

1-1 By: Martinez Fischer, et al. (Senate Sponsor - Ellis) H.B. No. 670
1-2 (In the Senate - Received from the House April 6, 2009;
1-3 April 7, 2009, read first time and referred to Committee on
1-4 Jurisprudence; April 20, 2009, reported adversely, with favorable
1-5 Committee Substitute by the following vote: Yeas 5, Nays 0;
1-6 April 20, 2009, sent to printer.)

1-7 COMMITTEE SUBSTITUTE FOR H.B. No. 670 By: Wentworth

1-8 A BILL TO BE ENTITLED
1-9 AN ACT

1-10 relating to a qualified privilege of a journalist not to testify.
1-11 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:
1-12 SECTION 1. Chapter 22, Civil Practice and Remedies Code, is
1-13 amended by adding Subchapter C to read as follows:

1-14 SUBCHAPTER C. JOURNALIST'S QUALIFIED TESTIMONIAL PRIVILEGE IN
1-15 CIVIL PROCEEDINGS

1-16 Sec. 22.021. DEFINITIONS. In this subchapter:

1-17 (1) "Communication service provider" means a person or
1-18 the parent, subsidiary, division, or affiliate of a person who
1-19 transmits information chosen by a customer by electronic means,
1-20 including:

1-21 (A) a telecommunications carrier, as defined by
1-22 Section 3, Communications Act of 1934 (47 U.S.C. Section 153);

1-23 (B) a provider of information service, as defined
1-24 by Section 3, Communications Act of 1934 (47 U.S.C. Section 153);

1-25 (C) a provider of interactive computer service,
1-26 as defined by Section 230, Communications Act of 1934 (47 U.S.C.
1-27 Section 230); and

1-28 (D) an information content provider, as defined
1-29 by Section 230, Communications Act of 1934 (47 U.S.C. Section 230).

1-30 (2) "Journalist" means a person, including a parent,
1-31 subsidiary, division, or affiliate of a person, who for a
1-32 substantial portion of the person's livelihood or for substantial
1-33 financial gain, gathers, compiles, prepares, collects,
1-34 photographs, records, writes, edits, reports, investigates,
1-35 processes, or publishes news or information that is disseminated by
1-36 a news medium or communication service provider and includes:

1-37 (A) a person who supervises or assists in
1-38 gathering, preparing, and disseminating the news or information; or

1-39 (B) notwithstanding the foregoing, a person who
1-40 is or was a journalist, scholar, or researcher employed by an
1-41 institution of higher education at the time the person obtained or
1-42 prepared the requested information, or a person who at the time the
1-43 person obtained or prepared the requested information:

1-44 (i) is earning a significant portion of the
1-45 person's livelihood by obtaining or preparing information for
1-46 dissemination by a news medium or communication service provider;
1-47 or

1-48 (ii) was serving as an agent, assistant,
1-49 employee, or supervisor of a news medium or communication service
1-50 provider.

1-51 (3) "News medium" means a newspaper, magazine or
1-52 periodical, book publisher, news agency, wire service, radio or
1-53 television station or network, cable, satellite, or other
1-54 transmission system or carrier or channel, or a channel or
1-55 programming service for a station, network, system, or carrier, or
1-56 an audio or audiovisual production company or Internet company or
1-57 provider, or the parent, subsidiary, division, or affiliate of that
1-58 entity, that disseminates news or information to the public by any
1-59 means, including:

1-60 (A) print;

1-61 (B) television;

1-62 (C) radio;

1-63 (D) photographic;

2-1 (E) mechanical;
2-2 (F) electronic; and
2-3 (G) other means, known or unknown, that are
2-4 accessible to the public.

2-5 (4) "Official proceeding" means any type of
2-6 administrative, executive, legislative, or judicial proceeding
2-7 that may be conducted before a public servant, including a
2-8 proceeding under Rule 202, Texas Rules of Civil Procedure.

2-9 (5) "Public servant" means a person elected, selected,
2-10 appointed, employed, or otherwise designated as one of the
2-11 following, even if the person has not yet qualified for office or
2-12 assumed the person's duties:

2-13 (A) an officer, employee, or agent of government;

2-14 (B) a juror;

2-15 (C) an arbitrator, referee, or other person who
2-16 is authorized by law or private written agreement to hear or
2-17 determine a cause or controversy;

2-18 (D) an attorney or notary public when
2-19 participating in the performance of a governmental function; or

2-20 (E) a person who is performing a governmental
2-21 function under a claim of right, although the person is not legally
2-22 qualified to do so.

