers contain trade
3-27 secrets or confidential information.

3-28 (B) Answers to interrogatories shall be
3-29 submitted under a sworn certificate in such form as the related
3-30 demand designates by a natural person having knowledge of the facts
3-31 and circumstances relating to the preparation of the answers to the
3-32 effect that all of the requested information in the possession,
3-33 custody, control, or knowledge of the person to whom the demand is
3-34 directed has been set forth fully and accurately.

3-35 (5) Oral Examination.

3-36 (A) The examination of any person pursuant to a
3-37 demand for oral testimony duly served under this section shall be
3-38 taken before any person authorized to administer oaths and
3-39 affirmations by the laws of Texas or the United States. The person
3-40 before whom the testimony is to be taken shall put the witness on
3-41 oath or affirmation and shall personally or by someone acting under
3-42 his or her direction and in his or her presence record the witness's
3-43 testimony. At the expense of the attorney general, the testimony
3-44 shall be taken stenographically and may be transcribed.

3-45 (B) The oral testimony of any person taken
3-46 pursuant to a demand served under this section shall be taken in the
3-47 county where the person resides, is found, transacts business, or
3-48 in such other place as may be agreed upon by the person and the
3-49 attorney general.

3-50 (C) Any person compelled to appear under a demand
3-51 for oral testimony under this section may be accompanied,
3-52 represented, and advised by counsel. Counsel may advise such
3-53 person in confidence, either upon the request of such person or upon
3-54 counsel's own initiative, with respect to any question arising in
3-55 connection with the examination.

3-56 (D) The individual conducting the examination on
3-57 behalf of the attorney general shall exclude from the place of
3-58 examination all other persons except the person being examined, the
3-59 person's counsel, the counsel of the person to whom the demand has
3-60 been issued, the person before whom the testimony is to be taken,
3-61 any stenographer taking the testimony, and any persons assisting
3-62 the individual conducting the examination.

3-63 (E) During the examination, the person being
3-64 examined or his or her counsel may object on the record to any
3-65 question, in whole or in part, and shall briefly state for the
3-66 record the reason for the objection. An objection may properly be
3-67 made, received, and entered upon the record when it is claimed that
3-68 such person is entitled to refuse to answer the question on grounds
3-69 of any constitutional or other legal right or privilege, including

4-1 the privilege against self-incrimination. Neither such person nor
 4-2 his or her counsel shall otherwise object to or refuse to answer any
 4-3 question or interrupt the oral examination. If the person refuses
 4-4 to answer any question, the attorney general may petition the
 4-5 district court in the county where the examination is being
 4-6 conducted for an order compelling the person to answer the
 4-7 question.

4-8 (F) If and when the testimony has been fully
 4-9 transcribed, the person before whom the testimony was taken shall
 4-10 promptly transmit the transcript of the testimony to the witness
 4-11 and a copy of the transcript to the attorney general. The witness
 4-12 shall have a reasonable opportunity to examine the transcript and
 4-13 make any changes in form or substance accompanied by a statement of
 4-14 the reasons for such changes. The witness shall then sign and
 4-15 return the transcript, unless he or she is ill, cannot be found,
 4-16 refuses to sign, or in writing waives the signing. If the witness
 4-17 does not sign the transcript within 15 days of receiving it, the
 4-18 person before whom the testimony has been given shall sign it and
 4-19 state on the record the reason, if known, for the witness's failure
 4-20 to sign. The officer shall then certify on the transcript that the
 4-21 witness was duly sworn and that the transcript is a true record of
 4-22 the testimony given by the witness and promptly transmit a copy of
 4-23 the certified transcript to the attorney general.

4-24 (G) Upon request, the attorney general shall
 4-25 furnish a copy of the certified transcript to the witness.

4-26 (H) The witness shall be entitled to the same
 4-27 fees and mileage that are paid to witnesses in the district courts
 4-28 of Texas.

4-29 (h) Failure To Comply With Demand.

4-30 (1) Petition for Enforcement. Whenever any person
 4-31 fails to comply with any demand duly served on such person under
 4-32 this section, the attorney general may file in the district court in
 4-33 Travis County or in the county in which the person resides, is
 4-34 found, or transacts business and serve on the person a petition for
 4-35 an order of the court for enforcement of this section. [~~If the~~
 4-36 ~~person transacts business in more than one county, the petition~~
 4-37 ~~shall be filed in the county of the person's principal office or~~
 4-38 ~~place of business in the state or in any other county as may be~~
 4-39 ~~agreed upon by the person and the attorney general.]~~

4-40 (2) Deliberate Noncompliance. Any person, who, with
 4-41 intent to avoid, evade, or prevent compliance in whole or part with
 4-42 a demand issued under this section, removes from any place,
 4-43 conceals, withholds, destroys, mutilates, alters, or by any other
 4-44 means falsifies any documentary material or otherwise provides
 4-45 inaccurate information is guilty of a misdemeanor and on conviction
 4-46 is punishable by a fine of not more than \$5,000 or by confinement in
 4-47 county jail for not more than one year or by both.

4-48 (i) Disclosure and Use of Material and Information.

