

BILL ANALYSIS

Senate Research Center
81R3389 CAE-F

S.B. 915
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Jurisprudence
3/23/2009
As Filed

AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

The purpose of this legislation is to foster the free flow of information about significant issues of public interest (such as government corruption, corporate malfeasance, et cetera), to preserve a free and active press, while at the same time protecting the right of the public to effective law enforcement and the fair administration of justice. Currently, whistleblowers are hesitant to come forward to discuss matters of public concern (e.g., issues at the Texas Youth Commission) because of fear of retribution. As the law stands, a journalist can make no assurance that a whistleblower's identity or the information the whistleblower provides will be kept confidential without the journalist risking going to jail. Without the promise of confidentiality, information may not be provided to reporters and the public will suffer from the resulting lack of information, the continued "behind the scenes" malfeasance, and the inability to shine light on corruption that impacts society at large. By adopting this bill Texas will join 36 other states and the District of Columbia that safeguard the free flow of information to the public by protecting the rights of sources to provide information and the rights of journalists to gather and communicate the news without unwarranted intrusion. The net effect of this legislation will be to increase information about matters of broad public interest and concern to the citizens of Texas.

As proposed, S.B. 915 enacts a qualified privilege providing a balancing test for compelled disclosure of confidential and nonconfidential information and sources from a journalist. The bill requires the test to be applied by an unbiased third party—a judge—rather than the subpoenaing party or the journalist.

RULEMAKING AUTHORITY

This bill does not expressly grant any additional rulemaking authority to a state officer, institution, or agency.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends Chapter 22, Civil Practice and Remedies Code, by adding Subchapter C, as follows:

SUBCHAPTER C. JOURNALIST'S QUALIFIED TESTIMONIAL PRIVILEGE

Sec. 22.021. DEFINITIONS. Defines "communication service provider," "journalist," "news medium," "official proceeding," "public servant," and "violent offense."

Sec. 22.022. PURPOSE. Provides that the purpose of this subchapter is to increase the free flow of information and preserve a free and active press and, at the same time, protect the right of the public to effective law enforcement and the fair administration of justice.

Sec. 22.023. PRIVILEGE. (a) Prohibits a judicial, legislative, administrative, or other body with the authority to issue a subpoena or other compulsory process, except as otherwise provided by this subchapter, 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 the source of any information, document, or item described by this subsection.

(b) 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 that are privileged from disclosure under Subsection (a).

Sec. 22.024. LIMITED DISCLOSURE GENERALLY. 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 information, document, or item obtained while acting as a journalist, other than as described by Section 22.025, if the person seeking the information, document, or item of the source of any information, document, or item makes a clear and specific showing that:

- (1) all reasonable efforts have been exhausted to obtain the information from an alternative source;
- (2) the subpoena is not overboard, 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;
- (3) reasonable and timely notice was given of the demand for the information, document, or item;
- (4) 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;
- (5) the subpoena or compulsory process is not being used to obtain peripheral, nonessential, or speculative information; and
- (6) the information, document, or item is relevant and material to the 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; or 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.

Sec. 22.025. LIMITED DISCLOSURE: INFORMATION OBTAINED BY OBSERVING CRIME OR PERSON ALLEGED TO HAVE COMMITTED CERTAIN CRIMES; PREVENTION OF CERTAIN HARMS. (a) Authorizes a journalist to be compelled to testify regarding or to produce or disclose any information, document, or item or the 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 information, document, or item or the source of any information, document, or item:

- (1) was obtained as the result of an eyewitness observation of criminal conduct by the journalist and a court determines by clear and specific evidence that the person requesting the testimony, production, or disclosure has exhausted reasonable efforts to obtain the information, document, or item from alternative sources;
- (2) was obtained from a person who has confessed or admitted to 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 a court determines by clear and specific evidence that the person requesting the testimony, production, or disclosure has exhausted reasonable efforts to obtain the information, document, or item from alternative sources;

(3) was obtained from a person for whom probable cause exists that the person has participated in a violent offense or in a crime against a child victim younger than 14 years of age at the time the offense was committed and a court determines by clear and specific evidence that the person requesting the testimony, production, or disclosure has exhausted reasonable efforts to obtain the information, document, or item from alternative sources; or

(4) is reasonably necessary to stop or prevent reasonably certain death or substantial bodily harm.

(b) Provides that if the alleged criminal conduct is the act of communicating, receiving, or possessing the information, document, or item and the information does not relate to conduct constituting a violent offense under Section 22.021(6) (relating to the definition of a "violent offense"), this section does not apply, and Section 22.024 governs the act.

(c) Provides that notwithstanding Subsection (b), Subsection (a)(1) applies to any information, document, or item disclosed or received in violation of a grand jury oath given to either a juror or a witness under Article 19.34 (Oath of Grand Jurors) or 20.16 (Oaths to Witness), Code of Criminal Procedure.

(d) Requires that an application for a subpoena of a journalist under Article 24.03 (Subpoena and Application Therefor), Code of Criminal Procedure, or a subpoena of a journalist issued by an attorney representing the state under Article 20.10 (Attorney or Foreman May Issue Process) or 20.11 (Out-of-County Witnesses), Code of Criminal Procedure, be signed by the elected district attorney, elected criminal district attorney, or elected county attorney, as applicable. Requires that the application for subpoena or the subpoena, if the elected district attorney, elected criminal district attorney, or elected county attorney has been disqualified or recused, be signed by the person succeeding the elected attorney.

Sec. 22.026. NOTICE. Authorizes an order to compel testimony, production, or disclosure to which a journalist has asserted a privilege under this subchapter to be issued 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. Requires that the order 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.

Sec. 22.027. PUBLICATION OF PRIVILEGED INFORMATION. Provides that publication or dissemination by a news medium or communication service provider of information, documents, or items privileged under this subchapter is not a waiver of the journalist's privilege.

SECTION 2. Amends Chapter 38, Code of Criminal Procedure, by adding Article 38.11, as follows:

Art. 38.11. JOURNALIST'S TESTIMONIAL PRIVILEGE. Provides that Subchapter C, Chapter 22, Civil Practice and Remedies Code, applies to a criminal proceeding.

SECTION 3. Provides that this Act applies only to information, documents, or items or the source of any information, document, or item obtained or prepared for publication in a news medium or communication service provider on or after the effective date of this Act.

SECTION 4. Effective date: September 1, 2009.