

**SUBJECT:** Establishing a qualified privilege of a journalist not to testify

**COMMITTEE:** Judiciary — committee substitute recommended

**VOTE:** 8 ayes — Hartnett, Hopson, Alonzo, R. Cook, Gonzales, Goolsby, Hughes, Krusee

0 nays

1 absent — Homer

**SENATE VOTE:** On final passage, May 1 — 27-4 (Harris, Janek, Nelson, Williams)

**WITNESSES:** For — Lucy Dalglish, Reporters Committee for Freedom of the Press; Mike Devlin, WFAA - TV - KHOUTV; Robert P. Latham, Texas Association of Broadcasters; Laura Lee Prather, Texas Daily Newspapers, Texas Press Association, Texas Association of Broadcasters, Freedom of Information Foundation of Texas; Doug Toney, Texas Daily Newspaper Association Texas Press Association; Paul Watler, Texas Association of Broadcasters, Texas Daily Newspaper Association, Freedom of Information Foundation of Texas; (*Registered, but did not testify:* Marita Heyden; Milton Morin, Daily Court Review)

Against — Scott Durfee, Harris County District Attorney’s Office; Clifford Herberg, Bexar County District Attorney’s Office; Barry Macha; David Weeks; (*Registered, but did not testify:* Amy Mills, Tarrant County District Attorney’s Office)

On — Robert Kepple, Texas District & County Attorneys Association

**DIGEST:** CSSB 966 would amend chap. 22, Civil Practice and Remedies Code, by adding subch. C, to create a “Journalist’s Qualified Testimonial Privilege.”

**Privilege.** With some exceptions, CSSB 966 would prevent a judicial, legislative, administrative, or other body with the authority to issue a subpoena or other compulsory process from compelling a journalist to testify, produce, or disclose in an official proceeding:

- any confidential or non-confidential information, document, or item obtained or prepared while acting as a journalist; or
- the source of any 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 the information, documents, or items or the source of any information, documents, or items that were privileged.

**Limited disclosure.** CSSB 966 would empower a court to compel a journalist and certain others to testify, produce, or disclose any information or its source obtained while acting as a journalist if the person seeking the information made a clear and specific showing that:

- all reasonable efforts had been exhausted to obtain the information from an alternative source;
- the subpoena was not overbroad, unreasonable, or oppressive and, where appropriate, would be limited to the verification of 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;
- the interest of the party subpoenaing the information outweighed the public interest in gathering and dissemination of news in that instance; and
- the compulsory process was not being used to obtain peripheral or speculative information.

The information requested also would have to be:

- relevant and material to the proper administration of the official proceeding for which the disclosure was sought and essential to the maintenance of a claim or defense of the person seeking the disclosure; or
- central to the investigation or prosecution of a criminal case regarding the establishment of guilt or innocence and, based on something other than the assertion of the person requesting the subpoena, reasonable grounds existed to believe that a crime had occurred.

**Criminal circumstances.** CSSB 966 would allow a court to compel a journalist to disclose information obtained while the person was acting as a journalist if the person seeking the disclosure made a clear and specific showing that the information, document, or item or the source of any information, document, or item was obtained under certain circumstances, including the following:

*Journalist's eyewitness observation of a crime.* If the journalist obtained the information as a result of the journalist's eyewitness observation of criminal conduct and a court determined by clear and specific evidence that the person requesting testimony, production, or disclosure had exhausted reasonable efforts to obtain the information, document, or item from alternative sources, then the journalist could be compelled to reveal the information sought. This would apply to any information, document, or item disclosed or received in violation of a grand jury oath administered to either a juror or a witness under art. 19.34 or 20.16, Code of Criminal Procedure. The specific exception for eyewitness observation of criminal conduct otherwise would not apply if the alleged criminal conduct was the act of communicating, receiving, or possessing the information, document or item and the information did not relate to a violent offense or crime against a child victim.

*Certain violent offenses and crimes against child victims.* If the journalist obtained the information from any person who had confessed or admitted to, or whom there was probable cause to believe had participated in, the commission of a violent offense, or to a crime against a child victim younger than 14 years of age at the time the offense was committed, and if a court determined by clear and specific evidence that the person requesting the testimony, production, or disclosure had exhausted reasonable efforts to obtain the information from alternative sources, then a journalist could be compelled to produce the information.

Under CSSB 966, a "violent offense" would include:

- murder (sec. 19.02, Penal Code);
- capital murder (sec. 19.03, Penal Code);
- kidnapping (sec. 20.03, Penal Code);
- aggravated kidnapping (sec. 20.04, Penal Code);
- indecency with a child (sec. 21.11, Penal Code);
- assault (sec. 22.01(a), Penal Code);
- sexual assault (sec. 22.011, Penal Code);

- aggravated sexual assault (sec. 22.021, Penal Code);
- injury to a child or elderly or disabled individual (sec. 22.04, Penal Code);
- aggravated robbery (sec. 29.03, Penal Code);
- terroristic threats (sec. 22.07, Penal Code);
- sexual performance by a child (sec. 43.25, Penal Code);
- promotion or possession of child pornography (sec. 43.26(e), Penal Code); or
- soliciting membership in a criminal street gang (sec. 71.022, Penal Code).

