

1-1 By: Ellis, Duncan, Hinojosa S.B. No. 915
1-2 (In the Senate - Filed February 17, 2009; March 9, 2009,
1-3 read first time and referred to Committee on Jurisprudence;
1-4 March 30, 2009, reported adversely, with favorable Committee
1-5 Substitute by the following vote: Yeas 6, Nays 0; March 30, 2009,
1-6 sent to printer.)

1-7 COMMITTEE SUBSTITUTE FOR S.B. No. 915 By: Duncan

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, photographs,
1-34 records, writes, edits, reports, investigates, processes, or
1-35 publishes news or information that is disseminated by a news medium
1-36 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 an alternative source;
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, photographs,
 3-47 records, writes, edits, reports, investigates, processes, or
 3-48 publishes news or information that is disseminated by a news medium
 3-49 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 CONCERNING CONFIDENTIAL SOURCES. (a) A
 4-34 journalist may be compelled to testify regarding or to disclose the
 4-35 confidential source of any information, document, or item obtained
 4-36 while acting as a journalist if the person seeking the testimony,
 4-37 production, or disclosure makes a clear and specific showing that
 4-38 the source of any information, document, or item:

4-39 (1) was observed by the journalist committing a felony
 4-40 criminal offense and the subpoenaing party has exhausted reasonable
 4-41 efforts to obtain from alternative sources the confidential source
 4-42 of any information, document, or item obtained or prepared while
 4-43 acting as a journalist;

4-44 (2) is a person who confessed or admitted to the
 4-45 journalist the commission of a felony criminal offense and the
 4-46 subpoenaing party has exhausted reasonable efforts to obtain from
 4-47 alternative sources the confidential source of any information,
 4-48 document, or item obtained or prepared while acting as a
 4-49 journalist;

4-50 (3) is a person for whom probable cause exists that the
 4-51 person participated in a felony criminal offense and the
 4-52 subpoenaing party has exhausted reasonable efforts to obtain from
 4-53 alternative sources the confidential source of any information,
 4-54 document, or item obtained or prepared while acting as a
 4-55 journalist; or

4-56 (4) disclosure of the confidential source is
 4-57 reasonably necessary to stop or prevent reasonably certain death or
 4-58 substantial bodily harm.

4-59 (b) If the alleged criminal conduct is the act of
 4-60 communicating, receiving, or possessing the information, document,
 4-61 or item, this section does not apply and Section 4 governs the act.

4-62 (c) Notwithstanding Subsection (b), Subsection (a) applies
 4-63 to any information, document, or item disclosed or received in
 4-64 violation of a grand jury oath given to either a juror or a witness
 4-65 under Article 19.34 or 20.16. In this context, the court has the
 4-66 discretion to conduct an in camera hearing. The court may not order
 4-67 the production of the confidential source until a ruling has been
 4-68 made on the motion.

4-69 (d) An application for a subpoena of a journalist under

5-1 Article 24.03, or a subpoena of a journalist issued by an attorney
 5-2 representing the state under Article 20.10 or 20.11, must be signed
 5-3 by the elected district attorney, elected criminal district
 5-4 attorney, or elected county attorney, as applicable. If the
 5-5 elected district attorney, elected criminal district attorney, or
 5-6 elected county attorney has been disqualified or recused or has
 5-7 resigned, the application for the subpoena or the subpoena must be
 5-8 signed by the person succeeding the elected attorney. If the
 5-9 elected officer is not in the jurisdiction, the highest ranking
 5-10 assistant to the elected officer must sign the subpoena.

