

SENATE BILL REPORT

SHB 2452

As Reported By Senate Committee On:
Judiciary, February 22, 2006

Title: An act relating to a privilege from compelled testimony for members of the news media.

Brief Description: Protecting the news media from being compelled to testify in legal proceedings.

Sponsors: House Committee on Judiciary (originally sponsored by Representatives Kessler, Armstrong, Clibborn, Priest, Nixon, Blake, Hunt, Morrell, Grant, Newhouse, Dickerson, Kagi, Ericksen, Ericks, Wood, Upthegrove, Ormsby, Roberts and O'Brien; by request of Attorney General).

Brief History: Passed House: 2/13/06, 87-11.

Committee Activity: Judiciary: 2/15/06, 2/16/06, 2/22/06 [DPA, DNP].

SENATE COMMITTEE ON JUDICIARY

Majority Report: Do pass as amended.

Signed by Senators Kline, Chair; Johnson, Ranking Minority Member; Esser, Hargrove, Rasmussen and Thibaudeau.

Minority Report: Do not pass.

Signed by Senators Weinstein, Vice Chair; Carrell and McCaslin.

Staff: Lidia Mori (786-7755)

Background: The judiciary has inherent power to compel witnesses to appear and testify in judicial proceedings so that the court will receive all relevant evidence. However, the common law and statutory law recognize exceptions to compelled testimony in some circumstances.

Privileges are recognized when certain classes of relationships or communications within those relationships are deemed of such importance that they should be protected. Four criteria must be satisfied to find a privilege under the common law: (1) the communication must be made in confidence; (2) the element of confidentiality must be essential to the relationship; (3) the relationship is one that should be sedulously fostered; and (4) the injury of disclosing the communication must be greater than the benefit of disclosure.

Washington has not enacted a statutory reporter privilege, but the Washington Supreme Court has recognized a common law qualified privilege for reporters against compelled disclosure of confidential source information in both civil and criminal cases. To overcome the privilege, a party must show that: (1) the claim is meritorious; (2) the information sought is necessary or critical to the cause of action or defense pleaded; and (3) the party made a reasonable effort to obtain the information by other means.

Thirty one states and the District of Columbia have enacted statutory reporter shield laws. State laws vary with respect to whether and how they apply the privilege in different types of proceedings (e.g., civil versus criminal) and the showing that must be made to overcome the privilege where it is qualified. At the federal level, Congress has not adopted a reporter privilege law, although a number of bills have been introduced on the subject. Most federal circuit courts, including the Ninth Circuit, have recognized some form of qualified reporter privilege, either deriving from the common law or the First Amendment.

Summary of Amended Bill: A privilege from compelled testimony or disclosure of information is established for members of the news media. In addition, a privilege from compelled disclosure of certain information is established for a non-news media party under specific circumstances.

The news media has an absolute privilege from being compelled to testify, produce, or disclose the identity of a source of news or information, or any information that would tend to identify the source, if the source has a reasonable expectation of confidentiality. The news media has a qualified privilege from being compelled to testify, produce, or disclose any news or information obtained or prepared in the course of gathering, receiving, or processing news or information for potential communication to the public. This qualified privilege does not apply to physical evidence of a crime. The qualified privilege may be overcome if the court finds the following factors are present: (1) In the case of a criminal proceeding, there are reasonable grounds to believe a crime occurred, and in the case of a civil proceeding, there is a prima facie case; (2) The news or information is highly material and relevant; (3) The news or information is critical or necessary to maintenance of a claim, defense, or proof of a material issue; (4) The party seeking the news or information has exhausted all reasonable and available means of obtaining the information from another source; and (5) There is a compelling public interest in the disclosure. In evaluating public interest, the court may consider whether the information came from a confidential source.

A non-news media party is protected from compelled disclosure of records, information, or other communications relating to business transactions with the news media, where the purpose of seeking the records is to discover the identity of a source or information protected from disclosure under the news media privilege. The news media must be given prior notice and an opportunity to be heard when records relating to a non-news media party's business transactions with the news media are sought. Prior notice is not required where the news media is the target of a criminal investigation and prior notice would pose a clear and substantial threat to the investigation. The news media privilege is not waived by the publication or dissemination by the news media of the news or information or any portion of the news or information. The fact and content of a publication may be established by judicial notice.

"News media" is defined to mean any of the following persons or entities: newspaper; magazine or periodical; book publisher; news agency; wire service; radio, television, cable, or satellite station or network; or audio or audiovisual production company; any person or entity in the regular business of disseminating news or information to the public by any means; a journalist, higher education researcher or scholar, or other individual who is either: earning or about to earn a substantial amount of his or her livelihood by obtaining or preparing information for any of the above; or acting as an agent, assistant, employee, or supervisor of

any of the above; and a parent, subsidiary, or affiliate of the entities listed above. "News media" does not include a governmental entity, or its officers or employees while engaged in official duties.

Amended Bill Compared to Original Bill: The court's authority to conduct a suitable inquiry necessary to make findings of fact and enter conclusions of law is specified.

Appropriation: None.

Fiscal Note: Not requested.

Committee/Commission/Task Force Created: No.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Testimony For: This is an important time for the news media to have the protection provided in this bill. Current Washington case law only gives a qualified protection for the source of news information. This legislation will also cut down on the amount of time and money being spent now to fight subpoenas. The bill does not protect criminal conduct. Both parties, the source and the reporter, must have agreed to confidentiality. A criminal would not have a reasonable expectation of confidentiality and the reporter would not agree to it. If a reporter aids and abets by shielding criminal behavior, he or she could be charged as an accomplice. The greater good is served by providing protection from compelled disclosure of a confidential source. If a reporter or a source violates criminal law, the bill does not address or change current law. Prosecutors don't support privileges lightly. The qualified work product protection in this bill codifies four or five cases in our state. Under current case law, a reporter can't promise confidentiality unless he or she is willing to run the risk of jail.

Testimony Against: This bill creates a potential impediment to an attorney who is defending a client. The status of the common law is better. Courts have already liberally shielded reporters. The Legislature should go slower at this point and study this proposal. The definition of "news media" is overly broad and could include bloggers who are not professional news organizations. The same tests that pertain to work product should apply to the identity of a source. A reporter could say anything and attribute it to a confidential source and no one can do anything about it.

Who Testified: PRO: Representative Kessler; Rob McKenna, Attorney General; Bruce Johnson, Allied Daily Newspaper; Dan Satterberg, King County Prosecutor's Office; Mark Allen, Washington State Association of Broadcasters; Tim Boyd, Washington State Association of Broadcasters; Bill Will, Washington Newspaper Association; Kathleen Merrill, Issaquah Press.

CON: John Sinclair, Washington Defender Association, Washington Association of Criminal Defense Lawyers; Dean Little, King County Bar Association; Mel Sorenson, Washington Defense Trial Lawyers, Rick Slunacker, Washington Construction Industry Council, Associated General Contractors; Cliff Webster, United Services Automobile Association.