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H.B. No. 670

Substitute the following for H.B. No. 670:

By: Madden

C.S.H.B. No. 670

A BILL TO BE ENTITLED

AN ACT

relating to a qualified privilege of a journalist not to testify.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Chapter 22, Civil Practice and Remedies Code, is amended by adding Subchapter C to read as follows:

SUBCHAPTER C. JOURNALIST'S QUALIFIED TESTIMONIAL PRIVILEGE IN
CIVIL PROCEEDINGS

Sec. 22.021. DEFINITIONS. In this subchapter:

(1) "Communication service provider" means a person or the parent, subsidiary, division, or affiliate of a person who transmits information chosen by a customer by electronic means, including:

(A) a telecommunications carrier, as defined by Section 3, Communications Act of 1934 (47 U.S.C. Section 153);

(B) a provider of information service, as defined by Section 3, Communications Act of 1934 (47 U.S.C. Section 153);

(C) a provider of interactive computer service, as defined by Section 230, Communications Act of 1934 (47 U.S.C. Section 230); and

(D) an information content provider, as defined by Section 230, Communications Act of 1934 (47 U.S.C. Section 230).

(2) "Journalist" means a person, including a parent, subsidiary, division, or affiliate of a person, who for a substantial portion of the person's livelihood or for substantial

1 financial gain, gathers, compiles, prepares, collects,
2 photographs, records, writes, edits, reports, investigates,
3 processes, or publishes news or information that is disseminated by
4 a news medium or communication service provider and includes:

5 (A) a person who supervises or assists in
6 gathering, preparing, and disseminating the news or information; or

7 (B) notwithstanding the foregoing, a person who
8 is or was a journalist, scholar, or researcher employed by an
9 institution of higher education at the time the person obtained or
10 prepared the requested information, or a person who at the time the
11 person obtained or prepared the requested information:

12 (i) is earning a significant portion of the
13 person's livelihood by obtaining or preparing information for
14 dissemination by a news medium or communication service provider;
15 or

16 (ii) was serving as an agent, assistant,
17 employee, or supervisor of a news medium or communication service
18 provider.

19 (3) "News medium" means a newspaper, magazine or
20 periodical, book publisher, news agency, wire service, radio or
21 television station or network, cable, satellite, or other
22 transmission system or carrier or channel, or a channel or
23 programming service for a station, network, system, or carrier, or
24 an audio or audiovisual production company or Internet company or
25 provider, or the parent, subsidiary, division, or affiliate of that
26 entity, that disseminates news or information to the public by any
27 means, including:

- 1 (A) print;
- 2 (B) television;
- 3 (C) radio;
- 4 (D) photographic;
- 5 (E) mechanical;
- 6 (F) electronic; and
- 7 (G) other means, known or unknown, that are
- 8 accessible to the public.

9 (4) "Official proceeding" means any type of
10 administrative, executive, legislative, or judicial proceeding
11 that may be conducted before a public servant, including a
12 proceeding under Rule 202, Texas Rules of Civil Procedure.

13 (5) "Public servant" means a person elected, selected,
14 appointed, employed, or otherwise designated as one of the
15 following, even if the person has not yet qualified for office or
16 assumed the person's duties:

- 17 (A) an officer, employee, or agent of government;
- 18 (B) a juror;
- 19 (C) an arbitrator, referee, or other person who
20 is authorized by law or private written agreement to hear or
21 determine a cause or controversy;

22 (D) an attorney or notary public when
23 participating in the performance of a governmental function; or

24 (E) a person who is performing a governmental
25 function under a claim of right, although the person is not legally
26 qualified to do so.

27 Sec. 22.022. PURPOSE. The purpose of this subchapter is to

1 increase the free flow of information and preserve a free and active
2 press and, at the same time, protect the right of the public to
3 effective law enforcement and the fair administration of justice.