2-23 Sec. 22.022. PURPOSE. The purpose of this subchapter is to
2-24 increase the free flow of information and preserve a free and active
2-25 press and, at the same time, protect the right of the public to
2-26 effective law enforcement and the fair administration of justice.

2-27 Sec. 22.023. PRIVILEGE. (a) Except as otherwise provided
2-28 by this subchapter, a judicial, legislative, administrative, or
2-29 other body with the authority to issue a subpoena or other
2-30 compulsory process may not compel a journalist to testify regarding
2-31 or to produce or disclose in an official proceeding:

2-32 (1) any confidential or nonconfidential information,
2-33 document, or item obtained or prepared while acting as a
2-34 journalist; or

2-35 (2) the source of any information, document, or item
2-36 described by Subdivision (1).

2-37 (b) A subpoena or other compulsory process may not compel
2-38 the parent, subsidiary, division, or affiliate of a communication
2-39 service provider or news medium to disclose the information,
2-40 documents, or items or the source of any information, documents, or
2-41 items that are privileged from disclosure under Subsection (a).

2-42 Sec. 22.024. LIMITED DISCLOSURE GENERALLY. After notice
2-43 and an opportunity to be heard, a court may compel a journalist, a
2-44 journalist's employer, or a person with an independent contract
2-45 with a journalist to testify regarding or to produce or disclose any
2-46 information, document, or item or the source of any information,
2-47 document, or item obtained while acting as a journalist, if the
2-48 person seeking the information, document, or item or the source of
2-49 any information, document, or item makes a clear and specific
2-50 showing that:

2-51 (1) all reasonable efforts have been exhausted to
2-52 obtain the information from alternative sources;

2-53 (2) the subpoena is not overbroad, unreasonable, or
2-54 oppressive and, when appropriate, will be limited to the
2-55 verification of published information and the surrounding
2-56 circumstances relating to the accuracy of the published
2-57 information;

2-58 (3) reasonable and timely notice was given of the
2-59 demand for the information, document, or item;

2-60 (4) in this instance, the interest of the party
2-61 subpoenaing the information outweighs the public interest in
2-62 gathering and dissemination of news, including the concerns of the
2-63 journalist;

2-64 (5) the subpoena or compulsory process is not being
2-65 used to obtain peripheral, nonessential, or speculative
2-66 information; and

2-67 (6) the information, document, or item is relevant and
2-68 material to the proper administration of the official proceeding
2-69 for which the testimony, production, or disclosure is sought and is

3-1 essential to the maintenance of a claim or defense of the person
3-2 seeking the testimony, production, or disclosure.

3-3 Sec. 22.025. NOTICE. An order to compel testimony,
3-4 production, or disclosure to which a journalist has asserted a
3-5 privilege under this subchapter may be issued only after timely
3-6 notice to the journalist, the journalist's employer, or a person
3-7 who has an independent contract with the journalist and a hearing.
3-8 The order must include clear and specific findings as to the showing
3-9 made by the person seeking the testimony, production, or disclosure
3-10 and the clear and specific evidence on which the court relied in
3-11 issuing the court's order.

3-12 Sec. 22.026. PUBLICATION OF PRIVILEGED INFORMATION.
3-13 Publication or dissemination by a news medium or communication
3-14 service provider of information, documents, or items privileged
3-15 under this subchapter is not a waiver of the journalist's
3-16 privilege.

3-17 Sec. 22.027. NEWS MEDIA RECORDINGS. Extrinsic evidence of
3-18 the authenticity of evidence as a condition precedent to the
3-19 admissibility of the evidence in a civil proceeding is not required
3-20 with respect to a recording that purports to be a broadcast by a
3-21 radio or television station that holds a license issued by the
3-22 Federal Communications Commission at the time of the recording.
3-23 The court may take judicial notice of the recording license as
3-24 provided by Rule 201, Texas Rules of Evidence.

