

BILL ANALYSIS

C.S.H.B. 670
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Judiciary & Civil Jurisprudence
Committee Report (Substituted)

BACKGROUND AND PURPOSE

Thirty-six other states and the District of Columbia have statutes relating to the free flow of information and the right of a journalist to gather and communicate the news. Under current Texas law, a journalist has no assurance that a whistleblower's identity or information may be kept confidential without the journalist's risk of imprisonment. A whistleblower may hesitate to come forward to discuss matters of public concern because of fear of retribution. If a journalist cannot guarantee confidentiality, a whistleblower may not provide information to a reporter and, ultimately, to the public about matters of public concern.

C.S.H.B. 670 creates a qualified privilege and provides for a balancing test for compelled disclosure of confidential and non-confidential information and sources by a journalist. The test would be applied by a judge rather than by the subpoenaing party or by the journalist.

RULEMAKING AUTHORITY

It is the committee's opinion that this bill does not expressly grant any additional rulemaking authority to a state officer, department, agency, or institution.

ANALYSIS

C.S.H.B. 670 amends the Civil Practice and Remedies Code to prohibit a judicial, legislative, administrative, or other body with the authority to issue a subpoena or other compulsory process from compelling a journalist to testify regarding or to produce or disclose in an official proceeding any confidential or nonconfidential information, document, or item obtained or prepared while acting as a journalist or to produce or disclose in an official proceeding the source of any such material.

C.S.H.B. 670 prohibits a subpoena or other compulsory process from compelling 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 such material, that is privileged from disclosure under the provisions of the bill.

C.S.H.B. 670 sets out a general limited disclosure provision and authorizes a court, after notice and an opportunity to be heard, to compel a journalist, a journalist's employer, or a person with an independent contract with a journalist to testify regarding or to produce or disclose any information, document, or item or the source of any such material obtained while acting as a journalist, other than certain criminal conduct information subject to a distinct limited disclosure provision, if the person seeking such material or its source makes a clear and specific showing that:

- all reasonable efforts have been exhausted to obtain the information from an alternative source;
- the subpoena is not overbroad, unreasonable, or oppressive and, when appropriate, will 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, document, or item;

- in this instance, the interest of the party subpoenaing the information outweighs the public interest in gathering and dissemination of news, including the concerns of the journalist;
- the subpoena or compulsory process is not being used to obtain peripheral, nonessential, or speculative information; and
- the information, document, or item is relevant and material to proper administration of the official proceeding for which the testimony, production, or disclosure is sought and is essential to the maintenance of a claim or defense of the person seeking the testimony, production, or disclosure.

C.S.H.B. 670 authorizes the court to issue an order to compel testimony, production, or disclosure to which a journalist has asserted a privilege under the provisions of the bill only after timely notice to the journalist, the journalist's employer, or a person who has an independent contract with the journalist and a hearing. The bill requires the order to include clear and specific findings as to the showing made by the person seeking the testimony, production, or disclosure and the clear and specific evidence on which the court relied in issuing the court's order.

C.S.H.B. 670 provides that the publication or dissemination by a news medium or communication service provider of information, documents, or items privileged under the provisions of the bill is not a waiver of the journalist's privilege.

C.S.H.B. 670 specifies that extrinsic evidence of the authenticity of evidence as a condition precedent to the admissibility of the evidence in a civil proceeding is not required with respect to a recording that purports to be a broadcast by a radio or television station that holds a license issued by the Federal Communications Commission at the time of the recording. The bill authorizes the court to take judicial notice of the recording license as provided by Rule 201, Texas Rules of Evidence.

C.S.H.B. 670 defines "communication service provider," "journalist," "news medium," "official proceeding," and "public servant," and sets out the bill's purpose.

C.S.H.B. 670 amends the Code of Criminal Procedure to authorize the compelling of a journalist to testify regarding or to disclose the confidential source of any information, document, or item obtained while acting as a journalist if the person seeking the testimony, production, or disclosure makes a clear and specific showing that the source of any information, document, or item was observed by the journalist committing a felony criminal offense and the subpoenaing party has exhausted reasonable efforts to obtain the confidential source of any information, document, or item obtained or prepared while acting as a journalist; is a person who confessed or admitted to the journalist the commission of a felony criminal offense and the subpoenaing party has exhausted reasonable efforts to obtain the confidential source of any information, document, or item obtained or prepared while acting as a journalist; is a person for whom probable cause exists that the person participated in a felony criminal offense and the subpoenaing party has exhausted reasonable efforts to obtain the confidential source of any information, document, or item obtained or prepared while acting as a journalist; or disclosure of the confidential source is reasonably necessary to stop or prevent reasonably certain death or substantial bodily harm. The bill removes alleged criminal conduct that is the act of communicating, receiving, or possessing the information, document, or item from the applicability of these privileged confidential sources provisions and subjects that conduct to the provisions on privilege concerning unpublished information, document or item and nonconfidential sources. The bill authorizes, notwithstanding that exception, after a showing by clear and specific evidence of the exhaustion of reasonable alternative sources, the compelling of a journalist to testify regarding any information, document, or item disclosed or received in violation of a grand jury oath given to either a juror or a witness under applicable provisions in the Code of Criminal Procedure relating to such an oath, and gives the court the discretion to conduct an in camera hearing in this context. The bill prohibits the court from ordering the production of the confidential source until a ruling has been made on the motion.

