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BILL ANALYSIS



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Senate Bill 85 (as enrolled)
 Sponsor: Senator William Van Regenmorter
 Senate Committee: Judiciary
 House Committee: Judiciary and Civil Rights

PUBLIC ACT 148 of 1995

Date Completed: 8-10-95

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 adds 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 provides for the confidentiality of prosecutors' applications and evidence obtained in an investigation; permits a person to object to an investigative subpoena or file reasons for not complying; provides that a person may have legal counsel present during an inquiry; allows prosecutors to file a motion for an order compelling compliance or granting immunity; provides that reporters do not have to disclose the identity of an informant; and establishes penalties for perjury and contempt.

The bill will take effect October 1, 1995.

Application for Investigative Subpoena

The bill allows a prosecuting attorney (the Attorney General or the prosecuting attorney for a county, or his or her designee) 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 must contain all of the following: a brief description of each felony being investigated; the name of each person who will 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 is relevant to the investigation of a felony described in the petition.

A petition may 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 maintains an office.
- The Recorder's Court if the felony or any portion of it allegedly was committed in the City of Detroit or if the prosecutor maintains 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 maintains an office.

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

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

Issuance of Investigative Subpoena

A judge may authorize a prosecuting attorney in writing to issue one or more investigative subpoenas if a petition is properly filed; the judge determines that there is reasonable cause to believe a felony has been committed; and the judge determines that there is reasonable cause to believe either 1) the person who is the subject of the subpoena may have knowledge regarding the commission of the felony, or 2) the records, documents, or physical evidence is 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 must contain a statement identifying each felony to be investigated; a statement listing each person to whom an investigative subpoena may 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 may issue investigative subpoenas to the extent authorized by the judge in the authorization order. If additional investigative subpoenas are required to conduct an investigation, the prosecutor may file one or more supplemental petitions with the judge who issued the authorization requesting the additional subpoenas. A supplemental petition may incorporate the original petition by reference. The petition must be filed in the same manner as the original petition was filed.

Information in Investigative Subpoena

An investigative subpoena must contain the name of the person to whom it is directed and his or her address, if known. If the person's name is not known, the subpoena must give a general description sufficient to identify the person. A subpoena also must include the time and place for the person to testify or to produce the required documents or physical evidence; a statement that the subpoena is 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 must contain a statement that the person may 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 must inform the person that the prosecuting attorney may seek an order compelling compliance with the subpoena.

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

Service of and Compliance with Subpoena

The court rules that apply to service of process in civil actions will apply to service of investigative subpoenas. An investigative subpoena must 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 has shortened that period of time for good cause shown.

A person properly served with an investigative subpoena must appear before the prosecuting attorney and answer questions concerning the felony being investigated or produce any records, documents, or physical evidence he or she is required to produce. The person may have legal counsel present in the room in which the inquiry is held, and may 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 may administer oaths and affirmations in the manner prescribed by law to implement Chapter VIIA. The prosecutor also may require a person having knowledge of any records, documents, or physical evidence subpoenaed to testify under oath or acknowledgment with respect to those records, documents, or evidence. The prosecutor must inform the person of his or her constitutional rights regarding compulsory self-incrimination before

asking any questions under an investigative subpoena, unless the person is granted immunity.

Disclosure to Defendant

If a criminal charge is 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 is arraigned on the charge, the trial judge must direct the prosecuting attorney to furnish to the defendant the testimony the defendant gave regarding the crime with which he or she is charged. The court also may direct the prosecuting attorney to give the defendant the testimony that any witness who will be testifying at the trial gave to the prosecutor regarding that crime, except those portions that are irrelevant or immaterial, or that are excluded for other good cause shown. If the defendant requests the testimony of a witness and the trial judge directs the prosecuting attorney to give a copy of it to the defendant, the prosecutor must furnish the copy not later than 14 days before trial. If the prosecutor fails or refuses to give a copy of the witness's testimony to the defendant, the prosecutor may be barred from calling that witness to testify at the defendant's trial. If the trial judge has 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, must furnish a copy of that testimony to the defendant after direct examination of that witness at trial has been completed.

Order Compelling Compliance

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

The court must hold a hearing on the motion. The person has the right to appear and be heard regarding the motion and to have legal counsel present. If the court determines that the question or evidentiary request is appropriate and within the scope of the authorization, the court must order the person to answer the question or to produce the record, document, or physical evidence. If the court determines that the question or request is inappropriate or outside the scope of the authorization, the court may order the prosecutor

to modify the question or request or may disallow it.

The court may 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 may make any further order in the proceedings that justice requires to protect the person from unreasonable annoyance, embarrassment, oppression, burden, or expense.

Immunity

A prosecuting attorney may apply to the court for an order granting immunity to any person, designated by name and address in the application, whom the prosecutor intends to require to give testimony concerning any matter under investigation pursuant to the bill. The application must be accompanied by a verified petition of the prosecutor setting forth the facts upon which the application is based. If the judge determines that it is in the interest of justice to grant immunity, he or she must enter an order granting immunity to the person if the person appears before the prosecutor and testifies under oath concerning any matter under investigation and set forth in the prosecutor's petition. The order granting immunity will extend to all related questions asked of the person. The prosecuting attorney must give the person a true copy of the order before asking the person any questions.

