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BILL



ANALYSIS

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Senate Bill 85 (Substitute S-2 as passed by the Senate)
 Sponsor: Senator William Van Regenmorter
 Committee: Judiciary

Date Completed: 3-2-95

RATIONALE

Reportedly, the prosecution of serious crime often is impeded because witnesses are unwilling to cooperate voluntarily in the investigation. This is particularly true, apparently, when witnesses were involved in some way in the commission or concealment of the offense, or have some relationship with a suspect. Other individuals may be afraid to cooperate or simply might wish to avoid involvement. To facilitate criminal investigations, it has been suggested that prosecutors be permitted to issue judicially authorized subpoenas to compel witnesses to testify or produce evidence.

CONTENT

The bill would add Chapter VIIA to the Code of Criminal Procedure to allow prosecuting attorneys to petition the district, circuit, or Recorder's Court for an authorization to issue one or more subpoenas to investigate the commission of a felony. The bill would provide for the confidentiality of prosecutors' applications and evidence obtained in an investigation; permit a person to object to an investigative subpoena or file reasons for not complying; provide that a person could have legal counsel present during an inquiry; allow prosecutors to file a motion for an order compelling compliance or granting immunity; prohibit the disclosure of any testimony or exhibit obtained or used in connection with an investigation; and establish penalties for perjury and contempt. The bill would take effect October 1, 1995.

Application for Investigative Subpoena

The bill would allow a prosecuting attorney (the Attorney General or the prosecuting attorney for a county) to petition the district court, the circuit court, or the Recorder's Court in writing for authorization to issue one or more subpoenas to investigate the commission of a felony. A petition would have to contain all of the following: a brief description of each felony being investigated; the name of each person who would be questioned or required to produce material; a general description of any records, documents, or physical evidence to be examined; and a brief description of the facts establishing the basis for the prosecutor's belief that the testimony or examination was relevant to the investigation of a felony described in the petition.

A petition could be filed with any of the following:

- The circuit court of the judicial circuit in which the felony or a portion of the felony allegedly was committed or of any judicial circuit in which the prosecutor maintained an office.
- The Recorder's Court if the felony or any portion of it allegedly were committed in the City of Detroit or if the prosecutor maintained an office in Detroit.
- The district court of the judicial district in which the felony or any portion of it allegedly was committed or of any judicial district in which the prosecutor maintained an office.

A prosecutor could file an application for immunity at the time he or she filed a petition for authorization to issue an investigative subpoena. An application for an investigative subpoena would be confidential, would not be available for public inspection or copying, and could not be divulged to

any person except as otherwise provided in the bill. An application would be exempt from disclosure under the Freedom of Information Act.

Issuance/Denial of Investigative Subpoena

A judge could authorize a prosecuting attorney in writing to issue one or more investigative subpoenas if a petition were properly filed; the judge determined that there was reasonable cause to believe a felony had been committed; and the judge determined that there was reasonable cause to believe either 1) the person who was the subject of the subpoena could have knowledge regarding the commission of the felony, or 2) the records, documents, or physical evidence was relevant to investigate the commission of a felony described in the petition.

An order authorizing a prosecuting attorney to issue one or more investigative subpoenas would have to contain a statement identifying each felony to be investigated; a statement listing each person to whom an investigative subpoena could be issued; and a statement listing the records, documents, or physical evidence subject to production under an investigative subpoena, describing the records, documents, or evidence with sufficient definiteness to permit the records, documents, or evidence to be fairly identified.

A prosecuting attorney could issue investigative subpoenas to the extent authorized by the judge in the authorization order. If additional investigative subpoenas were required to conduct an investigation, the prosecutor could file one or more supplemental petitions with the judge who issued the authorization requesting the additional subpoenas. A supplemental petition could incorporate the original petition by reference. The petition would have to be filed in the same manner as the original petition was filed.

If the court denied a prosecuting attorney authority to issue an investigative subpoena, the prosecutor could seek authorization as follows:

- If the request were denied by a district judge other than the chief judge of the judicial district, the prosecutor could petition the chief judge or could petition the circuit court or the Recorder's Court to issue the subpoena.
- If the request were denied by the chief judge of the judicial district, the prosecutor could petition the circuit court or the Recorder's Court.

- If the request were denied by a circuit judge other than the chief judge of the judicial circuit, or by a Recorder's Court judge other than the chief judge, the prosecutor could petition the chief judge of the judicial circuit or of the Recorder's Court.

