

Kansas Enacts Shield Law; Wisconsin Bill Clears Legislature

Kansas Gov. Mark Parkinson signed a journalist shield bill into law on April 15, 2010, saying that “we must allow journalists to perform their jobs without fear of prosecution and continue bringing the news home to Kansans.”

The shield law, Senate Substitute for House Bill 2585, requires a journalist to comply with a subpoena only if a judge rules that the party seeking the previously undisclosed information made a reasonable effort to obtain it some other way. The judge must also find that the information sought is of a “compelling interest” and is “likely to outweigh any harm done to the free dissemination of information to the public through the activities of journalists.” The statute defines “compelling interest” to include preventing a “miscarriage of justice” or acts that would result in “death or great bodily harm.”

The law, which goes into effect July 1, 2010, covers those who collect and publish information for “online journal[s] in the regular business of newsgathering and disseminating news or information to the public” in addition to reporters for traditional media such as newspapers, radio and television stations.

“Our founding fathers were very meticulous in making certain that our country, including members of the press, received the necessary protections for freedom,” Parkinson said in an April 15 statement. “The shield law demonstrates that Kansas upholds that belief and respects a reporter’s discretion in disclosing information and sources.”

Doug Anstaett, executive director of the Kansas Press Association (KPA), a primary advocate of the bill, said the law will encourage reporters and their sources to actively uncover abuse and corruption in government. “While this won’t eliminate all fishing expeditions by prosecutors, it will certainly at least cause them to pause when they’re tempted to try to force reporters to become an arm of law enforcement, which is not what the framers had in mind when they wrote the First Amendment to the U.S. Constitution,” Anstaett said in an April 16 Associated Press (AP) report.

Although efforts to pass a shield law began in 2002, Anstaett cited the recent subpoena of *Dodge City Daily Globe* reporter Claire O’Brien as a primary impetus for the law’s passage.

“With the situation that developed in Dodge City, there was a much higher interest and awareness of this issue among the legislators this year,” Anstaett

said in an April 16 *Emporia (Kan.) Gazette* story. “That made it somewhat easier to bring it forward and get it moving.”

O’Brien was fined and held in contempt of court on Feb. 10, 2010, after refusing to comply with a subpoena compelling her to testify about a confidential source and give prosecutors her unpublished notes.

Ford County prosecuting attorney Terry Malone issued subpoenas to the *Globe* and O’Brien seeking details about an Oct. 7, 2009 interview O’Brien conducted with Samuel Bonilla, who was charged with second-degree murder and attempted murder in the shooting death of Steven Holt and the wounding of Tanner Brunson in a September 2009 incident.

The subpoenas were issued after the *Globe* published a story written by O’Brien on Oct. 13, 2009, in which O’Brien quoted an anonymous source as saying that Brunson had a supply of semiautomatic weapons and “a base of support that is well-known for its anti-Hispanic beliefs.” In the October 13 story, Bonilla, who is Hispanic, said he acted in self-defense after the two victims, both white, tried to run him down while he was jogging with two children. O’Brien’s story also quoted bail bondswoman Rebecca Escalante as saying that she would have posted Bonilla’s bond if several people had not warned her that Bonilla’s life would be in danger if he was released from jail.

The newspaper moved to quash the subpoenas, but Dodge City District Court Judge Daniel Love refused the request and ordered O’Brien to testify about her newsgathering at an inquisition, Kansas’ equivalent of a grand jury. In his Dec. 9, 2009, ruling, Love wrote that courts must balance the government’s need for information against the reporter’s interest in protecting sources. “In this case, when applying the balancing test, it is clear to the court that the need for this information outweighs the news reporter’s privilege of confidentiality,” Love wrote, according to a Dec. 10, 2009 report by the AP and the First Amendment Center.

William Hurst, an attorney who represented *Globe* owner GateHouse Media Kansas Holdings II, said that Love’s ruling “collapsed” the balancing test by relying on “a minimum relevancy standard” for news media subpoenas in state criminal cases, a Dec. 21, 2009 AP report said.

O’Brien said she reassured her confidential source throughout the legal battle that she would not disclose his identity. “I think the reporter’s only currency is her word – and I really did give it,” O’Brien said in the December 21 AP report. “Every time I try to work myself through giving the information, I just can’t imagine myself being able to compromise my professional reputation to that extent... Who would trust me again?”