3-25 SECTION 2. Chapter 38, Code of Criminal Procedure, is
3-26 amended by adding Articles 38.11 and 38.111 to read as follows:

3-27 Art. 38.11. JOURNALIST'S QUALIFIED TESTIMONIAL PRIVILEGE
3-28 IN CRIMINAL PROCEEDINGS

3-29 Sec. 1. DEFINITIONS. In this article:

3-30 (1) "Communication service provider" means a person or
3-31 the parent, subsidiary, division, or affiliate of a person who
3-32 transmits information chosen by a customer by electronic means,
3-33 including:

3-34 (A) a telecommunications carrier, as defined by
3-35 Section 3, Communications Act of 1934 (47 U.S.C. Section 153);

3-36 (B) a provider of information service, as defined
3-37 by Section 3, Communications Act of 1934 (47 U.S.C. Section 153);

3-38 (C) a provider of interactive computer service,
3-39 as defined by Section 230, Communications Act of 1934 (47 U.S.C.
3-40 Section 230); and

3-41 (D) an information content provider, as defined
3-42 by Section 230, Communications Act of 1934 (47 U.S.C. Section 230).

3-43 (2) "Journalist" means a person, including a parent,
3-44 subsidiary, division, or affiliate of a person, who for a
3-45 substantial portion of the person's livelihood or for substantial
3-46 financial gain, gathers, compiles, prepares, collects,
3-47 photographs, records, writes, edits, reports, investigates,
3-48 processes, or publishes news or information that is disseminated by
3-49 a news medium or communication service provider and includes:

3-50 (A) a person who supervises or assists in
3-51 gathering, preparing, and disseminating the news or information; or

3-52 (B) notwithstanding the foregoing, a person who
3-53 is or was a journalist, scholar, or researcher employed by an
3-54 institution of higher education at the time the person obtained or
3-55 prepared the requested information, or a person who at the time the
3-56 person obtained or prepared the requested information:

3-57 (i) is earning a significant portion of the
3-58 person's livelihood by obtaining or preparing information for
3-59 dissemination by a news medium or communication service provider;
3-60 or

3-61 (ii) was serving as an agent, assistant,
3-62 employee, or supervisor of a news medium or communication service
3-63 provider.

3-64 (3) "News medium" means a newspaper, magazine or
3-65 periodical, book publisher, news agency, wire service, radio or
3-66 television station or network, cable, satellite, or other
3-67 transmission system or carrier or channel, or a channel or
3-68 programming service for a station, network, system, or carrier, or
3-69 an audio or audiovisual production company or Internet company or

4-1 provider, or the parent, subsidiary, division, or affiliate of that
 4-2 entity, that disseminates news or information to the public by any
 4-3 means, including:

4-4 (A) print;

4-5 (B) television;

4-6 (C) radio;

4-7 (D) photographic;

4-8 (E) mechanical;

4-9 (F) electronic; and

4-10 (G) other means, known or unknown, that are
 4-11 accessible to the public.

4-12 (4) "Official proceeding" means any type of
 4-13 administrative, executive, legislative, or judicial proceeding
 4-14 that may be conducted before a public servant.

4-15 (5) "Public servant" means a person elected, selected,
 4-16 appointed, employed, or otherwise designated as one of the
 4-17 following, even if the person has not yet qualified for office or
 4-18 assumed the person's duties:

4-19 (A) an officer, employee, or agent of government;

4-20 (B) a juror or grand juror;

4-21 (C) an arbitrator, referee, or other person who
 4-22 is authorized by law or private written agreement to hear or
 4-23 determine a cause or controversy;

4-24 (D) an attorney or notary public when
 4-25 participating in the performance of a governmental function; or

4-26 (E) a person who is performing a governmental
 4-27 function under a claim of right, although the person is not legally
 4-28 qualified to do so.

4-29 Sec. 2. PURPOSE. The purpose of this article is to increase
 4-30 the free flow of information and preserve a free and active press
 4-31 and, at the same time, protect the right of the public to effective
 4-32 law enforcement and the fair administration of justice.