*Prevention of death or substantial bodily harm.* A journalist also could be compelled to disclose information if it were reasonably necessary to stop or prevent reasonably certain death or substantial bodily harm.

**Notice to journalists.** CSSB 966 would require that an order to compel testimony, production, or disclosure to which a journalist had asserted a privilege could be issued only after timely notice to the journalist, the journalist's employer, or a person who had an independent contract with a journalist and a hearing. The order would have to include clear and specific findings as to the showing made by the person seeking the disclosure and the clear and specific evidence on which the court relied in issuing the court's order.

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

CSSB 966 would amend Code of Criminal Procedure, ch. 38 by stating that a journalist's testimonial privilege applied in criminal proceedings.

**Definitions.** A "journalist" covered by the bill would be a person, including a parent, subsidiary, division, or affiliate of a person, that for a substantial portion of the person's livelihood or for substantial financial gain, gathered, compiled, prepared, collected, photographed, recorded, wrote, edited, reported, investigated, processed, or published news or information that was disseminated by a news medium or communication service provider and would include a person who supervised or assisted in gathering, preparing and disseminating the news or information.

A person who was or had been a journalist, scholar, or researcher employed by an institution of higher education at the time the person obtained or prepared the requested information also would be considered a journalist.

CSSB 966 would also consider a journalist someone who at the time the person obtained or prepared the requested information:

- was earning a significant portion of the person's livelihood by obtaining or preparing information for dissemination by a news medium or communication service provider; or
- was serving as an agent, assistant, employee, or supervisor of a news medium or communication service provider.

A "news medium" would be a newspaper, magazine or periodical, book publisher, news agency, wire service, radio or television station or network, cable, satellite, or other transmission system or carrier or channel, or a channel or programming service for a station, network, system, or carrier, or an audio or audiovisual production company or Internet company or provider, or the parent, subsidiary, division, or affiliate of that entity that disseminated news or information to the public by any means, including print, television, radio, photographic, mechanical, electronic, and other means, known or unknown, that were accessible to the public.

CSSB 966 would define a "communication service provider" as a person or the parent, subsidiary, division, or affiliate of a person who transmitted information chosen by a customer by electronic means, including:

- a telecommunications carrier;
- a provider of information service;
- a provider of interactive computer service;
- an information content provider.

An "official proceeding" would be any type of administrative, executive, legislative, or judicial proceeding that could be conducted before a public servant. "Public servant" would mean a person elected, selected, appointed employed, or otherwise designated as an officer, employee or agent of government; a juror or grand juror; an arbitrator, referee, or other person who is authorized by law or private written agreement to hear or determine a cause or controversy; an attorney or notary public when participating in

the performance of a governmental function; or a person who is performing a governmental function under claim of right.

**SUPPORTERS  
SAY:**

CSSB 966 would protect the ability of the press to keep whistleblowers and other sources confidential from prosecutors who might try to use the media as an investigative arm. Under current law, a journalist who protects the confidentiality of a source against a judicial order could 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. More than 30 states already have some form of “shield law” to protect journalists and the free flow of information, and it is time for Texas to do the same.

The press plays a vital role in a democracy by helping to protect the population from domination by powerful public 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. However, 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.

CSSB 966 would protect the free flow of information by forcing prosecutors to establish certain criteria to prove a need for the information they were seeking from the press and would require that prosecutors show that all reasonable efforts had been exhausted to obtain the information from other sources. The bill 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, or there is probable cause to believe that the person was involved with, the commission of certain serious and violent offenses. 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 establish certain criteria would help deter abuse and over-reliance by law enforcement on the news media for information.

CSSB 966's limited disclosure rules would provide a good balance between protecting the free flow of information and still allowing prosecutors to discover important evidence to prosecute crimes.

OPPONENTS  
SAY:

CSSB 966 is not needed. Texas has enjoyed a functioning democracy and a functioning press since the days of the Republic. Current law provides adequate protections for journalists faced with orders to compel disclosure of information. In addition, prosecutors do not, as a rule, rely excessively on journalists for information, and those who inappropriately subpoena journalists would find their subpoenas tossed out of court by the judiciary. In addition, the press enjoys substantial protections under the First Amendment.

CSSB 966 could hinder the ability of prosecutors to gather information. One of the goals of CSSB 966 would be to promote accountability for large government and corporate institutions, but prosecutors need to speak with whistleblowers in order to investigate effectively any accusations. CSSB 966 would shift the burden to prosecutors to show that they had exhausted all reasonable efforts to obtain the information from other sources, 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 966 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 of journalists with respect to statutory protection. Also, the bill would apply only to journalists who practiced the craft for significant financial gain, leaving out many amateur bloggers and student journalists.

NOTES:

The House committee substitute differs from the Senate-passed version by requiring that the subpoena used to obtain testimony in general disclosure situations seek information that was not only central to an investigation or prosecution of a criminal case regarding the establishment of guilt or innocence, but was based on something other than the assertion of the person requesting the subpoena that reasonable grounds existed to believe that a crime had occurred.

The substitute would require specifically that any information disclosed or received in violation of a grand jury oath given to either a juror or a witness under art. 19.34 or 20.16, Code of Criminal Procedure would fall under the required disclosure in certain criminal circumstances provisions of the bill. It also would require that an application for a subpoena of a journalist brought by the state be signed by the local district attorney.