Information in Investigative Subpoena

An investigative subpoena would have to contain the name of the person to whom it was directed and his or her address, if known. If the person's name were not known, the subpoena would have to give a general description sufficient to identify the person. A subpoena also would have to include the time and place for the person to testify or to produce the required documents or physical evidence; a statement that the subpoena was issued under Chapter VIIA; a statement identifying the criminal activity being investigated; and a statement describing the records, documents, or physical evidence to be produced, describing the records, documents, or evidence with sufficient definiteness to permit the records, documents, or evidence to be fairly identified.

In addition, an investigative subpoena would have to contain a statement that the person could object to the subpoena or file reasons for not complying with it by filing a written statement of objection or noncompliance with the prosecuting attorney by the date scheduled for the questioning or the production of records, documents, or physical evidence. The subpoena also would have to inform the person that the prosecuting attorney could seek an order compelling compliance with the subpoena.

Further, an investigative subpoena would have to contain a statement that the person could have legal counsel present at all times he or she was being questioned and during the examination of any records, documents, or physical evidence that he or she was required to produce.

Service of & Compliance with Subpoena

The court rules that apply to service of process in civil actions would apply to service of investigative subpoenas. An investigative subpoena would have to be served, however, at least seven days before the date set for the taking of testimony or examination of records, documents, or physical evidence, unless the judge who issued the authorization for the subpoena had shortened that period of time for good cause shown.

A person properly served with an investigative subpoena would have to appear before the prosecuting attorney and answer questions concerning the felony being investigated or produce any records, documents, or physical evidence he or she was required to produce. The person could have legal counsel present in the room in which the inquiry was held, and could fully discuss with his or her legal counsel any matter relating to the person's part in the inquiry without being subject to citation for contempt.

The prosecuting attorney could administer oaths and affirmations in the manner prescribed by law to implement Chapter VIIA. The prosecutor also could require a person having knowledge of any records, documents, or physical evidence subpoenaed to testify under oath or acknowledgement with respect to those records, documents, or evidence. The prosecutor would be required to inform the person of his or her constitutional rights regarding compulsory self-incrimination before asking any questions under an investigative subpoena, unless the person were granted immunity.

If a criminal charge were filed by the prosecuting attorney based upon information obtained pursuant to the bill, upon the defendant's motion made within 21 days after the defendant was arraigned on the charge, the trial judge would have to require the prosecuting attorney to furnish to the defendant the testimony the defendant gave regarding the crime with which he or she was charged. The court also could direct the prosecuting attorney to give the defendant the testimony that any witness who would be testifying at the trial gave to the prosecutor regarding that crime, except those portions that were irrelevant or immaterial, or that were excluded for other good cause shown. If the defendant requested the testimony of a witness and the trial judge directed the prosecuting attorney to give a copy of it to the defendant, the prosecutor would have to furnish the copy not later than 14 days before the trial. If the prosecutor failed or refused to give a copy of the witness's testimony to the defendant, the prosecutor could be barred from calling that witness to testify at the defendant's trial. If the trial judge had not directed the prosecutor to give a copy of a witness's testimony to the defendant before trial, the prosecutor, upon the defendant's request, would have to furnish a copy of that testimony to the defendant after direct examination of that witness at trial had been completed.

Order Compelling Compliance

If a person filed an objection to, or failed or refused to answer any question or to produce any record, document, or physical evidence set forth in an investigative subpoena, the prosecuting attorney could file a motion with the judge who authorized the subpoena for an order compelling the person to comply with it. The prosecutor would have to serve notice of the motion under applicable court rules.

The court would have to hold a hearing on the motion. The person would have the right to appear and be heard regarding the motion and to have legal counsel present. If the court determined that the question or evidentiary request was appropriate and within the scope of the authorization, the court would have to order the person to answer the question or to produce the record, document, or physical evidence. If the court determined that the question or request was inappropriate or outside the scope of the authorization, the court could order the prosecutor to modify the question or request or could disallow it.

The court could not compel the person to answer a question or produce any record, document, or physical evidence if answering that question or producing that record, document, or evidence would violate a statutory privilege or a constitutional right. Upon the person's motion and for good cause shown, the court could make any further order in the proceedings that justice required to protect the person from unreasonable annoyance, embarrassment, oppression, burden, or expense.

Immunity

A prosecuting attorney could apply to the court for an order granting immunity to any person, designated by name and address in the application, whom the prosecutor intended to require to give testimony concerning any matter under investigation pursuant to the bill. The application would have to be accompanied by a verified petition of the prosecutor setting forth the facts upon which the application was based. If the judge determined that it was in the interest of justice to grant immunity, he or she would have to enter an order granting immunity to the person if the person appeared before the prosecutor and testified under oath concerning any matter under investigation and set forth in the prosecutor's petition. The order granting immunity would extend to all related questions asked of the person.

