

FAQ: Texas Free Flow of Information Act

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1. How will a Free Flow of Information Act benefit Texas?

A Free Flow of Information Act isn't about protecting the journalist – it's about protecting the public. Without a law to allow whistleblowers to remain confidential the public will never learn of many scandals and outrageous abuses by government officials and corporate executives.

Sources often will provide more information and act with more candor in notifying journalists of very real concerns about consumer safety, governmental abuse, etc., if they can be guaranteed anonymity. Without an assurance of anonymity, many conscientious citizens with evidence of wrongdoing would stay silent. They would rightly fear for their jobs, their reputations – even, in some cases, their safety.

Three decades ago, all Americans came to understand the value of confidentiality when an informant named Mark Felt, the source known for decades only as "Deep Throat," approached two *Washington Post* reporters with details of corruption and criminal activity in the White House. He did so only because he was promised his identity would never be revealed. The reporters kept that promise. It was Felt's family who eventually revealed his identity.

Passage of such a law benefits the public by increasing the free flow of information, improving protection from governmental abuse, and enhancing the health and welfare of the general public by allowing witnesses or others with knowledge of information of wrongdoing to speak to the public through the media without fear of reprisal.

2. What's the current state of a reporter privilege in Texas?

Constitutional Protection in Criminal Cases — None. There is essentially no state or federal constitutional protection for journalists who are called to testify, turn over reporters' notes or

otherwise participate in a criminal case in the state of Texas. (See *State ex rel. Healey v. McMeans*, 884 S.W.2d 772 (Tex. Crim. App. 1994 (en banc) and *United States v. Smith*, 135 F.3d 963, 970 (5th Cir. 1998)).

Constitutional Protection in Civil Cases — None. In civil cases, there is very little protection and what exists does not derive from the constitution. The civil courts simply apply the same test to a subpoena issued to a reporter as they do to any other subpoena and ask if the information sought through the subpoena is (1) highly material and relevant; (2) necessary or critical to the maintenance of the claim; and (3) not obtainable from other available sources.

Statutory, Protection — None. Unlike 36 other states and the District of Columbia who have already adopted a Free Flow of Information Act in their jurisdictions, the Texas Legislature has not adopted any such statutory protection.

Common Law Protection — None. The Texas Rules of Evidence do not recognize a testimonial privilege for reporters. Texas Rule of Evidence 501 states that privileges are not recognized unless they are based on a constitution statute or rule of evidence Thus, Texas does not recognize a common law basis for a reporter's privilege.

3. What would the proposed Free Flow of Information Act do?

The proposed Free Flow of Information Act would:

- ♣ Require a judge to decide whether disclosure of a reporter's information is essential to a criminal or civil case, could be obtained otherwise and will serve the public interest.
- ♣ Require a journalist to testify at the request of criminal prosecutors, criminal defendants and civil litigants using balancing tests that are based on existing case law and the U.S. Department of Justice's guidelines for subpoenaing reporters that have been in place for more than 30 years.
- ♣ Establish that journalists must divulge information in situations where the journalist is an eyewitness to a crime or in instances where someone's life depends on confidential source information.
- ♣ The law would provide a qualified privilege – rather than an absolute privilege – regarding confidential sources and is the more moderate approach taken by the majority of the 36 states that have Free Flow of Information laws.

4. What's the status of a Free Flow of Information Act in Texas, Congress and in other states?

Texas lawmakers will act on a Free Flow of Information Act (FFOIA) in 2009. HB 670 and SB 915 have been filed in the 81st Texas Legislature.

In 2007, significant headway was made toward adopting a FFOIA in Texas. SB 966 by Sen. Rodney Ellis (D-Houston) and Sen. Robert Duncan (R-Lubbock) passed both its Senate and House committees on unanimous votes, passed the Senate in a 27-4 floor vote and was poised to pass the Texas House when it was killed by a parliamentary point of order on the last day for Senate bills to be considered by the House on second reading in the 2007 regular session.

