

PRIMER ON TEXAS REPORTERS' PRIVILEGE

Background: HB 670 and SB 915 have been filed in the 81st Texas Legislature.

During the last Texas legislative session, headway was made toward adopting a Free Flow of Information Act (FFOIA), and all branches of the media joined together to support it. 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 at the end of the session.

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, Kansas, Massachusetts and Wisconsin are considering such laws in 2009.

Congress will act on a federal FFOIA in 2009. H.R. 985 and S. 448 were filed in February. Each would provide for a federal reporter privilege law for journalists based on existing Department of Justice guidelines on confidential sources. President Obama has already indicated he would sign a FFOIA.

During the previous Congress, the U.S. House of Representatives voted 398-21 to pass 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 voted for the bill.

Movement in Congress on a federal FFOIA bill helps the Texas FFOIA effort. The actions by Congress marked the first time in three decades that a measure has passed one chamber and that bills have passed out of Senate and House committees.

Momentum on the issue in other states and in Congress will be hard for Texas lawmakers to ignore.

Current State of the Law 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.

Addressing Industry Group Concerns

The following is a list of concerns that have been expressed concerning the adoption of a FFOIA law and a response to each.

- **"Defining a journalist is a bad thing"** — The fact that we would be defining a journalist gives the members of the media protection which does not currently exist. Whether bloggers or others are included is not our fight. We have already defined the media in other legislation such as the interlocutory appeal statute, the open government laws, and others.
- **"Passage of a FFOIA will open up the ability for the Legislature to add harmful things to the law at a later time"** — That is always a concern with the passage of legislation; however, the way to deal with that is to monitor the laws as they are proposed in the future not to prevent the passage of the law in the first place. If this had been our approach to open government issues, then we would never have passed the Open Meetings and Public Information laws that are in existence today. Every session we have to evaluate proposed legislation that may amend these laws, but the key is that we have the laws in place to begin with and have some checks and balances on the government that are necessary. There isn't a history in other states of negative amending of existing shield laws. In fact, it's quite the opposite. In almost every example, language was added to existing laws to address problems arising from negative court decisions against media entities.
- **"Passage of a FFOIA may set us up for future requirements of continuing education for journalists"** — First that has not been the case in any of the 36 states or D.C. where shield laws have been adopted. Second, that is something that can be addressed when and if future proposed legislation is submitted.
- **"Passage of a FFOIA will increase our legal costs in fighting subpoenas"** — If we were to have a FFOIA then we would have some backing to support not handing over notes or disclosing confidential sources. Right now, we simply hand over the materials without a fight and spend the money in reproduction and working out deals with the district attorneys (to the extent they are willing) without even having the ability to fight anything in court. If a shield law were adopted the number of subpoenas coming into the newsroom would drastically decline and would actually result in a lowering of legal (and internal administrative) costs.

- **"Passage of a FFOIA makes a journalist a different class of citizen"** — There are a number of privileges that exist in the law currently for the purpose of increasing the free flow information. For instance, the medical peer review privilege protects doctors from having to provide information that they have given during the medical peer review process – the rationale is that it increases the honesty and candor of the process and, as a by product, the general health and welfare of the citizenry of Texas is enhanced. In the case of a privilege protecting journalists, the same rationale applies: oftentimes sources will provide more information and act with more candor in notifying the media of very real concerns about consumer safety concerns, governmental abuse, etc. if they can be guaranteed anonymity. The result for the general public is increasing the free flow of information, better protection from governmental abuse, and enhancing the health and welfare of the general public by allowing the media to do its job as a watchdog in an uninhibited manner.

Impact of Having No Protection in Texas

- **Adverse Financial Impact on News Organizations** — Given the lack of protection in Texas, until the Texas Legislature passes a FFOIA, the only recourse journalists may have to protect sources is their willingness to resist a subpoena and suffer the consequences. In some cases, those consequences can be jail and in others they can be enormous financial exposure for the media company who employs the journalist. (*The Boston Globe* just had a default judgment entered against them for \$2.1 million for the failure of a journalist to give up their source).
- **Reduces the Potential Journalism Job Candidates** — Texas journalists have no constitutional protections and no state law protections and some journalists simply do not want to work in a state where they might go to jail for protecting a confidential source. This is actually a deterrent to working in the media industry in Texas.
- **Difficulties in Defending Lawsuits for the Media** — The lack of a FFOIA in Texas can stymie a media entity's ability to defend itself in a trial if the reporter who broke the story has moved on to another state and refuses to come back to the State to testify because they don't want to risk being thrown in jail for refusing to give up a source.
- **Increases Burden on Media Organizations** — Because there is no ability to fight a subpoena issued on a reporter or a news organization, it opens the organization and reporter up to unlimited requests for notes, testimony, tapes, etc. and severely burdens a newsrooms time and energy in reproducing such materials whenever they are asked for. If there were a FFOIA, the cost of reproduction and constantly responding to the subpoenas, or the time spent testifying in response to such subpoenas would be alleviated.
- **Decreases the Information the Media Provides to the General Public** — Oftentimes the only way information can be brought to the public is through the knowledge of a confidential source or the direction of a confidential source who can educate a journalist about where to look for government corruption, about consumer protection mishaps, etc.