

SUBJECT: Qualified privilege for journalists not to testify in criminal and civil cases

COMMITTEE: Judiciary and Civil Jurisprudence — committee substitute recommended

VOTE: 11 ayes — Hunter, Hughes, Alonzo, Branch, Hartnett, Jackson,
Leibowitz, Lewis, Madden, Martinez, Woolley

0 nays

WITNESSES: (*On committee substitute:*)
For — Don Adams; Katrina Daniels, Clifford Herberg, Bexar County
District Attorney's Office; Laura Prather, Texas Daily Newspaper
Association, Texas Press Association, Texas Association of Broadcasters,
Freedom of Information Foundation of Texas; John Rolater, Collin County
Criminal District Attorney's Office; Michael Schneider, Texas
Association of Broadcasters; (*Registered, but did not testify:* Barry Macha)

Against — None

On — Wanda Cash

DIGEST: CSHB 670 would create a qualified privilege for journalists not to testify
on information or sources. The privilege would apply in civil actions and
to confidential sources and unpublished information in criminal matters.

Under the bill, a journalist would be defined as a person who engaged in
the practice of journalism for a substantial portion of the person's
livelihood or for substantial financial gain. It would include someone
employed by an institution of higher education at the time information was
gathered for publication for a news medium or an agent of the news
medium.

Criminal Proceedings

Unpublished information in criminal proceedings. CSHB 670 would
amend Code of Criminal Procedure, ch. 38 to create a journalist's
qualified testimonial privilege in criminal proceedings for unpublished
information. After service of a subpoena and an opportunity to be heard, a
court could compel a journalist, a journalist's employer, or a person with

an independent contract with a journalist to testify on or produce any unpublished information, document, or item, or its source, obtained while acting as a journalist. The party seeking the information would have to make a clear and specific showing that all reasonable efforts had been exhausted to obtain the information from another source and that:

- the information was relevant and material to the official proceeding for which it was sought or that disclosure was essential to a claim or defense of the party seeking it, or
- the information was central to the investigation or prosecution of a criminal case and not based solely on the assertion of the person requesting the subpoena, but on reasonable grounds that support a belief that a crime has occurred.

CSHB 670 would direct a court, when considering whether to compel disclosure, to consider factors including, but not limited to, whether:

- the subpoena was overbroad, unreasonable, or oppressive;
- reasonable and timely notice was given of the demand for the information;
- in the particular instance, the interest of the party seeking the information outweighed the public interest in gathering and disseminating news, including the concerns of the journalist; and
- the subpoena or compulsory process was being used to obtain peripheral, nonessential, or speculative information.

A court could not consider any one of the above factors to be outcome-determinative.

Confidential sources in criminal proceedings. CSHB 670 would allow a court to compel a journalist to testify about or to disclose the source of any information if the party seeking the testimony made a clear and specific showing that the source of any information:

- was observed by the journalist committing a felony criminal offense and the subpoenaing party had exhausted reasonable efforts to obtain the confidential source;
- was a person who confessed or admitted to the journalist committing a felony criminal offense and the subpoenaing party had exhausted reasonable efforts to obtain the confidential source;

- was a person for whom probable cause existed that the person participated in a felony criminal offense and the subpoenaing party had exhausted reasonable efforts to obtain the confidential source; or
- the disclosure of the confidential source was reasonably necessary to stop or prevent reasonably certain death or substantial bodily harm.

Under CSHB 670, a court could compel a journalist to testify if the information was disclosed or received in violation of a grand jury oath given to either a juror or a witness. A court would have the discretion to conduct an in camera hearing but would not be able to order the production of a confidential source until a ruling had been made on the motion to quash the subpoena requiring such testimony.

Other crimes in which the transmission of information was, in and of itself a criminal act would be subject to a clear and specific showing that all reasonable efforts had been exhausted to obtain the information from another source and that:

- the information was relevant and material to the proper administration of the proceeding or was essential to the maintenance of a claim or defense, or
- was central to the investigation or prosecution of a case and based on something other than the assertion of the person requesting the subpoena, reasonable grounds exist to believe a crime occurred.

An application for a subpoena of a journalist would have to be signed by the elected district attorney, elected criminal district attorney, or elected county attorney, as applicable, or by the person succeeding the elected attorney. If the elected officer was not in the jurisdiction, then the highest-ranking assistant to the elected officer would be required to sign the subpoena.

Notice and hearing. A court could compel disclosure from a journalist only after timely notice and a hearing. The order compelling the testimony would have to include clear and specific findings as to the showing made by the party seeking disclosure and the clear and specific evidence on which the court relied in issuing the order.