5-11 Sec. 4. PRIVILEGE CONCERNING UNPUBLISHED INFORMATION,
 5-12 DOCUMENT, OR ITEM AND NONCONFIDENTIAL SOURCES. (a) After service
 5-13 of subpoena and an opportunity to be heard, a court may compel a
 5-14 journalist, a journalist's employer, or a person with an
 5-15 independent contract with a journalist to testify regarding or to
 5-16 produce or disclose any unpublished information, document, or item
 5-17 or the source of any information, document, or item obtained while
 5-18 acting as a journalist, other than as described by Section 3, if the
 5-19 person seeking the unpublished information, document, or item or
 5-20 the source of any information, document, or item makes a clear and
 5-21 specific showing that:

5-22 (1) all reasonable efforts have been exhausted to
 5-23 obtain the information from alternative sources; and

5-24 (2) the unpublished information, document, or item:

5-25 (A) is relevant and material to the proper
 5-26 administration of the official proceeding for which the testimony,
 5-27 production, or disclosure is sought and is essential to the
 5-28 maintenance of a claim or defense of the person seeking the
 5-29 testimony, production, or disclosure; or

5-30 (B) is central to the investigation or
 5-31 prosecution of a criminal case and, based on something other than
 5-32 the assertion of the person requesting the subpoena, reasonable
 5-33 grounds exist to believe that a crime has occurred.

5-34 (b) The court, when considering an order to compel testimony
 5-35 regarding or to produce or disclose any unpublished information,
 5-36 document, or item or the source of any information, document, or
 5-37 item obtained while acting as a journalist, should consider the
 5-38 following factors, including but not limited to, whether:

5-39 (1) the subpoena is overbroad, unreasonable, or
 5-40 oppressive;

5-41 (2) reasonable and timely notice was given of the
 5-42 demand for the information, document, or item;

5-43 (3) in this instance, the interest of the party
 5-44 subpoenaing the information outweighs the public interest in
 5-45 gathering and dissemination of news, including the concerns of the
 5-46 journalist; and

5-47 (4) the subpoena or compulsory process is being used
 5-48 to obtain peripheral, nonessential, or speculative information.

5-49 (c) A court may not consider a single factor under
 5-50 Subsection (b) as outcome-determinative in the decision whether to
 5-51 compel the testimony or the production or disclosure of the
 5-52 unpublished information, document, or item, or the source of any
 5-53 information, document, or item.

5-54 Sec. 5. NOTICE. An order to compel testimony, production,
 5-55 or disclosure to which a journalist has asserted a privilege under
 5-56 this article may be issued only after timely notice to the
 5-57 journalist, the journalist's employer, or a person who has an
 5-58 independent contract with the journalist and a hearing. The order
 5-59 must include clear and specific findings as to the showing made by
 5-60 the person seeking the testimony, production, or disclosure and the
 5-61 clear and specific evidence on which the court relied in issuing the
 5-62 court's order.

5-63 Sec. 6. PUBLICATION OF PRIVILEGED INFORMATION. Publication
 5-64 or dissemination by a news medium or communication service provider
 5-65 of information, documents, or items privileged under this article
 5-66 is not a waiver of the journalist's privilege regarding sources and
 5-67 unpublished information, documents, or items.

5-68 Sec. 7. PUBLISHED INFORMATION. This article does not apply
 5-69 to any information, document, or item that has at any time been

6-1 published or broadcast by the journalist.

6-2 Sec. 8. REIMBURSEMENT OF COSTS. The subpoenaing party
6-3 shall pay a journalist a reasonable fee for the journalist's time
6-4 and costs incurred in providing the information, item, or document
6-5 subpoenaed, based on the fee structure provided by Subchapter F,
6-6 Chapter 552, Government Code.

6-7 Art. 38.111. NEWS MEDIA RECORDINGS. Extrinsic evidence of
6-8 the authenticity of evidence as a condition precedent to the
6-9 admissibility of the evidence in a criminal proceeding is not
6-10 required with respect to a recording that purports to be a broadcast
6-11 by a radio or television station that holds a license issued by the
6-12 Federal Communications Commission at the time of the recording.
6-13 The court may take judicial notice of the recording license as
6-14 provided by Rule 201, Texas Rules of Evidence.

6-15 SECTION 3. This Act applies only to information, documents,
6-16 or items or the source of any information, document, or item
6-17 obtained or prepared for publication in a news medium or
6-18 communication service provider on or after the effective date of
6-19 this Act.

6-20 SECTION 4. This Act takes effect September 1, 2009.

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