

Why the Texas Legislature Should Pass a Free Flow of Information Act

The ability of a free press to report the truth to the public sometimes requires the participation of whistleblowers who fear for their personal or professional safety if their identities were disclosed.

Examples: *Texas Youth Commission (TYC), Firestone, Watergate, Whitewater, Iran-Contra, Abu Ghraib prison in Iraq, Enron, WorldCom*

If reporters can't ensure a confidential source's identity, the public will never receive information on critical public safety, public policy and corporate governance matters.

At this time, law enforcement officials and litigation adversaries often first subpoena reporters' notes, video outtakes or other unpublished information before conducting their own investigations. This practice essentially turns the news media into a *de facto* investigative arm of law enforcement or litigators. Allowing this practice to continue erodes the independence of the media and the public's trust in the media as impartial providers of news.

Texas has no statute prohibiting this practice. Court rulings have found that the First Amendment does not provide protections against this practice, but the U.S. Supreme Court has pointedly ruled in a key case that Congress and the states could enact measures to create protections for reporters' confidential sources. To date, 36 states and the District of Columbia have enacted such protection.

What the proposed law would do:

- 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 journalists 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.

What the proposed law would NOT do:

- The law would not impede the administration of justice. None of the 36 states with similar statutes has experienced undue burdens on the investigation and prosecution of crimes or found the statutes to be impediments to civil litigation.
- The law would not eviscerate the integrity of the grand jury process. None of the 36 states with similar statutes has cited the statutes as the cause of any violations of the grand jury process.
- The law would not cover "bloggers" who are not employed by print or broadcast news entities or authors.