No testimony or other information compelled under an immunity order, or any information directly or indirectly derived from that testimony or other information, may 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 will continue in effect until the judge or his or her successor, in his or her discretion and upon application by the prosecutor, enters an order terminating the order granting immunity and the prosecutor notifies the witness of the order of termination.

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

Confidentiality

A reporter or other person who is involved in the gathering or preparation of news for broadcast or publication is not required to disclose the identity of an informant, any unpublished information obtained from an informant, or any unpublished matter or documentation, in whatever manner required, relating to a communication with an informant, in any inquiry conducted under the bill. A reporter or other person involved in gathering or preparing news for broadcast or publication is subject to an inquiry under the bill only to obtain information that has been disseminated to the public by media broadcast or print publication, or if the reporter or other person is the subject of the inquiry.

Petitions for immunity, immunity orders, transcripts of testimony delivered to witnesses pursuant to grants of immunity, and records, documents, and physical evidence obtained by a prosecuting attorney pursuant to an investigation under the bill will be confidential, will not be available for public inspection or copying, and may not be divulged to any person except as otherwise provided in the bill. Material and information obtained under the bill will be exempt from disclosure under the Freedom of Information Act.

Penalties

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

- By imprisonment for up to 15 years if the false statement was 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 was made during the investigation of a crime punishable by life imprisonment.

A person who neglects or refuses to comply with an investigative subpoena in violation of a court order will be guilty of contempt punishable by imprisonment for up to one year, a fine up to \$10,000, or both. If the witness appears before the court to purge himself or herself of that contempt, he or she must be allowed to appear before the prosecuting attorney to answer any proper question concerning the matter under investigation. After the witness appears, upon transcript of the testimony, he or she must be

brought before the court, which after examination, must determine whether the witness has purged himself or herself of the contempt. The court must commute the sentence if it finds that the witness has purged himself or herself.

MCL 767A.1-767A.9

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 will give prosecutors a new tool for the investigation of crimes that might otherwise remain unsolved. Patterned after the grand jury process, the bill provides for similar procedures and protections but without the expense or formality. Specifically, under the bill, prosecutors may obtain a court's authorization to issue investigative subpoenas, and individuals who fail to cooperate may be punished for contempt. Prosecutors also may seek an immunity order when an individual's testimony may be incriminating or a witness has invoked his or her constitutional right to remain silent. Witnesses, meanwhile, may seek judicial intervention and will be entitled to have legal counsel present at all times. Defendants also will be entitled to copies of their own testimony and relevant portions of witnesses' testimony. With these new procedures, valuable and expensive court time will be saved, criminals will find it harder to cover their tracks, and witnesses will be protected.

Opposing Argument

Although prosecutors will have to obtain judicial authorization before issuing investigative subpoenas, the bill still represents an uncomfortable expansion of prosecutors' powers. In effect, a prosecuting attorney may 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 must either cooperate, regardless of how well founded the investigation, or file an objection to it, and may be ordered by the court to comply. Furthermore, although the bill makes it clear that a person may be accompanied

by and consult with an attorney, there is no provision for the appointment of assigned counsel. Thus, the bill might force innocent individuals to hire an attorney or, if they cannot afford one, to testify without the benefit of legal counsel.

Opposing Argument

Some have raised concerns about the bill's constitutionality, because it purports to allow the seizure of a person and/or property without probable cause, as required by the State and U.S. Constitutions. Although the bill's proponents might argue that a subpoenaed person is not actually detained, others would contend that a custodial and coercive environment exists when a witness is subject to an investigative subpoena and compelled to testify in a prosecutor's office, or risk imprisonment and/or fines for failure to comply. Absent a probable cause requirement, at least the bill should require the prosecutor to show the judge that he or she has tried all other methods of obtaining the information sought and that they have failed. This would be similar to the requirement for obtaining a Federal wiretap--which also represents a substantial intrusion upon the privacy of citizens.

Opposing Argument

The bill's immunity provisions are inadequate in two respects. First, the bill provides only for what is known as "use immunity", which grants immunity from the use of the compelled testimony, but permits prosecution for related offenses if evidence from an independent source is available. "Transactional immunity", on the other hand, which may be granted to grand jury witnesses, prevents prosecution for the offense to which the compelled testimony relates.

In addition, a person subject to an investigative subpoena may be granted only personal immunity, which will not provide immunity from forfeiture of property. Thus, even if someone is granted immunity from criminal prosecution, his or her property could be forfeited to the State as a result of the compelled testimony. This may be of particular concern in the case of drug investigations.

Opposing Argument

Under the bill, if a criminal charge is filed based upon information obtained pursuant to an investigative subpoena, the court may direct the prosecutor to provide the defendant with the testimony that any witness who will be testifying at the trial gave to the prosecutor. The prosecutor does not have to comply, however, until 14 days

before trial. This deadline conflicts with a recently adopted Michigan Court Rule, which requires prosecutors to provide disclosure *within seven days of a request* (MCR 6.201).

Legislative Analyst: S. Margules

FISCAL IMPACT

The bill will have an indeterminate fiscal impact. Costs and savings will depend on the frequency and success of investigative demands. Costs will include the issuance of demands, enforcement of contempt provisions, and legal counsel for indigents (if required). Savings will 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.