

## The Resurgence of Free Flow Initiatives: A Case Study of What Transpired in Texas

By: Laura Lee Prather

With more and more attention being given to journalists going to jail or being put under house arrest, the need for each state to follow the advice of the U.S. Supreme Court in *Branzburg v. Hayes* and adopt their own Free Flow Act is at an all time high. Lest one think this is just a journalists' problem, think again. Courts have begun rendering hefty fines or judgments against employers when their employee refuses to identify a source or produce documents – pitting First Amendment considerations against bottom-line business concerns. Beyond the journalist and their employer, though, the issue is one that should be on the forefront of every citizen's mind. Without some protection for confidential sources and materials, whistleblowers are going to stop coming forward, and the function of the press as the Fourth Estate will cease to exist. Government corruption (like Watergate) and corporate malfeasance (like the Firestone tire cover up) will go undiscovered. Recognizing that the public's right to know is in danger, legislatures in Connecticut and Washington passed Free Flow legislation in 2006 and 2007 respectively. With these two recent additions, the tally is 34 jurisdictions with some sort of protection for confidential sources and materials. There are a handful of other states (Utah and Massachusetts) attempting to get such laws passed as well as a pending piece of legislation in the U.S. Congress.

Texas is one of the states that *almost* got a free flow act passed this year. Like most things Texan, the history of what transpired is larger than life. What one needs to understand from the outset is that we have very narrow windows of opportunity to get any laws passed in Texas. Our system,

quite literally, is set up to see bills die. To begin with, the Texas state legislature meets for only 5 months every other year (that is, when they are not fleeing to Oklahoma to prevent a quorum from existing). This necessarily means -- the period from January through May of odd numbered years is a unique time in Austin.

This year was to be the year of SB 966 – the Texas Free Flow of Information Act. Texas State Senator Rodney Ellis (D-Houston) and Senator Robert Duncan (R-Lubbock) sponsored the legislation that featured a qualified privilege for confidential and nonconfidential sources and documents. The legislation was patterned, in large part, after the Department of Justice Guidelines, and took some concepts from the recently passed laws in Washington, Connecticut and from Texas case law. Essentially, the proposed bill provided a mechanism by which a court could determine, in the first instance, whether the party issuing a subpoena for information from a journalist really needed the information to prove or defend his case. A three prong test was established for information sought in all civil and nonviolent criminal cases, and the legal standard instituted was clear and specific evidence (as established in Texas case law and utilized under the New York and Florida statutes). In a civil case, the party who issued the subpoena had to establish they: (1) had exhausted all reasonable efforts to get the information elsewhere, (2) the information is relevant and material to the proper administration of justice, and (3) is essential to the maintenance of the claim or defense of the person asking for it. In a nonviolent criminal case, the party who issued the subpoena had to establish they: (1) had exhausted all reasonable efforts to get the information

elsewhere, (2) the information is central to the investigation or prosecution of a criminal case regarding the establishment of guilt or innocence, and (3) based on an independent source, reasonable grounds exist to believe that a crime has occurred. When dealing with a violent criminal offense, the test was less onerous – the party requesting the information simply had to establish that they had exhausted all reasonable efforts to obtain the information elsewhere. The proposed legislation was a moderate approach as compared to many other jurisdictions and, for the first time in Texas history, was gaining momentum for passage this year.

After the legislative 2005 session, the Governor had requested that an interim study be done by the House Judiciary Committee on whether a reporter's privilege was necessary. A hearing was held on the issue prior to the start of the legislative session; testimony was taken; and a report was issued recommending that some sort of free flow legislation be passed. Throughout the prior legislative session and during the interim, it was apparent that the two chief opponents to the legislation were law enforcement and private business concerns lead by USAA (a formidable employer in San Antonio who was the subject of an investigative report that they claimed was funneled by stolen trade secrets).

The proposed legislation was introduced on February 27, 2007. The legislation was sent to the Senate Jurisprudence Committee, chaired by Senator Jeff Wentworth (R-San Antonio). In order to get a hearing before the Committee, one has to get approval from the Chairperson. Chairman Wentworth set the Committee hearing for March 28, 2007. It was apparent, however, that the bill would not be brought up for a vote in the

*Continued on page 19*

## Free Flow Initiatives

*Continued from page 18*

Committee until and unless the media and USAA could work through some of their differences. USAA's interest in the matter stemmed from a WOAI investigative report on potential security breaches within the company. USAA sued WOAI over the report and claimed, among other things, that the station and its reporter stole USAA's trade secrets. The business coalition representative testified at the hearing about how reporters could encourage

employees of companies to violate trade secret laws and give up valuable confidential information and essentially get away with it, if the proposed free flow legislation were passed. Although citing to the WOAI investigation, none of the business interests ever mentioned that the Court found there had been no theft of trade secrets by WOAI and had ordered USAA to pay fees and costs in conjunction with that part of the lawsuit.

