

An Editorial Endorsement of Reporter Privilege

The 81st Texas Legislature has the opportunity to bring Texas in line with most other states in recognizing a statutory privilege for working journalists.

The Texas Free Flow of Information Act would establish the right of journalists to receive and disseminate information in various media and limit the right of legal processes to compel the disclosure of sources. The privilege would be limited in that under some circumstances journalists could still be compelled to produce information critical to legal proceedings.

The proposed law would establish a formal procedure by which those seeking the information would have to provide a judge evidence that journalists had relevant information critical to a claim before the court. All too often in recent years, lawyers have used subpoenas on journalists as mere “fishing expeditions” for information that may or may not exist.

In the House, HB 670 is authored by Rep. Trey Martinez Fischer (D-San Antonio), Rep. Jim Pitts (R-Waxahachie), Rep. Pete Gallego (D-Alpine), and Rep. Eddie Lucio III (D-San Benito). In the Senate, the authors of SB 915 are Sen. Rodney Ellis (D-Houston) and Sen. Robert Duncan (R-Lubbock). The two measures are companion bills that would accomplish a limited reporter privilege in Texas.

The issue is critical when viewed in the context of media doing exactly what the Founders intended, which is to be a check on government. In recent years, the media has also served as a valuable check on business regarding abuses of the consumer and the public. Reporter privilege is particularly important in protecting the right of government and business whistleblowers to talk with journalists in confidence.

Major recent stories in which confidential sources were used include, among others, uncovering the abuses in the Texas Youth Commission system (The Dallas Morning News), Medicare fraud in the Dallas area (KDFW-TV), Department of Public Safety security issues before the fire at the governor’s mansion (Austin American-Statesman), mishandling of funds related to a 2006 bond election by the Judson Independent School District (WOAI-TV and the San Antonio Express News), and an ongoing series about deficiencies in the Houston Police Department Crime Lab (KHOU-TV).

Reporter privilege has been an issue of increasing importance in recent years. A 1972 Supreme Court decision, *Branzburg v. Hayes*, decided that a privilege freeing journalists from subpoenas was not to be found in the First Amendment. Yet out of a deeply divided court emerged a certain understanding that journalists did indeed have rights, and the work that news media did was an essential part of democracy.

In his famous and articulate dissent, Justice Potter Stewart complained of the court’s “crabbed view of the First Amendment.” He further said that the court was inviting “state and federal authorities to undermine the historic independence of the press by attempting to annex the journalistic profession as an investigative arm of government.”

After *Branzburg*, a number of states moved to adopt laws protecting reporter privilege. They are commonly referred to as shield laws. Currently, 36 states and the District of Columbia have shield laws. Efforts to pass a shield law in Texas came close to success

back in the 1970s. After that, as state and federal courts in Texas began to recognize a limited privilege for journalists, the efforts subsided.

Unfortunately, in recent years at both the state and federal level in Texas, subpoenas on journalists have become a matter of routine and, sadly, have bordered on harassment. The basic journalistic process—the free flow of information that is essential in a democracy—has been threatened.

Two years ago, the Texas Free Flow of Information Act was near passage late in the legislative session when it died on a technicality. The current proposal in the 81st Legislature is the same bill, carefully drafted by First Amendment lawyers and supported by a wide coalition of media and consumer rights groups.

The 81st Legislature should pass the Texas Free Flow of Information Act without delay and send it to Gov. Rick Perry for his signature. The media will then have a much better chance of keeping the public informed on the matters essential to promoting and protecting a robust and free democracy in Texas.

More details on the proposal are available at www.FreeFlowAct.com