4-33 Sec. 3. PRIVILEGE. (a) Except as otherwise provided by
 4-34 this article, a judicial, legislative, administrative, or other
 4-35 body with the authority to issue a subpoena or other compulsory
 4-36 process may not compel a journalist to testify regarding or to
 4-37 produce or disclose in an official proceeding:

4-38 (1) any confidential or nonconfidential unpublished
 4-39 information, document, or item obtained or prepared while acting as
 4-40 a journalist; or

4-41 (2) the source of any information, document, or item
 4-42 described by Subdivision (1).

4-43 (b) A subpoena or other compulsory process may not compel
 4-44 the parent, subsidiary, division, or affiliate of a communication
 4-45 service provider or news medium to disclose the unpublished
 4-46 information, documents, or items or the source of any information,
 4-47 documents, or items that are privileged from disclosure under
 4-48 Subsection (a).

4-49 Sec. 4. PRIVILEGE CONCERNING CONFIDENTIAL SOURCES. (a) A
 4-50 journalist may be compelled to testify regarding or to disclose the
 4-51 confidential source of any information, document, or item obtained
 4-52 while acting as a journalist if the person seeking the testimony,
 4-53 production, or disclosure makes a clear and specific showing that
 4-54 the source of any information, document, or item:

4-55 (1) was observed by the journalist committing a felony
 4-56 criminal offense and the subpoenaing party has exhausted reasonable
 4-57 efforts to obtain from alternative sources the confidential source
 4-58 of any information, document, or item obtained or prepared while
 4-59 acting as a journalist;

4-60 (2) is a person who confessed or admitted to the
 4-61 journalist the commission of a felony criminal offense and the
 4-62 subpoenaing party has exhausted reasonable efforts to obtain from
 4-63 alternative sources the confidential source of any information,
 4-64 document, or item obtained or prepared while acting as a
 4-65 journalist;

4-66 (3) is a person for whom probable cause exists that the
 4-67 person participated in a felony criminal offense and the
 4-68 subpoenaing party has exhausted reasonable efforts to obtain from
 4-69 alternative sources the confidential source of any information,

5-1 document, or item obtained or prepared while acting as a
 5-2 journalist; or

5-3 (4) disclosure of the confidential source is
 5-4 reasonably necessary to stop or prevent reasonably certain death or
 5-5 substantial bodily harm.

5-6 (b) If the alleged criminal conduct is the act of
 5-7 communicating, receiving, or possessing the information, document,
 5-8 or item, this section does not apply, and Section 5 governs the act.

5-9 (c) Notwithstanding Subsection (b), if the information,
 5-10 document, or item was disclosed or received in violation of a grand
 5-11 jury oath given to either a juror or a witness under Article 19.34
 5-12 or 20.16, a journalist may be compelled to testify if the person
 5-13 seeking the testimony, production, or disclosure makes a clear and
 5-14 specific showing that the subpoenaing party has exhausted
 5-15 reasonable efforts to obtain from alternative sources the
 5-16 confidential source of any information, document, or item obtained.
 5-17 In this context, the court has the discretion to conduct an in
 5-18 camera hearing. The court may not order the production of the
 5-19 confidential source until a ruling has been made on the motion.

5-20 (d) An application for a subpoena of a journalist under
 5-21 Article 24.03, or a subpoena of a journalist issued by an attorney
 5-22 representing the state under Article 20.10 or 20.11, must be signed
 5-23 by the elected district attorney, elected criminal district
 5-24 attorney, or elected county attorney, as applicable. If the
 5-25 elected district attorney, elected criminal district attorney, or
 5-26 elected county attorney has been disqualified or recused or has
 5-27 resigned, the application for the subpoena or the subpoena must be
 5-28 signed by the person succeeding the elected attorney. If the
 5-29 elected officer is not in the jurisdiction, the highest ranking
 5-30 assistant to the elected officer must sign the subpoena.