Nonetheless, to pass legislation,

one must be able to listen attentively and respond to criticisms in a manner in which opponents feel like their concerns are being met and, at the same time, proponents don't feel as though the integrity of the legislation is lost. On April 12, 2007, we reached such a compromise with the business coalition, and the following open letter was signed and presented to Chairman Wentworth and the Senate Jurisprudence Committee:

### OPEN LETTER TO THE MEMBERS OF THE TEXAS LEGISLATURE APRIL 12, 2007

On March 28, 2007, the Senate Jurisprudence Committee received testimony on S.B. 966, "The Free Flow of Information Act." The two of us were among the people who testified for and against the bill: Laura Prather advocated for the bill on behalf of the Texas Association of Broadcasters, while Phil Goldberg expressed concerns about the potential impact of some of the bill's provisions on behalf of a coalition of businesses.

Since that time and under the direction of the members of the Senate Jurisprudence Committee, we have earnestly worked together to reach a compromise on behalf of our clients. The Committee Substitute to S.B. 966 (which passed out of the Senate Jurisprudence Committee on April 11, 2007) and accompanying legislative intent language, both of which are attached, represent that compromise.

We believe that the tone of the negotiations and the resulting compromise show that it is possible to find a middle ground solution on this issue when the media and business community work together and balance the important concerns involved.

The Texas Association of Broadcasters, the Texas Daily Newspaper Association and the Texas Press Association have agreed to urge the passage of the compromise and approval by the Governor without change. The coalition of businesses whose interests Mr. Goldberg represented in the negotiations, including the Texas Association of Business and the Texas Association of Manufacturers who registered against the version of the bill heard by the Committee on March 28, have agreed not to oppose the compromise version of the bill before the Legislature at this time.

The diligence and help in reaching this resolution provided by the Senate Jurisprudence Committee is greatly appreciated - not only by us, but undoubtedly by citizens throughout the state of Texas.

Sincerely,

Laura Lee Prather  
Sedgwick, Detert, Moran & Arnold

Philip S. Goldberg  
Shook, Hardy & Bacon

*Continued on page 20*

## Free Flow Initiatives

*Continued from page 19*

The compromises that were reached with the business groups were (1) to change the legal standard from "clear and convincing" to "clear and specific;" (2) to clarify the definition of journalist to cover those people who were journalists, scholars or researchers at the time they received the information at issue (even if they are no longer in these professions), and (3) to make the balancing test the court should consider clearer so that the interest of the party subpoenaing the information has to outweigh the public interest in gathering and disseminating the news, including the concerns of the journalist. After these concerns were met and the business community registered their nonopposition, the Senate Jurisprudence Committee unanimously voted the bill out on April 11, 2007.

One opponent down, one to go, and now onto the Senate Floor. At this point, the D.A.'s have come out "guns-a-blazing" lobbying and testifying against the legislation. They've testified against it during the 2005 session, at the interim committee hearing, and before the Senate Jurisprudence Committee. Their message has been the same throughout – if this legislation passes, law enforcement will never be able to convict another criminal. Despite these concerns, however the District Attorneys Association never offered any compromise language. In fact, on countless occasions, the media sat down with law enforcement to invite a discussion about what, if any compromise could be reached, and the answer from law enforcement was always the same -- have the law only apply in civil cases.

The testimony the District Attorneys offered in support of their position was riveting as well. To hear them, one would wonder how any criminal is ever convicted without the

aid of the media -- never mind the fact that crime has not run amuck in the 34 other states that have such legislation. Tales of horror in the streets were spun by each District Attorney and misstatements about whether their offices had been issuing overreaching subpoenas to the media -- simply because they could -- were being offered. District Attorney Barry Macha

*The compromises that were reached with the business groups were (1) to change the legal standard from "clear and convincing" to "clear and specific;" (2) to clarify the definition of journalist to cover those people who were journalists, scholars or researchers at the time they received the information at issue (even if they are no longer in these professions), and (3) to make the balancing test the court should consider clearer so that the interest of the party subpoenaing the information has to outweigh the public interest in gathering and disseminating the news, including the concerns of the journalist.*

from Wichita Falls, Texas provided particularly compelling testimony that his predecessor, Guy James Grey (who was noticeably absent from this hearing and has never testified under oath on the issue) would not have been able to convict the third defendant, Shawn Berry, in the horrific Jasper, Texas dragging death of James Byrd were it not for the D.A. getting access to the CBS jailhouse interview tapes of Mr. Berry.

Now, as Paul Harvey would say, let's hear the rest of the story ... let's think about this, would CBS allow Dan Rather to do an interview with a potential killer without some form of protection in the room? What

conditions did law enforcement place on Rather and CBS to gain access to Berry for the interview? The reality is that there were armed guards in the room with Rather during the entire interview, and each of these individuals could have testified about the substance of the interview. The real kicker, though, is the fact that law enforcement officials insisted on running their own tape of the entire interview at the same time as CBS so that they would have their own footage of the interview from start to finish. So, what was the need for the CBS tape? There has never been an answer to this question. Thankfully, Bob Latham was able to come forward and rebut Mr. Macha's comments, but the testimony is still out there and the questions were and are still lingering in the minds of those legislators who were not at the hearing and/or only heard one side of the story from law enforcement lobbyists. As they say,

why bother with the truth when one is creating legislative history?