Congress will act on a federal FFOIA in 2009. Reps. Rick Boucher (D-VA) and Mike Pence (R-IN) introduced H.R. 985 on Feb. 11 which would provide for a federal reporter privilege law for journalists based on existing Department of Justice guidelines on confidential sources. Two

Texas congressmen, Rep. Charles Gonzalez, D-San Antonio and Rep. Michael McCaul, R-Austin have already signed on as co-sponsors of the legislation. Sens. Arlen Specter (R-Pa.), Charles Schumer (D-N.Y.), and Richard Lugar (R-Ind.) introduced S. 448 on Feb. 13. President Obama has already indicated he would sign a FFOIA.

In the last Congress, the U.S. House of Representatives voted 398-21 to pass Boucher and Pence's previous FFOIA legislation, H.R. 2102, with more than two-thirds of the Texas congressional delegation voting in favor of the bill. The move by the House came on the heels of a 15-2 Senate Judiciary Committee vote that same month in favor of S. 2035, a Senate version of a FFOIA, by Sen. Arlen Specter (R-PA). Texas Sen. John Cornyn, who serves on the Judiciary Committee, voted for the bill. It was the first time in three decades that a Congressional committee has approved a FFOIA and that one chamber had sent the other a FFOIA bill to consider.

The Senate did not conduct a floor vote on either bill due to other pressing business brought on by the economic downturn and bank lending crisis.

Some versions of the proposed federal shield legislation provided protection only to the extent that a state provides protection. Significantly, the focus on the federal legislation was on the fact that a shield law would actually increase the flow of information to the general public. However, because Texas has no shield law in place, if the federal law only provided protection that the state provides, reporters in Texas would still be left with no protection.

There is also significant movement on this issue in other states. In the last three years, Washington, Connecticut, Utah, Maine and Hawaii have adopted such protection, making it 36 states with a reporter privilege. The District of Columbia also has such protection.

Three other states are considering such laws in 2009 – Kansas, Massachusetts and Wisconsin.

5. Aren't journalists already covered by the First Amendment or other constitutional protections?

Although other states might recognize a constitutional protection, Texas courts have essentially recognized no state or federal constitutional protection for journalists who are called to testify, to turn over reporters' notes or otherwise participate in a criminal case case.

In civil cases, there is very little protection. What exists does not derive from the Constitution but from the Rules of Evidence and basically exists only in theory, not in practice.

The civil courts are supposed to apply the same test to a subpoena issued to a reporter as they do to any other subpoena and ask if the information sought through the subpoena is:

- (1) highly material and relevant;
- (2) necessary or critical to the maintenance of the claim; and
- (3) not obtainable from other available sources.

In reality the courts are not even applying the test. When a subpoena is issued for a reporter, whether or not there is an alternative source for the information, the courts are requiring the reporter to testify.

The other reality now is that counsel are, by practice, issuing subpoenas to reporters (rather than producers or camerapersons who might have the same knowledge) simply for the purpose of adding "entertainment" value to their cases or star power.

Furthermore, the Texas Rules of Evidence do not recognize a testimonial privilege for reporters. Texas Rule of Evidence 501 states that privileges are not recognized unless they are based on a constitution, statute or rule of evidence. Thus, Texas not only does not recognize a common law basis for a reporter's privilege but also the courts are not enforcing the few requirements the rules currently provide.

6. The U.S. Supreme Court has already ruled on the issue in *Branzburg v. Hayes*, so why do we need a FFOIA law in Texas?

The majority opinion in this 1972 decision went against the media and said the First Amendment did not create a reporters' privilege. The Court, however, pointedly said Congress and the states could enact measures to establish so-called "shield laws."

"At the federal level, Congress has freedom to determine whether a statutory newsman's privilege is necessary and desirable and to fashion standards and rules as narrow or broad as deemed necessary to deal with the evil discerned and, equally important, to refashion those rules as experience may from time to time dictate.

There is also merit in leaving state legislatures free, within First Amendment limits, to fashion their own standards in light of the conditions and problems with respect to the relations between law enforcement officials and press in their own areas."

Bills were introduced in 2007 in both houses of Congress. Four other states are contemplating enacting such laws. Meanwhile, 36 states and the District of Columbia have Free Flow of Information Acts and some were adopted, or amended, as a result of the *Branzburg* decision.