5-31 Sec. 5. PRIVILEGE CONCERNING UNPUBLISHED INFORMATION,
 5-32 DOCUMENT, OR ITEM AND NONCONFIDENTIAL SOURCES. (a) After service
 5-33 of subpoena and an opportunity to be heard, a court may compel a
 5-34 journalist, a journalist's employer, or a person with an
 5-35 independent contract with a journalist to testify regarding or to
 5-36 produce or disclose any unpublished information, document, or item
 5-37 or the source of any information, document, or item obtained while
 5-38 acting as a journalist, other than as described by Section 4, if the
 5-39 person seeking the unpublished information, document, or item or
 5-40 the source of any information, document, or item makes a clear and
 5-41 specific showing that:

5-42 (1) all reasonable efforts have been exhausted to
 5-43 obtain the information from alternative sources; and

5-44 (2) the unpublished information, document, or item:

5-45 (A) is relevant and material to the proper
 5-46 administration of the official proceeding for which the testimony,
 5-47 production, or disclosure is sought and is essential to the
 5-48 maintenance of a claim or defense of the person seeking the
 5-49 testimony, production, or disclosure; or

5-50 (B) is central to the investigation or
 5-51 prosecution of a criminal case and based on something other than the
 5-52 assertion of the person requesting the subpoena, reasonable grounds
 5-53 exist to believe that a crime has occurred.

5-54 (b) The court, when considering an order to compel testimony
 5-55 regarding or to produce or disclose any unpublished information,
 5-56 document, or item or the source of any information, document, or
 5-57 item obtained while acting as a journalist, should consider the
 5-58 following factors, including but not limited to whether:

5-59 (1) the subpoena is overbroad, unreasonable, or
 5-60 oppressive;

5-61 (2) reasonable and timely notice was given of the
 5-62 demand for the information, document, or item;

5-63 (3) in this instance, the interest of the party
 5-64 subpoenaing the information outweighs the public interest in
 5-65 gathering and dissemination of news, including the concerns of the
 5-66 journalist; and

5-67 (4) the subpoena or compulsory process is being used
 5-68 to obtain peripheral, nonessential, or speculative information.

5-69 (c) A court may not consider a single factor under

6-1 Subsection (b) as outcome-determinative in the decision whether to
6-2 compel the testimony or the production or disclosure of the
6-3 unpublished information, document, or item, or the source of any
6-4 information, document, or item.

6-5 Sec. 6. NOTICE. An order to compel testimony, production,
6-6 or disclosure to which a journalist has asserted a privilege under
6-7 this article may be issued only after timely notice to the
6-8 journalist, the journalist's employer, or a person who has an
6-9 independent contract with the journalist and a hearing. The order
6-10 must include clear and specific findings as to the showing made by
6-11 the person seeking the testimony, production, or disclosure and the
6-12 clear and specific evidence on which the court relied in issuing the
6-13 court's order.

6-14 Sec. 7. PUBLICATION OF PRIVILEGED INFORMATION. Publication
6-15 or dissemination by a news medium or communication service provider
6-16 of information, documents, or items privileged under this article
6-17 is not a waiver of the journalist's privilege regarding sources and
6-18 unpublished information, documents, or items.

6-19 Sec. 8. PUBLISHED INFORMATION. This article does not apply
6-20 to any information, document, or item that has at any time been
6-21 published or broadcast by the journalist.

6-22 Sec. 9. REIMBURSEMENT OF COSTS. The subpoenaing party shall
6-23 pay a journalist a reasonable fee for the journalist's time and
6-24 costs incurred in providing the information, item, or document
6-25 subpoenaed, based on the fee structure provided by Subchapter F,
6-26 Chapter 552, Government Code.

6-27 Art. 38.111. NEWS MEDIA RECORDINGS. Extrinsic evidence of
6-28 the authenticity of evidence as a condition precedent to the
6-29 admissibility of the evidence in a criminal proceeding is not
6-30 required with respect to a recording that purports to be a broadcast
6-31 by a radio or television station that holds a license issued by the
6-32 Federal Communications Commission at the time of the recording.
6-33 The court may take judicial notice of the recording license as
6-34 provided by Rule 201, Texas Rules of Evidence.

6-35 SECTION 3. This Act applies only to information, documents,
6-36 or items or the source of any information, document, or item
6-37 obtained or prepared for publication in a news medium or
6-38 communication service provider on or after the effective date of
6-39 this Act.

6-40 SECTION 4. This Act takes effect immediately if it receives
6-41 a vote of two-thirds of all the members elected to each house, as
6-42 provided by Section 39, Article III, Texas Constitution. If this
6-43 Act does not receive the vote necessary for immediate effect, this
6-44 Act takes effect September 1, 2009.

6-45 * * * * *