Despite opposition by the D.A.'s the bill was brought up on the Senate floor and voted out 27-4 on May 1, 2007. During the process, two Senators, in particular, were vocal opponents to the legislation arguing that the proposed legislation was soft on crime. We had extensive negotiations with these Senators and additional language was added to incorporate child pornography, gang violence, and terroristic threats into the definition of "violent offense" so that one only need to exhaust reasonable alternative sources before requesting information concerning these issues from a journalist.

*Continued on page 20*

## Free Flow Initiatives

*Continued from page 20*

Now, it was a race against time. With only 3 weeks left – the bill had to be heard and voted out of the House Judiciary Committee, voted out of the House Calendars Committee so that it could get a setting on the House floor, and debated and passed out of the House. House Bill 2249 was the companion bill to SB 966, and our sponsors were Representative Corbin Van Arsdale (R-Houston) and Representative Aaron Pena (D-Edinburg). On May 7, 2007, the House Judiciary Committee met and took testimony on the bill. This was no normal night at the Texas legislature. Being so late in the legislative session, committees meet after the House adjourns for the night – that could be at 5 p.m. or at midnight. On this particular night, the House was still going strong at 9 p.m. Witnesses who had promised to come testify on the bill – including some citizen whistleblowers – were falling by the way-side as they could no longer wait to see when the Committee would begin its hearing. Finally at approximately 10 p.m., the Chairman of the House Judiciary Committee, Will Hartnett (R-Dallas), got special approval for his committee to meet *while* the House was still in session. We all scurried over to the hearing room, and the Committee took up its order of business. One bill was considered before ours, and, at about 11 p.m., testimony on the Free Flow Act began. Witnesses from both sides came forward and weary legislators listened as attentively as they could -- given the sleep deprivation and other distractions. The largest distraction of the night came around 12:30 a.m. when a revolt happened on the House Floor. A decision of the Speaker of the House was being challenged by the House members. The entire Judiciary Committee adjourned and resume their duties on the House Floor. An hour and a half later, and after history was made because the Speaker's decision was,

indeed, overturned, the Committee resumed its hearing. More testimony was offered from 2:00 a.m.-3:30 a.m. More stories of the “sky falling” were offered by the D.A.’s. Unfortunately, when you are testifying in the middle of the night, the patience of your audience is short, and they don’t always wait to hear the “rest of the story.” Legislative history is created, but how accurate is it under circumstances like these?

Still, however, the House Judiciary Committee was particularly receptive to the fact that we had tried on countless occasions to compromise and law enforcement had not budged in their all or nothing approach. The Committee unanimously voted the Free Flow bill out on Tuesday, May 15th. We had just 5 working days to get the bill through the Calendars Committee and onto the House Floor for debate. On Thursday, May 18th, the House Calendars Committee met and added the bill to the House Calendar for May 21st. The bill was brought up on the House Floor for debate on Monday, May 21st. Everything continued to look good for the citizens of Texas gaining the ability to come forward and report wrongdoing without fear of retribution. And, then, a sharp shooter arrived and torpedoed the legislation. When the bill was brought up for debate, Representative Robert Talton (R-Pasadena) – despite prior promises not to do anything to thwart the legislation – handed a “Point of Order” to Representative Debbie Riddle (R-Houston) who brought it to the Floor for a ruling from the House Parliamentarian. A Point of Order is something that can be brought up to pull legislation from being voted on because of a technical error, in this instance, in the bill analysis. When the clerk of the House Judiciary Committee prepared his summary of the Free Flow Act, he left out one sentence, and the Point of Order claimed that, as a result, the Bill Analysis did not accurately summarize legislation. The House Parliamentarian

then rules on whether the Point of Order should be sustained or overruled. In our case, the Parliamentarian sustained the Point of Order and that resulted in the death of the bill. (The Parliamentarian resigned later that week.) If something like this were to have happened earlier in the session, the Bill Analysis could have been easily cleaned up and then brought back to the Floor for debate, but, this late in the session – there was no chance to revive it.

Although there was one more attempt to try to get the legislation attached to another Senate bill and brought back over to the House, there was not enough time for that effort either because one of the four senators who voted against the bill previously threatened to filibuster against it on the last day of session and prevent anything else from passing. Finally, on the last day votes were taken, some proposed language came from the D.A.’s. They suggested that the news media boldly display a multi-paragraph disclaimer at the heading of each newspaper article (or audibly read at the beginning of any broadcast) in which a confidential source was relied upon and expressly state, the media cannot vouch for the accuracy of the information provided by the source. How’s that for turning constitutional law on its head? Be on the look out for similar proposals in your state legislatures if you are still attempting to get a Free Flow Act passed. Until then, let’s keep our fingers crossed for 2009 in Texas, and wear your bullet-proof vest.

---

*Laura Lee Prather  
is a partner in the  
Austin, Texas office of  
Sedgwick Detert  
Moran & Arnold LLP.*

*Laura is also one of the Co-Chairs of  
the ABA First Amendment &  
Media Litigation Committee.*

---