Let the Free Flow of Information Begin – Texas Has Adopted a Reporter's Privilege

By: Laura Lee Prather[1]

On May 13, 2009, Texas became the thirty-seventh state to enact a reporter's privilege. The law was signed by Governor Rick Perry that day and became effectively immediately. Texans have tried for decades to get a law like this on the books. In recent history, legislation was proposed during the last three sessions. In 2005, the major accomplishment was getting the broadcast and the print media to speak with one voice on the issue and to both support the measure. In 2007, the bill would have passed but for a last minute point of order killing the bill on a technicality. The 2009 session, however, proved that the third time was indeed a charm.

The Legislative History

The bill that was proposed the last three sessions is a qualified privilege patterned in large part after the Department of Justice Guidelines. In 2007, there were two chief opponents to the legislation – law enforcement and the business community. During the last session, we were able to negotiate with the business community to alleviate their concerns about disclosure of trade secrets and other information they deemed to be "private" or "proprietary" in nature. Ultimately the business community groups signed a letter to the Legislature indicating they no longer opposed the bill. Unfortunately, despite repeated efforts, there were no fruitful negotiations with the prosecutors last session. Indeed, it was the former District Attorney from Houston (who was since been indicted) who actually supplied the point of order that killed the bill in 2007.

During the interim, the newspapers and broadcasters continued to work hard to better educate people through grass roots efforts and the establishment of a very informative website – www.freeflowact.com. The website gives examples of demonstrated need for the law, shows what laws have been adopted in other states and when their laws were enacted, provides editorials on the issue, and has a section on subpoena abuse and prosecutorial misconduct.

When the 2009 legislative session began, we were fortunate to continue to have our long-time sponsors in the Senate – Senator Rodney Ellis (D-Houston) and Senator Robert Duncan (R-Lubbock) as stead-fast supporters of the legislation. Since we had lost our House sponsor in the primary, we had to find a new lawmaker with a passion for the cause. We were lucky to find San Antonio Representative Trey Martinez-Fischer whose can-do attitude made a world of difference in our efforts. Because of the new Speaker in the House, though, the make up of all of the committees and committee chairmanships changed – including the committee that would hear our bill. HB 670 (the Texas Free Flow of Information Act) was heard by the House Judiciary and Civil Jurisprudence committee this time around, and there were only three returning members of the committee who had heard the issue in previous sessions. We were concerned that the learning curve would be detrimental to our cause. What we did not anticipate was the strength of the new chairman of the committee – Chairman Todd Hunter (R-Corpus Christi).

From the beginning, Chairman Hunter worked to have the bill heard early, and he put tremendous pressure on the prosecutorial community to sit down and have a meaningful discussion

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and negotiate with the media on the bill. He made it clear that the train was leaving the station, and they could either get on board or not. As a result of Chairman Hunter's tenacity and dedication, we had four different negotiation sessions with the prosecutors – the final one lasting more than thirteen hours. In the end, we had a bill that everyone could agree upon, and the bill sailed through the House and the Senate with unanimous votes on third reading.

What the Texas Free Flow of Information Act Says

The Texas Free Flow of Information Act (also known as a reporter's privilege) is a qualified privilege with separate civil and criminal sections. The civil section applies to confidential and nonconfidential sources, journalist's work product and published and unpublished materials. In order to require a reporter to testify or produce materials, the party who issued the subpoena must meet the following three part test: (1) they have exhausted all reasonable efforts to get the information elsewhere, (2) the information is relevant and material to the proper administration of justice, and (3) the information sought is *essential to the maintenance of the claim or defense* of the person asking for it.

The criminal section, on the other hand, is separated into three parts with different tests applying to different matters. The first part deals with confidential sources, the next with unpublished work product and nonconfidential sources, and the third with published information. When a confidential source is involved, there is an absolute privilege except to the extent that (1) the journalist was an eye witness to a felony, (2) the journalist received a confession of the commission of a felony, or (3) probable cause exists that the source committed a felony. In those three scenarios, the only hurdle one must overcome before calling the journalist to testify is establishing by clear and specific evidence that they have exhausted all reasonable efforts to get the information elsewhere. Further, a journalist can be compelled to give up his confidential source if disclosure is reasonably necessary to stop or prevent reasonably certain death or substantial bodily harm. With regard to unpublished materials (i.e. work product) in the criminal setting, the same three part test as the civil arena applies. Published materials are not covered by the statute so one would look to common law with regard to those materials.

Unique Twists in the Legislation

We also added a few unique twists to the bill which should help Texas newsrooms. First, with regard to criminal subpoenas, the elected district attorney is required to sign all subpoenas issued to journalists. Second, again with regard to criminal subpoenas, the subpoenaing party is required to pay the journalist a reasonable fee for the journalist's time and costs incurred in responding to the subpoena (the calculation of cost is based on the cost provision in the Texas Public Information Act). Last, there is now a provision in the law making broadcasts self-authenticating, like newspaper articles, so that a reporter will not have to be put on the stand solely for the purpose of authenticating a broadcast tape. With more and more newspapers putting video footage on their websites, this addition will help newspapers as well as broadcasters throughout Texas.