4-49 (1) No [~~Except as provided in this section or ordered~~
 4-50 by a court for good cause shown, no] documentary material, answers
 4-51 to interrogatories, or transcripts of oral testimony, or copies or
 4-52 contents thereof, shall be available for examination or used by any
 4-53 person other than by an authorized official, employee, or agent of
 4-54 the attorney general, except:

4-55 (A) by court order for good cause shown;

4-56 (B) with [~~without~~] the consent of:

4-57 (i) the person who produced the material,
 4-58 answers, or testimony; and

4-59 (ii) [~~r~~] in the case of any product of
 4-60 discovery, [~~of~~] the person from whom the discovery was obtained;

4-61 (C) to an agency of this state, the United
 4-62 States, or another state or territory for official law enforcement
 4-63 purposes; or

4-64 (D) as provided elsewhere in this section.

4-65 (2) The attorney general may make available for
 4-66 inspection or prepare copies of documentary material, answers to
 4-67 interrogatories, or transcripts of oral testimony in his or her
 4-68 possession as he or she determines may be required by the state in
 4-69 the course of any investigation or a judicial proceeding in which

5-1 the state is a party.

5-2 (3) The attorney general may make available for
5-3 inspection or prepare copies of documentary material, answers to
5-4 interrogatories, or transcripts of oral testimony in his or her
5-5 possession as he or she determines may be required for official use
5-6 by any officer of the State of Texas, ~~[or of]~~ the United States, or
5-7 another state or territory charged with the enforcement of the laws
5-8 of the State of Texas, ~~[or]~~ the United States, or that state or
5-9 territory, as applicable; provided that any material disclosed
5-10 under this subsection may not be used for criminal law enforcement
5-11 purposes.

5-12 (3-a) The attorney general may make available for
5-13 inspection or prepare copies of documentary material, answers to
5-14 interrogatories, or transcripts of oral testimony in the attorney
5-15 general's possession as may be required for official use by any
5-16 authorized official, employee, or agent of the attorney general.

5-17 (4) Upon request, the attorney general shall make
5-18 available copies of documentary material, answers to
5-19 interrogatories, and transcripts of oral testimony for inspection
5-20 by the person who produced such material or information and, in the
5-21 case of a product of discovery, the person from whom the discovery
5-22 was obtained or by any duly authorized representative of the
5-23 person, including his or her counsel.

5-24 (5) Not later than 15 days prior to making public
5-25 ~~[disclosing]~~ any documentary material or answers to written
5-26 interrogatories designated as containing trade secrets or
5-27 confidential information under this subsection, the attorney
5-28 general shall notify the person who produced the material of the
5-29 attorney general's intent to make the information public ~~[such~~
5-30 ~~disclosure]~~. The person who produced the documentary material or
5-31 answers to written interrogatories may petition a district court in
5-32 any county of this state in which the person resides, does business,
5-33 or maintains its principal office for a protective order limiting
5-34 the terms under which the attorney general may use the ~~[disclose~~
5-35 ~~such]~~ trade secrets or confidential information in public,
5-36 including in public court filings.

5-37 (6) Upon written request, the attorney general shall
5-38 return documentary material produced under this section in
5-39 connection with an antitrust investigation to the person who
5-40 produced it whenever:

5-41 (A) any case or proceeding before any court
5-42 arising out of the investigation has been completed; or

5-43 (B) the attorney general has decided after
5-44 completing an examination and analysis of such material not to
5-45 institute any case or proceeding before a court in connection with
5-46 the investigation.

5-47 (k) Nonexclusive Procedures. Nothing in this section shall
5-48 preclude the attorney general from using procedures not specified
5-49 in the section in conducting an antitrust investigation; provided,
5-50 however, that in conducting such an investigation, the attorney
5-51 general shall use the procedures set forth in this section in lieu
5-52 of those set forth in Article 1302-5.01 through Article 1302-5.06,
5-53 Texas Miscellaneous Corporation Laws Act. Information,
5-54 documentary materials, and communication with the attorney general
5-55 provided under a procedure not specified in this section is
5-56 confidential but may be used in a judicial proceeding at the
5-57 attorney general's discretion.

5-58 SECTION 3. Section 15.12, Business & Commerce Code, is
5-59 amended to read as follows:

5-60 Sec. 15.12. ADDITIONAL PROCEDURES. (a) In addition to the
5-61 procedures set forth in this subchapter, the attorney general and
5-62 any other party to a suit brought by the attorney general to enforce
5-63 any of the prohibitions in Section 15.05 of this Act may request
5-64 discovery and production of documents and other things, serve
5-65 written interrogatories, and subpoena and depose witnesses in
5-66 accordance with the applicable provisions of the Texas Rules of
5-67 Civil Procedure and other state law relating to discovery.

5-68 (b) Documents and other information discovered or produced
5-69 under Subsection (a) are confidential.

6-1 SECTION 4. Subchapter B, Chapter 15, Business & Commerce
6-2 Code, is amended by adding Section 15.14 to read as follows:

6-3 Sec. 15.14. CONFIDENTIALITY OF INVESTIGATIVE FILES AND
6-4 OTHER INFORMATION. The attorney general's investigative file,
6-5 wholly or partly, and any other information or documentary material
6-6 provided to the attorney general under this chapter are
6-7 confidential and not subject to disclosure under Chapter 552,
6-8 Government Code.

6-9 SECTION 5. The changes in law made by this Act apply only to
6-10 a cause of action that accrues on or after the effective date of
6-11 this Act. A cause of action that accrues before the effective date
6-12 of this Act is governed by the law applicable to the cause of action
6-13 immediately before that date, and that law is continued in effect
6-14 for that purpose.

6-15 SECTION 6. This Act takes effect September 1, 2021.

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