4 Sec. 22.023. PRIVILEGE. (a) Except as otherwise provided
5 by this subchapter, a judicial, legislative, administrative, or
6 other body with the authority to issue a subpoena or other
7 compulsory process may not compel a journalist to testify regarding
8 or to produce or disclose in an official proceeding:

9 (1) any confidential or nonconfidential information,
10 document, or item obtained or prepared while acting as a
11 journalist; or

12 (2) the source of any information, document, or item
13 described by Subdivision (1).

14 (b) A subpoena or other compulsory process may not compel
15 the parent, subsidiary, division, or affiliate of a communication
16 service provider or news medium to disclose the information,
17 documents, or items or the source of any information, documents, or
18 items that are privileged from disclosure under Subsection (a).

19 Sec. 22.024. LIMITED DISCLOSURE GENERALLY. After notice
20 and an opportunity to be heard, a court may compel a journalist, a
21 journalist's employer, or a person with an independent contract
22 with a journalist to testify regarding or to produce or disclose any
23 information, document, or item or the source of any information,
24 document, or item obtained while acting as a journalist, other than
25 as described by Section 22.025, if the person seeking the
26 information, document, or item or the source of any information,
27 document, or item makes a clear and specific showing that:

1 (1) all reasonable efforts have been exhausted to
2 obtain the information from an alternative source;

3 (2) the subpoena is not overbroad, unreasonable, or
4 oppressive and, when appropriate, will be limited to the
5 verification of published information and the surrounding
6 circumstances relating to the accuracy of the published
7 information;

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

10 (4) in this instance, the interest of the party
11 subpoenaing the information outweighs the public interest in
12 gathering and dissemination of news, including the concerns of the
13 journalist;

14 (5) the subpoena or compulsory process is not being
15 used to obtain peripheral, nonessential, or speculative
16 information; and

17 (6) the information, document, or item is relevant and
18 material to the proper administration of the official proceeding
19 for which the testimony, production, or disclosure is sought and is
20 essential to the maintenance of a claim or defense of the person
21 seeking the testimony, production, or disclosure.

22 Sec. 22.025. NOTICE. An order to compel testimony,
23 production, or disclosure to which a journalist has asserted a
24 privilege under this subchapter may be issued only after timely
25 notice to the journalist, the journalist's employer, or a person
26 who has an independent contract with the journalist and a hearing.
27 The order must include clear and specific findings as to the showing

1 made by the person seeking the testimony, production, or disclosure
2 and the clear and specific evidence on which the court relied in
3 issuing the court's order.

4 Sec. 22.026. PUBLICATION OF PRIVILEGED INFORMATION.
5 Publication or dissemination by a news medium or communication
6 service provider of information, documents, or items privileged
7 under this subchapter is not a waiver of the journalist's
8 privilege.

9 Sec. 22.027. NEWS MEDIA RECORDINGS. Extrinsic evidence of
10 the authenticity of evidence as a condition precedent to the
11 admissibility of the evidence in a civil proceeding is not required
12 with respect to a recording that purports to be a broadcast by a
13 radio or television station that holds a license issued by the
14 Federal Communications Commission at the time of the recording.
15 The court may take judicial notice of the recording license as
16 provided by Rule 201, Texas Rules of Evidence.

17 SECTION 2. Chapter 38, Code of Criminal Procedure, is
18 amended by adding Articles 38.11 and 38.111 to read as follows:

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

21 Sec. 1. DEFINITIONS. In this article:

22 (1) "Communication service provider" means a person or
23 the parent, subsidiary, division, or affiliate of a person who
24 transmits information chosen by a customer by electronic means,
25 including:

26 (A) a telecommunications carrier, as defined by
27 Section 3, Communications Act of 1934 (47 U.S.C. Section 153);

1 (B) a provider of information service, as defined
2 by Section 3, Communications Act of 1934 (47 U.S.C. Section 153);

3 (C) a provider of interactive computer service,
4 as defined by Section 230, Communications Act of 1934 (47 U.S.C.
5 Section 230); and

6 (D) an information content provider, as defined
7 by Section 230, Communications Act of 1934 (47 U.S.C. Section 230).