The prosecuting attorney would have to provide the person with a true copy of an order granting immunity before the prosecutor asked the person any questions. No testimony or other information compelled under the order, or any information directly or indirectly derived from that testimony or other information, could be used against the person in any criminal case, except for impeachment purposes, in a prosecution for perjury, or for otherwise failing to comply with the order granting immunity.

An immunity order would continue in effect until the judge or his or her successor, in his or her discretion and upon application by the prosecutor, entered an order terminating the order granting immunity and the prosecutor notified the witness of the order of termination.

A person granted immunity could have legal counsel present whenever he or she was being questioned concerning any matter included within the immunity order.

Disclosure

Except as otherwise provided by law, a person would be prohibited from disclosing to any other person any testimony or exhibit obtained or used, or any proceeding conducted, in connection with an inquiry conducted under the bill. A person who violated these provisions would be guilty of a misdemeanor punishable by imprisonment for up to one year, a fine of up to \$1,000, or both. These nondisclosure provisions would apply to an application or petition for immunity, an order of immunity, or a transcript of testimony delivered to a witness pursuant to a grant of immunity, except that the witness could disclose the application, petition, order, or transcript to his or her attorney. These nondisclosure provisions would not apply to communications between prosecuting authorities for the purpose of reviewing evidence for prospective prosecution, or between prosecuting authorities and other law enforcement agencies for any other purpose involving the execution of a public duty.

Records, documents, and physical evidence obtained by a prosecuting attorney pursuant to an investigation under the bill would be confidential, would not be available for public inspection or copying, and could not be divulged to any person except as otherwise provided in the bill. Material and information obtained under the bill would be exempt from disclosure under the Freedom of Information Act.

Penalties

A person who made a false statement under oath in an examination conducted under the bill knowing the statement was false would be guilty of perjury, punishable as follows:

- By imprisonment for up to 15 years if the false statement were made during the investigation of a crime other than one punishable by life imprisonment.
- By imprisonment for life or any term of years if the false statement were made during the investigation of a crime punishable by life imprisonment.

A person who neglected or refused to comply with an investigative subpoena in violation of a court order would be guilty of contempt punishable by imprisonment for up to one year, a fine up to \$10,000, or both. If the witness appeared before the court to purge himself or herself of that contempt, he or she would have to be allowed to appear before the prosecuting attorney to answer any proper question concerning the matter under investigation. After the witness appeared, upon transcript of the testimony, he or she would have to be brought before the court, which after examination, would have to determine whether the witness had purged himself or herself of the contempt. The court would have to commute the sentence if it found that the witness had purged himself or herself.

ARGUMENTS

(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)

Supporting Argument

Some criminals are never brought to justice because prosecutors' hands are tied when it comes to gathering information about serious crimes, such as murder. By enabling prosecuting attorneys, with judicial authorization, to force the cooperation of recalcitrant or fearful witnesses, the bill would give prosecutors a new tool for the investigation of crimes that might otherwise remain unsolved. Patterned after the grand jury process, the bill would provide for similar procedures and protections but without the expense or formality. Specifically, under the bill, prosecutors could obtain a court's authorization to issue investigative subpoenas, and individuals who failed to cooperate could be punished for contempt. Prosecutors also could seek immunity orders

when an individual's testimony could be incriminating or a witness had invoked his or her constitutional right to remain silent. Witnesses, meanwhile, could seek judicial intervention and would be entitled to have legal counsel present at all times. Defendants also would be entitled to copies of their own testimony and relevant portions of witnesses' testimony. With these new procedures, valuable and expensive court time would be saved, criminals would find it harder to cover their tracks, and witnesses would be protected.

Opposing Argument

Although prosecutors would have to obtain judicial authorization before issuing investigative subpoenas, the bill still represents an uncomfortable expansion of prosecutors' powers. In effect, a prosecuting attorney could obtain authority to bring people in off the street and compel them to testify, without the prosecutor's having to level any criminal charges. Someone subject to a subpoena either would have to cooperate, regardless of how well founded the investigation, or file an objection to it, and could be ordered by the court to comply. Furthermore, although the bill makes it clear that a person could be accompanied by and consult with an attorney, there is no provision for the appointment of assigned counsel. Thus, the bill could force innocent individuals to hire an attorney or, if they could not afford one, to testify without the benefit of legal counsel.

Legislative Analyst: S. Margules

FISCAL IMPACT

The bill would have an indeterminate fiscal impact. Costs and savings would depend on the frequency and success of investigative demands. Costs would include the issuance of demands, enforcement of contempt provisions, and legal counsel for indigents (if required). Savings could result from reduced investigative costs and a reduced need for grand juries.

Fiscal Analyst: B. Bowerman

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.