Published or broadcast information. These protections would not apply to any information, document, or item that had at any time been published or broadcast by the journalist.

Publication by a news medium or communication service provider of privileged information, documents, or items would not be a waiver of the journalist's privilege regarding sources and unpublished information, documents, or items.

CSHB 670 would make news media recordings self authenticating. Authenticity of evidence would not be required for recordings that purported to be broadcasts by a radio or television station that held an FCC license at the time of the recording. A court could take judicial notice of the license.

Costs and fees. Under CSHB 670, the requesting party would have to pay the journalist a reasonable fee for the journalist's time and costs incurred in providing the information. The fee would be based on the fee structure laid out in the Open Records Act under Government Code, ch. 552, subch. F.

Civil Proceedings

Privilege in civil proceedings. CSHB 670 would amend Civil Practice and Remedies Code, ch. 22 by creating a journalist's qualified privilege not to testify in civil proceedings. The bill would add sec. 22.023, which would prevent an authority with subpoena power from compelling a journalist to testify on or to produce or disclose any confidential or non-confidential information, document, or item obtained or prepared while acting as a journalist or the source of any such information, document, or item. A subpoena or other compulsory process could not compel the parent, subsidiary, division, or affiliate of a communication service provider or news medium to disclose such information.

A court could compel a journalist, a journalist's employer, or a person with an independent contract with a journalist to testify on or produce any information or its source if the party seeking the information made a clear and specific showing that:

- all reasonable efforts to obtain the information from an alternative source had been exhausted;

- the subpoena seeking the information was not overbroad, unreasonable, or oppressive, and when appropriate, was limited to verifying published information and the surrounding circumstances relating to the accuracy of the published information;
- reasonable and timely notice was given of the demand for the information;
- in the particular case, the interest of the party subpoenaing the information outweighed the public interest in the gathering and dissemination of news, including the concerns of the journalist;
- the subpoena or compulsory process was not being used to obtain peripheral, nonessential, or speculative information; and
- the information was relevant and material to the official proceeding for which testimony or production was sought and was essential to a claim or defense of the party seeking the testimony or production.

An order to compel disclosure could be issued only after timely notice and a hearing. The order would have to include clear and specific findings on the showing made by the party seeking disclosure and the clear and specific evidence the court relied on in issuing the order.

Publication by a news medium or communication service provider of privileged information would not constitute a waiver of the journalist's privilege.

Effective date. CSHB 670 would take effect on September 1, 2009, and would apply only to information or the source of information obtained or gathered for publication in a news medium or communication service provider on or after that date.

**SUPPORTERS
SAY:**

CSHB 670 would increase the free flow of information to the public and preserve a free and active press, while also protecting the right of the public to effective law enforcement and the fair administration of justice. The bill represents a compromise between media representatives and Texas district attorneys and would place Texas with the majority of states that have some form of shield law for journalists. It would provide valuable guidance to Texas courts as they tried to balance the freedom of the press with the interests of law enforcement. Currently, 36 states and the District of Columbia have some kind of testimonial privilege for journalists. Washington state created one in 2007, and Hawaii, Maine, and Utah did so in 2008.

The press plays a vital role in a democracy by helping to protect the public from abuses by powerful governmental and private interests. Some whistleblowers fear retaliation from reporting wrongdoing to a superior or fear interacting with police because of the government's ability to check for outstanding warrants or fines. The press serves as an entity through which anyone can report and bring important issues to the public's attention. If sources believe they will be exposed when a journalist is compelled to disclose information, those sources will be fearful of confiding in the press and that information may never reach the public. It is imperative for an open society to protect this vital function of the press by shielding it from forced disclosure of sources.

Under current law, a journalist who protects the confidentiality of a source against a judicial order can be jailed for contempt of court. In addition, responding to orders to produce notes and tapes can be a time-consuming burden for the news media. To fight a subpoena can easily exceed \$10,000 because of briefing costs and the hearings involved. Journalists and news media in Texas face a real burden. Large market Texas newspapers typically receive 10-20 subpoenas a year, and the average Dallas-Fort Worth newsroom received about 38 subpoenas a year from 2005 to 2008. A Mineola radio station's one-man news department was effectively shut down for almost two days to comply with a subpoena.