8 (2) "Journalist" means a person, including a parent,
9 subsidiary, division, or affiliate of a person, who for a
10 substantial portion of the person's livelihood or for substantial
11 financial gain, gathers, compiles, prepares, collects,
12 photographs, records, writes, edits, reports, investigates,
13 processes, or publishes news or information that is disseminated by
14 a news medium or communication service provider and includes:

15 (A) a person who supervises or assists in
16 gathering, preparing, and disseminating the news or information; or

17 (B) notwithstanding the foregoing, a person who
18 is or was a journalist, scholar, or researcher employed by an
19 institution of higher education at the time the person obtained or
20 prepared the requested information, or a person who at the time the
21 person obtained or prepared the requested information:

22 (i) is earning a significant portion of the
23 person's livelihood by obtaining or preparing information for
24 dissemination by a news medium or communication service provider;
25 or

26 (ii) was serving as an agent, assistant,
27 employee, or supervisor of a news medium or communication service

1 provider.

2 (3) "News medium" means a newspaper, magazine or
3 periodical, book publisher, news agency, wire service, radio or
4 television station or network, cable, satellite, or other
5 transmission system or carrier or channel, or a channel or
6 programming service for a station, network, system, or carrier, or
7 an audio or audiovisual production company or Internet company or
8 provider, or the parent, subsidiary, division, or affiliate of that
9 entity, that disseminates news or information to the public by any
10 means, including:

11 (A) print;

12 (B) television;

13 (C) radio;

14 (D) photographic;

15 (E) mechanical;

16 (F) electronic; and

17 (G) other means, known or unknown, that are
18 accessible to the public.

19 (4) "Official proceeding" means any type of
20 administrative, executive, legislative, or judicial proceeding
21 that may be conducted before a public servant.

22 (5) "Public servant" means a person elected, selected,
23 appointed, employed, or otherwise designated as one of the
24 following, even if the person has not yet qualified for office or
25 assumed the person's duties:

26 (A) an officer, employee, or agent of government;

27 (B) a juror or grand juror;

1 (C) an arbitrator, referee, or other person who
2 is authorized by law or private written agreement to hear or
3 determine a cause or controversy;

4 (D) an attorney or notary public when
5 participating in the performance of a governmental function; or

6 (E) a person who is performing a governmental
7 function under a claim of right, although the person is not legally
8 qualified to do so.

9 Sec. 2. PURPOSE. The purpose of this article is to increase
10 the free flow of information and preserve a free and active press
11 and, at the same time, protect the right of the public to effective
12 law enforcement and the fair administration of justice.

13 Sec. 3. PRIVILEGE CONCERNING CONFIDENTIAL SOURCES. (a) A
14 journalist may be compelled to testify regarding or to disclose the
15 confidential source of any information, document, or item obtained
16 while acting as a journalist if the person seeking the testimony,
17 production, or disclosure makes a clear and specific showing that
18 the source of any information, document, or item:

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

24 (2) is a person who confessed or admitted to the
25 journalist the commission of a felony criminal offense and the
26 subpoenaing party has exhausted reasonable efforts to obtain the
27 confidential source of any information, document, or item obtained

1 or prepared while acting as a journalist;

2 (3) is a person for whom probable cause exists that the
3 person participated in a felony criminal offense and the
4 subpoenaing party has exhausted reasonable efforts to obtain the
5 confidential source of any information, document, or item obtained
6 or prepared while acting as a journalist; or

7 (4) disclosure of the confidential source is
8 reasonably necessary to stop or prevent reasonably certain death or
9 substantial bodily harm.

10 (b) If the alleged criminal conduct is the act of
11 communicating, receiving, or possessing the information, document,
12 or item, this section does not apply, and Section 4 governs the act.

13 (c) Notwithstanding Section 3(b), Section 3(a) applies to
14 any information, document, or item disclosed or received in
15 violation of a grand jury oath given to either a juror or a witness
16 under Article 19.34 or 20.16. In this context, the court has the
17 discretion to conduct an in camera hearing. The court may not order
18 the production of the confidential source until a ruling has been
19 made on the motion.