According to Malone, investigators were conducting two separate ongoing inquisitions, one involving the Bonilla shootings, and the other involving the alleged threats against Bonilla to which the October 13 *Globe* story alluded.

“In that story I read as county prosecutor for the first time that people have information that Mr. Bonilla himself may be in danger from other people that have anti-Hispanic beliefs, and so the *Globe* reporter has information about that which she is unwilling to give us that I find to be rather inexplicable,” Malone said in the December 21 AP story. “I would think the normal person if they heard somebody may be in harm’s way that they would want to give that information to police.”

On Jan. 4, 2010, Love rejected a request from attorney Michael Giardine, who represented O’Brien and the newspaper, to postpone his order requiring O’Brien to testify. “Granting a stay order would leave the investigation where it is now – stymied,” Love wrote, according to a Jan. 6, 2010 AP report. “And it would leave Sam Bonilla’s life in danger. Granting the stay order would also place a higher value on the reporter’s unfounded legal argument than it would on the safety of Sam Bonilla.”

On Jan. 19, 2010, the Kansas Supreme Court granted O’Brien a temporary stay so that she would not have to testify at the inquisition scheduled for the next day. The Kansas Supreme Court lifted the temporary stay of the subpoena on February 2 in a two-sentence order issued by Chief Justice Robert E. Davis that required O’Brien to testify, the AP reported on Feb. 3, 2010.

After the ruling, Malone disputed claims by O’Brien and the KPA that enforcing the subpoena would hinder the efforts of reporters to gather news. “I don’t know what’s chilling about that,” Malone said, according to the February 3 AP story. “We just want the whole story, not just the part the reporter chose to put in there.”

Love found O’Brien in contempt of court on Feb. 10, 2010, when she failed to attend a scheduled closed hearing and answer questions about her confidential source as required by the subpoena, *The Topeka Capital-Journal* reported in a Feb. 10, 2010 story. Love fined O’Brien \$1,000 a day until she appeared in court.

The confidential source – who said he never told O’Brien his real name – revealed his identity to prosecutors the day after O’Brien did not show up in court. O’Brien then apologized to Love, and the judge rescinded the contempt citation and fine after O’Brien testified in a closed inquisition on Feb. 12, 2010, the AP reported on Feb. 15, 2010.

“He was moved by his own moral convictions,” O’Brien said of the source revealing his identity to authorities in the February 15 AP story. “The only thing

that could have evoked those was me demonstrating my moral convictions to that extent . . . when he saw I was willing to pay the whole price.”

A dispute between O’Brien and the *Globe* led to O’Brien’s dismissal, according to a March 8 AP story.

Wisconsin Governor Plans to Sign Journalist Shield Bill into Law

Wisconsin Gov. Jim Doyle said he planned to sign into law a journalist shield bill passed by the state legislature, the *Wisconsin State Journal* reported on April 20, 2010, the same day the Senate approved the measure by a voice vote. The Wisconsin Assembly previously approved the bill on Sept. 22, 2009.

The shield bill prohibits courts from compelling journalists to reveal confidential sources or unpublished material, except in limited circumstances. A subpoena may only be issued to a journalist if the information sought is “highly relevant” to a criminal investigation or civil claim and “not obtainable from any alternative source.” In these instances, the journalist is entitled to dispute the merit of the subpoena before having to reveal the requested information.

Sen. Pat Kreitlow (D-Chippewa Falls), a former television and radio reporter, co-sponsored Assembly Bill 333, which was written in consultation with the Wisconsin Newspaper Association, the Wisconsin Broadcasters Association, and the Wisconsin Freedom of Information Council. “This bill is not about protecting the journalists so much as protecting the whistleblowers and their ability to come forward without the fear of intimidation or retribution from their employers,” Kreitlow said in a statement, the *Milwaukee Journal Sentinel* reported on April 20.

The protections are limited to those who work for a “business or organization that, by means of print, broadcast, photographic, mechanical, electronic, or other medium, disseminates news or information to the public, including a newspaper, magazine, or other periodical; book publisher; news agency; wire service; radio or television station or network; cable or satellite network, service, or carrier; or audio or audiovisual production company.”

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