CSHB 670 would help protect the free flow of information by forcing prosecutors to satisfy certain criteria to prove a need for the information they seek from the press and would require that prosecutors show that all reasonable efforts had been exhausted to obtain the information from other sources. Critically, CSHB 670 would provide not an absolute privilege but a qualified privilege. A court could compel testimony if the journalist was an eyewitness to or obtained the information from a person who confessed to committing a felony, or if there were probable cause to believe that the person was involved with the commission of a felony. A journalist also could be compelled to testify if disclosure were reasonably necessary to stop or prevent reasonably certain death or substantial bodily harm. The party seeking the information would have to establish strong reasons the information was needed before a judge would breach a journalist's privilege against testimony. The simple requirement that the party seeking the information satisfy certain criteria would help deter abuse and over-reliance by law enforcement on the news media for information. In addition, the procedural requirements that CSHB 670 would establish

would give the media specific grounds on which to oppose subpoenas and would give judges greater guidance when making their rulings.

CSHB 670 also would provide some relief to prosecutors. Under current law, when prosecutors wish to enter as evidence a recording of a radio or television broadcast, they must first prove that it is admissible. To do so, they must offer extrinsic evidence that a broadcast is what it purports to be. CSHB 670 would remove this requirement, extending to other media what has been longstanding practice with newspaper articles. Attorneys still would need to overcome usual evidentiary objections, such as relevance and hearsay.

CSHB 670's limited disclosure rules would provide a carefully negotiated balance between protecting the free flow of information and allowing prosecutors to discover important evidence to prosecute serious crimes.

OPPONENTS
SAY:

CSHB 670 is not needed. Texas has enjoyed a functioning democracy and a functioning press since its earliest history. Current law provides adequate protections for journalists faced with orders to compel disclosure of information. Journalists already can, and routinely do, make successful motions to quash subpoenas forcing them to testify. Not every state that has recently considered a journalist shield law has adopted it. Both Missouri and West Virginia considered journalist shield legislation in 2008, but did not enact it.

Prosecutors do not, as a rule, rely excessively on journalists for information, and those who inappropriately subpoena journalists find their subpoenas tossed out of court by the judiciary. In addition, the press already enjoys substantial protections under the First Amendment to the U.S. Constitution.

CSHB 670 potentially could hinder the ability of prosecutors to gather information. One of the goals of CSHB 670 is to promote accountability by large government and corporate institutions, but prosecutors still need to speak with whistleblowers in order to investigate effectively any accusations of wrongdoing. CSHB 670 would shift the burden to prosecutors to show they have exhausted all reasonable efforts to obtain the information from other sources, among other burdens, which could too easily be capriciously interpreted by judges and result in wasted prosecutorial time and resources. Shifting the burden to prosecutors to

prove that the journalist was an appropriate source of information could delay or even prevent the administration of justice.

OTHER
OPPONENTS
SAY:

CSSB 670 would not go far enough to protect the free flow of information because it would provide too many exceptions to the journalist's privilege not to testify. In addition, the bill would provide certain legal protections to some journalists and not others, setting up a kind of licensing system that would protect journalists who practiced the craft for significant financial gain, while leaving out many amateur bloggers.

NOTES:

The committee substitute differs from the bill as filed by creating separate privileges for civil and criminal cases. In the committee substitute, the privilege in criminal proceedings includes exemptions for certain situations involving confidential witnesses, and the test to overcome the privilege generally contains fewer factors. The committee substitute also specifies that none of the concerns a court would have to weigh when examining these factors would be outcome determinative.

In the bill as filed, the types of crimes exempt from the privilege for confidential sources were violent crimes and those targeting children under 14 and younger, while in the committee substitute the exemption to the privilege for confidential sources would apply to all felony crimes.

The committee substitute also added a requirement that the requesting party pay a journalist a reasonable fee for time and costs incurred and removed a requirement that extrinsic evidence be offered to show that a radio or television broadcast be what it purports to be.

The companion bill, SB 915 by Ellis, was reported favorably, as substituted, by the Senate Jurisprudence Committee on March 30 and recommended for the Local and Uncontested Calendar. CSSB 915 is identical to CSSB 670 except that it would require prosecutors to prove that they had exhausted reasonable efforts to discover a confidential source "from alternative sources."

The House Judiciary and Civil Jurisprudence Committee heard testimony on HB 670 on March 2 and on March 16 reported HB 670 favorably, without amendment, by 9-1 (Lewis). On March 23, the committee reconsidered its vote and reported the bill favorably, as substituted, by 11-0.

During the 2007 regular session, a related journalist shield law, SB 966 by Ellis, passed the Senate and was set on the Major State Calendar in the House, but died when a point of order was sustained against the bill late in the session.