C.S.H.B. 670 requires an application for a subpoena of a journalist under applicable provisions of the Code of Criminal Procedure relating to such subpoena or a subpoena of a journalist issued by an attorney representing the state under applicable provisions of the Code of Criminal Procedure.

Procedure relating to such attorney's authority to issue process to be signed by the elected district attorney, elected criminal district attorney, or elected county attorney, as applicable. The bill requires the application for the subpoena or the subpoena to be signed by the person succeeding the elected attorney if the elected district, criminal district, or county attorney has been disqualified or recused or has resigned. The bill requires the highest ranking assistant to the elected officer to sign the subpoena if the elected officer is not in the jurisdiction.

C.S.H.B. 670 sets out a provision on privilege concerning unpublished information, document, or item and nonconfidential sources and authorizes a court, after service of subpoena and an opportunity to be heard, to compel a journalist, a journalist's employer, or a person with an independent contract with a journalist to testify regarding or to produce or disclose any information, document, or item obtained while acting as a journalist, other than testifying on or producing material relating to privileged confidential sources, if the person seeking such material makes a clear and specific showing that all reasonable efforts have been exhausted to obtain the information from an alternative source, and that the material either is relevant and material to the proper administration of the official proceeding for which the testimony, production, or disclosure is sought and essential to the maintenance of a claim or defense of the person seeking the testimony, production, or disclosure, or 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.

C.S.H.B. 670 specifies that the court, when considering an order to compel testimony regarding or to produce or disclose any unpublished information, document, or item or the source of any such material obtained while acting as a journalist, should consider the following factors, including but not limited to, whether: the subpoena is overbroad, unreasonable, or oppressive; reasonable and timely notice was given of the demand for the information, document, or item; in this instance, the interest of the party subpoenaing the information outweighs the public interest in gathering and dissemination of news, including the concerns of a journalist; and the subpoena or compulsory process is being used to obtain peripheral, nonessential, or speculative information. The bill prohibits a court from considering a single such factor as outcome-determinative in the decision whether to compel the testimony or the production or disclosure of the unpublished information, document, or item, or the source of such material.

C.S.H.B. 670 authorizes the court to issue an order to compel testimony, production, or disclosure to which a journalist has asserted a privilege under the provisions of the bill amending the Code of Criminal Procedure only after timely notice to the journalist, the journalist's employer, or a person who has an independent contract with the journalist and a hearing. The bill requires the order to include clear and specific findings as to the showing made by the person seeking the testimony, production, or disclosure and the clear and specific evidence on which the court relied in issuing the court's order.

C.S.H.B. 670 provides that the publication or dissemination by a news medium or communication service provider of information, documents, or items privileged under the provisions of the bill amending the Code of Criminal Procedure is not a waiver of the journalist's privilege regarding sources and unpublished information, documents, or items.

C.S.H.B. 670 specifies that this article does not apply in criminal proceedings to any information, document, or item that has at any time been published or broadcast by the journalist.

C.S.H.B. 670 requires the subpoenaing party to pay a journalist a reasonable fee for the journalist's time and costs incurred in providing the information, item, or document subpoenaed, based on the fee structure provided under state law in the Public Information Act.

C.S.H.B. 670 specifies that extrinsic evidence of the authenticity of evidence as a condition precedent to the admissibility of the evidence in a civil proceeding is not required with respect to a recording that purports to be a broadcast by a radio or television station that holds a license issued by the Federal Communications Commission at the time of the recording. The bill authorizes the court to take judicial notice of the recording license as provided by Rule 201, Texas Rules of Evidence.

C.S.H.B. 670 defines "communication service provider," "journalist," "news medium," "official proceeding," "public servant," and sets out the bill's purpose.

EFFECTIVE DATE

September 1, 2009.

COMPARISON OF ORIGINAL TO SUBSTITUTE

C.S.H.B. 670 differs from the original in the definitions that both versions add to the Civil Practice and Remedies Code by removing the definition of "violent offense" that the original added to the code; making a nonsubstantive change to the definition of "journalist" that was added by the original; expanding the definition of "official proceeding" that was added by the original to specify that a proceeding includes a proceeding under Rule 202, Texas Rules of Civil Procedure; and including a juror in the added definition of "public servant," whereas the original included both a juror and grand juror.

C.S.H.B. 670 differs from the original in the added Civil Practice and Remedies Code section that sets out the general limited disclosure provision by requiring the person seeking either the information, document, or item or the source of such material to make a clear and specific showing, as in the original, that the information, document, or item is relevant and material to the proper administration of an official proceeding and essential to the maintenance of the requestor's claim or defense but removing a provision from the original that alternatively permitted the person to show that the material is 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 exist to believe that a crime has occurred.