How the Texas Free Flow of Information Act Works

Here are some examples of how to handle future subpoenas:

Question: I am an Editor and just received a civil subpoena for all of my reporters' notes in a case where the party is just on a "fishing expedition," what do I do? Refer the person who issued the subpoena to the reporter's privilege and explain that you do not have to produce anything unless it is essential to the maintenance of their claim or defense and they have tried to get the information elsewhere been unsuccessful in doing so.

Question: I am a reporter and just received a civil subpoena for confidential source information, do I have to give up my source? Not likely. This is a subpoena you can fight with the new privilege. In order to get confidential source information, the party who has subpoenaed the information must show that the identity of the source is essential to the maintenance of their claim or defense and that they cannot get this information elsewhere. The judge will decide this after a hearing, and the court will have to refer to the clear and specific evidence that it relied on to make its ruling if the reporter is forced to testify.

Question: I am a reporter and just received a criminal subpoena in a misdemeanor case to get confidential source information, what do I do? You have an absolute privilege and do not have to testify under the new statute.

Question: I am an Editor and just received a criminal subpoena in a felony case where the criminal defendant confessed to the journalist that he committed the crime, will I have to produce the videotape of the confession? More than likely. Unless the court determines there is a reasonable alternative source of the information, you will have to produce the videotape. Will the journalist also have to testify? If you produce the videotape of the journalist's entire conversation with the criminal defendant, the journalist should not have to also testify about the conversation because the videotape should be an adequate alternative source for the information. Some courts may interpret this differently; however, and, as with any new legislation, the interpretation will take place on a case by case basis.

Question: I am a journalist and I just witness a felony being committed – and I am the only person who saw what was happening, will I have to testify if I get subpoenaed? Yes.

Question: I am a reporter and have a confidential source who has told me he is going to kill someone this afternoon, do I have to disclose this information? Yes. A reporter has to disclose their confidential source if it is reasonably necessary to stop or prevent reasonably certain death or substantial bodily harm.

Question: I am a reporter and just received a subpoena to produce video footage we put on our website, what do I have to do? If it is a civil subpoena, tell them to download it from the website and it is self authenticating. If it is a criminal subpoena, make a copy and charge them for the cost of production. In either instance, you do not need to provide a business records affidavit with the video because the video is self authenticating.

Question: My newspaper and two of the broadcast stations in the market all received subpoenas for photographs we took and video footage we each shot at the same crime scene, what

will happen if I try to fight it on the grounds of there being an alternative source of information? It depends on how the court interprets "alternative sources." If the court believes that one news outlet's photographs or video footage is sufficient, then the others should not have to produce their materials from the same incident. If, however, the court views each news outlet's information as unique, it might require all of the station's to produce their footage.

Question: I am an Editor and just received a criminal subpoena that was not signed by the elected District Attorney? You do not have to comply with it. It does not meet the requirements of the Act.

Question: I am a reporter and just received a Rule 202 Petition asking for my pre-suit deposition, can I invoke the reporter's privilege? Yes, the reporter's privilege specifically applies to Rule 202 proceedings.

Question: Does the reporter's privilege apply in administrative or executive proceedings as well? Yes.

Question: I am a blogger who does not work for a television station and really just blogs in my spare time, but I received a subpoena for my notes about a blog I recently posted on misuse of funds by government officials, does the reporter's privilege cover me? Not likely. The reporter's privilege applies to journalists as defined in the Act and basically covers those who earn a substantial portion of their living working for a bona fide news organization.

How Court Challenges Work

Under the new law, if you are fighting a subpoena, you can file a Motion to Quash, and the Court must hold a hearing on the matter before the reporter is required to testify or work product is required to be produced. In filing the Motion, the journalist will likely need to sign an affidavit supporting the motion to ensure that the Court knows the reporter falls within the definition of journalist contained in the Act. Also, the burden is on the party who is subpoenaing the information to prove by a heightened standard of clear and specific evidence that they really need the information for the heart of their case and that they cannot get the information elsewhere. Other factors the court can consider in balancing the interests of the reporter and the party who has subpoenaed the information are: (1) whether the subpoena is overbroad, unreasonable or oppressive, (2) whether it is being used to obtain peripheral, nonessential or speculative information, (3) the reasonableness and timeliness of the notice being given in the subpoena, and (4) whether the interest of the party subpoenaing the information outweighs the public interest in gathering and disseminating the news.

Last Words

We believe that the right balance has been struck in Texas' reporter's privilege – one in which the goal of increasing the free flow of information and preserving a free and active press has been balanced with protecting the right of the public to effective law enforcement and the fair administration of justice. It has been a monumental undertaking to get this law passed in Texas, and there are many people who have helped make this quest a reality. We thank all of those who have assisted in the effort and each of the lawmakers who voted in favor of passing a law that will benefit all Texas citizens – the Texas Free Flow of Information Act.