

## **BILL ANALYSIS**

Senate Research Center

C.S.S.B. 915  
By: Ellis et al.  
Jurisprudence  
3/26/2009  
Committee Report (Substituted)

### **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.

C.S.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 IN CIVIL PROCEEDINGS**

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 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.

Sec. 22.025. 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. 22.026. 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.

Sec. 22.027. NEWS MEDIA RECORDINGS. Provides 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 (FCC) at the time of the recording. Authorizes the court to take judicial notice of the recording license as provided by Rule 201 (Judicial Notice of Adjudicated Facts), Texas Rules of Evidence.

SECTION 2. Amends Chapter 38, Code of Criminal Procedure, by adding Articles 38.11 and 38.111, as follows:

Art. 38.11. JOURNALIST'S QUALIFIED TESTIMONIAL PRIVILEGE IN CRIMINAL PROCEEDINGS.

Sec. 1. DEFINITIONS. Defines "communication service provider," "journalist," "news medium," "official proceeding," and "public servant."

Sec. 2. PURPOSE. Provides that the purpose of this article 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. 3. PRIVILEGE CONCERNING CONFIDENTIAL SOURCES. (a) Authorizes a journalist to be compelled 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:

(1) was observed by the journalist committing a felony criminal offense and the subpoenaing party has exhausted reasonable efforts to obtain from alternative sources the confidential source of any information, document, or item obtained or prepared while acting as a journalist;

(2) 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 from alternative sources the confidential source of any information, document, or item obtained or prepared while acting as a journalist;

(3) 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 from alternative sources the confidential source of any information, document, or item obtained or prepared while acting as a journalist; or

(4) disclosure of the confidential source 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 time, this section does not apply and Section 4 governs the act.

(c) Provides that Section 3(a), notwithstanding Section 3(b), 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 Witnesses). Provides that in this context, the court has the discretion to conduct an in camera hearing. Prohibits the court from ordering the production of the confidential source until a ruling has been made on the motion.

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

assistant to the elected officer to sign the subpoena if the elected officer is not in the jurisdiction.

Sec. 4. PRIVILEGE CONCERNING UNPUBLISHED INFORMATION, DOCUMENT, OR ITEM AND NONCONFIDENTIAL SOURCES. (a) 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 while acting as a journalist, other than as described by Section 3, if the person seeking the unpublished information, document, or item or 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 alternative sources; and

(2) the unpublished 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 and based on something other than the assertion of the person requesting the subpoena, reasonable grounds exist to believe that a crime has occurred.

(b) Provides 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 information, document, or item obtained while acting as a journalist, should consider the following factors, including but not limited to, whether:

(1) the subpoena is overbroad, unreasonable, or oppressive;

(2) reasonable and timely notice was given of the demand for the information, document, or item;

(3) 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; and

(4) the subpoena or compulsory process is being used to obtain peripheral, nonessential, or speculative information.

(c) Prohibits a court from considering a single factor under Subsection (b) 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 any information, document, or item.

Sec. 5. 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. 6. 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 article is not a waiver of the journalist's privilege regarding sources and unpublished information, documents, or items.

Sec. 7. PUBLISHED INFORMATION. Provides that this article does not apply to any information, document, or item that has at any time been published or broadcast by the journalist.

Sec. 8. REIMBURSEMENT OF COSTS. 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 by Subchapter F (Charges for Providing Copies of Public Information), Chapter 552 (Public Information), Government Code.

Art. 38.111. NEWS MEDIA RECORDINGS. Provides that extrinsic evidence of the authenticity of evidence as a condition precedent to the admissibility of the evidence in a criminal 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 FCC at the time of the recording. Authorizes the court to take judicial notice of the recording license as provided by Rule 201, Texas Rules of Evidence.

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.