7. Why not just enact one of the federal proposals instead?

As drafted in the last Congress, the proposed federal Free Flow of Information legislation provided protection only to the extent that a state provides protection. Significantly, all of the federal proposals focused on the fact that the legislation would actually increase the flow of information to the general public. Because Texas has no such law in place, if the federal law only provided protection that the state provides, a reporter would be left with the choice of revealing his or her source or contempt of court.

8. What happens if a journalist is an eyewitness to a crime?

Texas law has long recognized the need in criminal cases to obtain testimony from journalists who are eyewitnesses to crimes committed by other persons. Under Texas' draft legislation, a journalist would be compelled to testify if he or she was an eyewitness to criminal conduct if a court determined by "clear and convincing evidence" that the party seeking the compelled disclosure had exhausted reasonable efforts to obtain the information from alternative sources, or was necessary to stop or prevent death or substantial bodily harm.

9. Shouldn't a Texas FFOIA provide for an *in-camera* review by a judge?

No other state's Free Flow of Information Act has such a provision and it should not be part of the Texas statute. Hauling a confidential source to a courthouse, even for an *in-camera* interview with a judge, increases the likelihood that the source's identity will be revealed. In

some states with Free Flow of Information laws, the courts have found a judge has discretion to conduct a review in some circumstances not involving confidential sources.

For example, an *in-camera* review may facilitate determination of whether broadcast out-takes are essential to the prosecution or defense of a case.

Nothing in the proposed bill would limit the discretion of Texas courts in determining whether an *in-camera* review is necessary in such circumstances. In any event, *in-camera* review should not be available in cases involving confidential sources because that is when the need for separation of news media from government is the greatest.

10. Would bloggers and authors be covered under the proposed Texas FFOIA?

As drafted, this bill would not cover authors or **most** bloggers. **It would cover bloggers who are employed by print or broadcast news entities.**

The vast majority of bloggers are individuals not under anyone's employ who comment on the reporting of others.

11. How does the proposed Texas FFOIA stack up to other states' Free Flow of Information laws?

The draft offers a qualified privilege for the protection of confidential and non-confidential sources and work product. In other words, the protection is limited to select circumstances. This is the approach taken by the majority of states that have Free Flow of Information laws. Some states and the District of Columbia offer an absolute privilege.

12. What is the impact from not having a Free Flow of Information Act in Texas?

Given the lack of protection in Texas afforded by current statutes and case law, the only recourse journalists have to protect sources is their willingness to resist a subpoena and suffer the consequences. In some cases, those consequences can be jail. In other cases, there can be enormous financial exposure for the media company who employs the journalist.

Because there now is no legal basis to fight a subpoena issued to a reporter or a news organization, the organization and reporter are open to unlimited requests for notes, testimony, tapes, etc. This severely burdens a newsroom's time, energy and resources by requiring the reproduction of materials whenever they are requested. Responding to subpoenas distracts from the task of delivering news and the public suffers as a result.

13. Why shouldn't newsrooms cooperate with any request for information that could help a prosecution?

Newsrooms often help local law enforcement, but they need to be able to act independently of the government on which they report. Newsrooms should not be viewed as a *de facto* investigatory arm of law enforcement. If that occurs, sources will dry up.

14. Do all subpoenas come from law enforcement?

No. Almost half of the subpoenas served on broadcast newsrooms come from civil and criminal defense attorneys and personal injury attorneys. Often these are parties seeking information they want to avoid gathering themselves.

A March 2007 survey of subpoenas issued to Texas news organizations showed more than 600 in 2006 for the 30 TV stations and 21 newspapers that responded. This is only a small portion of Texas newsrooms. A new survey is underway.

Of the subpoenas reported received in 2005 and 2005, more than half were from prosecutors.

15. Why should “unpublished” information be afforded protection?

Journalists gather information. Editors essentially make business decisions about what to publish or broadcast. What a newsroom decides not to publish or broadcast is similar to a trade secret.

16. How can one be certain that media outlets will use confidential sources responsibly?

The media understand that there are downsides to using anonymous sources such as:

- the public may be less willing to believe a story that heavily relies on confidential sources
- sources may prove unreliable

Newsrooms constantly evaluate the use of confidential sources. Guidelines developed by newsrooms set limits on the use of anonymous sources and dictate how they can be used.