20 (d) An application for a subpoena of a journalist under
21 Article 24.03, or a subpoena of a journalist issued by an attorney
22 representing the state under Article 20.10 or 20.11, must be signed
23 by the elected district attorney, elected criminal district
24 attorney, or elected county attorney, as applicable. If the
25 elected district attorney, elected criminal district attorney, or
26 elected county attorney has been disqualified or recused or has
27 resigned, the application for the subpoena or the subpoena must be

1 signed by the person succeeding the elected attorney. If the
2 elected officer is not in the jurisdiction, the highest ranking
3 assistant to the elected officer must sign the subpoena.

4 Sec. 4. PRIVILEGE CONCERNING UNPUBLISHED INFORMATION,
5 DOCUMENT, OR ITEM AND NONCONFIDENTIAL SOURCES. (a) After service
6 of subpoena and an opportunity to be heard, a court may compel a
7 journalist, a journalist's employer, or a person with an
8 independent contract with a journalist to testify regarding or to
9 produce or disclose any unpublished information, document, or item
10 or the source of any information, document, or item obtained while
11 acting as a journalist, other than as described by Section 3, if the
12 person seeking the unpublished information, document, or item or
13 the source of any information, document, or item makes a clear and
14 specific showing that:

15 (1) all reasonable efforts have been exhausted to
16 obtain the information from an alternative source; and

17 (2) the unpublished information, document, or item:

18 (A) is relevant and material to the proper
19 administration of the official proceeding for which the testimony,
20 production, or disclosure is sought and is essential to the
21 maintenance of a claim or defense of the person seeking the
22 testimony, production, or disclosure; or

23 (B) is central to the investigation or
24 prosecution of a criminal case and based on something other than the
25 assertion of the person requesting the subpoena, reasonable grounds
26 exist to believe that a crime has occurred.

27 (b) The court, when considering an order to compel testimony

1 regarding or to produce or disclose any unpublished information,
2 document, or item or the source of any information, document, or
3 item obtained while acting as a journalist, should consider the
4 following factors, including but not limited to, whether:

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

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

9 (3) in this instance, the interest of the party
10 subpoenaing the information outweighs the public interest in
11 gathering and dissemination of news, including the concerns of the
12 journalist; and

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

15 (c) A court may not consider a single factor under
16 Subsection (b) as outcome-determinative in the decision whether to
17 compel the testimony or the production or disclosure of the
18 unpublished information, document, or item, or the source of any
19 information, document, or item.

20 Sec. 5. NOTICE. An order to compel testimony, production,
21 or disclosure to which a journalist has asserted a privilege under
22 this article may be issued only after timely notice to the
23 journalist, the journalist's employer, or a person who has an
24 independent contract with the journalist and a hearing. The order
25 must include clear and specific findings as to the showing made by
26 the person seeking the testimony, production, or disclosure and the
27 clear and specific evidence on which the court relied in issuing the

1 court's order.

2 Sec. 6. PUBLICATION OF PRIVILEGED INFORMATION. Publication
3 or dissemination by a news medium or communication service provider
4 of information, documents, or items privileged under this article
5 is not a waiver of the journalist's privilege regarding sources and
6 unpublished information, documents, or items.

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

10 Sec. 8. REIMBURSEMENT OF COSTS. The subpoenaing party shall
11 pay a journalist a reasonable fee for the journalist's time and
12 costs incurred in providing the information, item, or document
13 subpoenaed, based on the fee structure provided by Subchapter F,
14 Chapter 552, Government Code.

15 Art. 38.111. NEWS MEDIA RECORDINGS. Extrinsic evidence of
16 the authenticity of evidence as a condition precedent to the
17 admissibility of the evidence in a criminal proceeding is not
18 required with respect to a recording that purports to be a broadcast
19 by a radio or television station that holds a license issued by the
20 Federal Communications Commission at the time of the recording.
21 The court may take judicial notice of the recording license as
22 provided by Rule 201, Texas Rules of Evidence.

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

1 SECTION 4. This Act takes effect September 1, 2009.