

Texas Enacts Shield Law

Texas Gov. Rick Perry signed a journalist's shield bill into law on May 13, 2009, making Texas the 36th state, as well as the District of Columbia, to adopt a statutory testimonial privilege for reporters.

"The Free Flow of Information Act," HB 670, passed on unanimous votes in both the Texas House of Representatives and Senate. It extends a qualified privilege to journalists under the state's civil and criminal codes, allowing them to refuse to disclose information or sources in some circumstances. The law went into effect immediately upon its signing.

The bill covers a broad cross-section of people professionally engaged in news gathering and reporting in a wide variety of media platforms. It defines a "journalist" as a person who, "for a substantial portion of the person's livelihood or for substantial financial gain, gathers, compiles, prepares, collects, photographs, records, writes, edits, reports, investigates, processes, or publishes news or information that is disseminated by a news medium or communication service provider." The law includes "parent[s], subsidiar[ies], division[s], or affiliate[s]" of covered journalists, as well as anyone who "supervises or assists" with the above newsgathering activities.

Additionally, the privilege extends to "a journalist, scholar, or researcher employed by an institution of higher education" as well as to people who, at the time they "obtained or prepared the requested information . . . [were] earning a significant portion of [their] livelihood by obtaining or preparing information for dissemination by a news medium or communication service provider; or [were] serving as an agent, assistant, employee, or supervisor of a news medium or communication service provider."

The bill says the term "communications service provider" applies to telecommunications carriers, information service providers, interactive computer service providers, and information content providers as they are defined by the Communications Act of 1934, 47 U.S.C. § 153 and 47 U.S.C. § 230.

The bill says "news medium" applies to a lengthy list of about 30 individual media formats, from "newspaper, magazine or periodical" to "Internet company or provider" and including "other means, known or unknown, that are accessible to the public."

In the context of civil proceedings, the bill says those who can claim the privilege may not be compelled by a state government body to disclose “any confidential or nonconfidential information, document, or item obtained or prepared while acting as a journalist,” or its source. In order to overcome the privilege, the party seeking disclosure must make “a clear and specific showing that (1) all reasonable efforts have been exhausted to obtain the information from alternative sources; (2) the subpoena is not overbroad, unreasonable, or oppressive . . . (3) reasonable and timely notice was given to the target of the requested disclosure; (4) the interest of the party subpoenaing the information outweighs the public interest in gathering and dissemination of news, including the concerns of the journalist; (5) the subpoena or compulsory process is not being used to obtain peripheral, nonessential, or speculative information; and (6) the information . . . is relevant and material to the proper administration of the official proceeding . . . and is essential to the maintenance of a claim or defense.”

The bill says that publication of privileged information does not constitute a waiver of the journalists’ privilege in civil proceedings.

In the context of criminal proceedings, however, the privilege is limited to unpublished information or sources. In the case of confidential sources, it can be overcome if the party seeking disclosure makes “a clear and specific showing that” other reasonable efforts to identify the source have been exhausted, and the source “was observed by the journalist committing a felony, . . . is a person who confessed or admitted to the journalist the commission of a felony,” or “is a person for whom probable cause exists that the person participated in a felony.”

There are also exceptions where “disclosure of the confidential source is reasonably necessary to stop or prevent reasonably certain death or substantial bodily harm,” and where the person seeking disclosure can make “a clear and specific showing that” other reasonable efforts to identify the source have been exhausted and “the information, document, or item was disclosed or received in violation of a grand jury oath.”

In circumstances of criminal proceedings where the above exceptions do not apply, the privilege can still be overcome when “all reasonable efforts have been exhausted to obtain the information from alternative sources; and the unpublished information, document, or item: (A) is relevant and material to the proper administration of the official proceeding . . . and is essential to the maintenance of a claim or defense . . . or (B) is central to the investigation or prosecution of a criminal case and[,] based on something other than the

assertion of the person requesting the subpoena, reasonable grounds exist to believe that a crime has occurred.”

The bill instructs courts to consider whether “the subpoena is overbroad, unreasonable, or oppressive; reasonable and timely notice was given of the demand for the information, . . . whether the interest of the party subpoenaing the information outweighs the public interest in gathering and dissemination of news, including the concerns of the journalist; [and whether] the subpoena or compulsory process is being used to obtain peripheral, nonessential, or speculative information.” The bill says that no one factor above should be “outcome-determinative” by itself.

The Associated Press reported on May 1 that similar proposals for a shield law were unsuccessful in 2005 and 2007.

— Patrick File
Silha Fellow and *Bulletin* Editor