C.S.H.B. 670 removes a specific limited disclosure provision that the original added to the Civil Practice and Remedies Code authorizing the compelling of a journalist to testify or to produce or disclose information obtained through the journalist's eyewitness observation of a crime or obtained from a person confessing to or being reasonably suspect of a violent crime or a crime against a child younger than 14 years of age when, in either case, the person seeking the testimony or production of material has exhausted reasonable efforts to obtain material from alternative sources or compelling that testimony, production, or disclosure if the information is necessary to stop or prevent a death or substantial bodily harm.

C.S.H.B. 670 differs from the original by adding a provision to the Civil Practice and Remedies Code dispensing with the requirement for extrinsic evidence of the authenticity of evidence as a condition precedent to the admissibility of the evidence in a civil proceeding with respect to a recording that purports to be a broadcast by a radio or television station licensed by the Federal Communications Commission at the time of the recording. The added provision, which also authorizes a court to take judicial notice of the recording license, was absent from the original.

C.S.H.B. 670 differs from the original by adding an article to the Code of Criminal Procedure containing many of the provisions that were added to the Civil Practice and Remedies Code, whereas the original amended the Code of Criminal Procedure only to the extent of adding a statute section making a subchapter of Civil Practice and Remedies Code relating to a journalist's testimonial privilege applicable to a criminal proceeding.

C.S.H.B. 670 differs from the original by adding the same definitions to the Code of Criminal Procedure as the original added to the Civil Practice and Remedies Code but did not add to the Code of Criminal Procedure.

C.S.H.B. 670 differs from the original by including the same purpose provision in the added Code of Criminal Procedure article as was added to the Civil Practice and Remedies Code by both the original and the substitute. The original adds no equivalent provision to the Code of Criminal Procedure.

C.S.H.B. 670 differs from the original by adding a provision to the Code of Criminal Procedure regarding privileged confidential sources that authorizes the compelling of a journalist to testify regarding or to disclose the confidential source of any information, document, or item obtained by the journalist if the person seeking the testimony, production, or disclosure makes a clear and specific showing that the source was observed by the journalist committing a felony criminal offense, the source confessed or admitted to the journalist the commission of a felony criminal offense, or there is probable cause that the person participated in a felony criminal offense, and in each case, the subpoenaing party has exhausted reasonable efforts to obtain the confidential source of such material, or if disclosure of the confidential source is reasonably necessary to stop or prevent death or substantial bodily harm. The original adds no equivalent provision to the Code of Criminal Procedure.

C.S.H.B. 670 differs from the original by adding a provision to the Code of Criminal Procedure regarding the procedure for contesting compelled disclosure of confidential sources who have violated grand jury oaths by indicating that a court has the discretion to conduct an in camera hearing. It also expressly states that the court may not order the production of the confidential source until a ruling has been made on the motion.

C.S.H.B. 670 differs from the original by adding resignation to the list of circumstances whereby an application for a subpoena must be signed by the person succeeding the elected attorney. It also provides that if the elected officer is not in the jurisdiction, the highest ranking assistant to the elected officer must sign the subpoena.

C.S.H.B. 670 differs from the original by adding a provision to the Code of Criminal Procedure regarding privileged unpublished information, documents or items and nonconfidential sources that authorizes a court, after service of subpoena and an opportunity to be heard, to compel a journalist, a journalist's employer, or a person with an independent contract with a journalist to testify regarding or to produce or disclose any unpublished information, document, or item or the source of any information, document, or item obtained by the journalist if the person seeking such material or the source of such material makes a clear and specific showing that all reasonable efforts have been exhausted to obtain the information from an alternative source and the unpublished material is relevant and material to the proper administration of an official proceeding and essential to the maintenance of the requestor's claim or defense or 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 provision added by the substitute, which is absent from the original, enumerates certain factors for the court to consider, but does not limit the court to only these factors, when considering an order to compel testimony regarding or production of unpublished material.

C.S.H.B. 670 differs from the original by including in the added Code of Criminal Procedures article the same notice requirements for a court order compelling testimony or production of material and the same provisions regarding non-waiver of privilege on basis of publication of privileged information as were added to the Civil Practice and Remedies Code by both the original and the substitute. The original added no equivalent provisions to the Code of Criminal Procedures.

C.S.H.B. 670 differs from the original by adding a provision to the Code of Criminal Procedures exempting any information, document, or item published or broadcast by the journalist from the application of the added article; a provision requiring a subpoenaing party to pay a journalist a reasonable fee for the journalist's time and costs incurred in providing the information, item, or document subpoenaed; and a provision dispensing with the requirement for extrinsic evidence of the authenticity of evidence as a condition precedent to the admissibility of the evidence in a civil proceeding with respect to a recording that purports to be a broadcast by a radio or television station licensed by the Federal Communications Commission at the time of the recording. The original did not add any equivalent provisions to the Code of Criminal Procedure.