

SENATE BILL REPORT

SB 5358

As Reported By Senate Committee On:
Judiciary, February 6, 2007

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: Senators Kline, Kohl-Welles, Fairley, McCaslin and Marr.

Brief History:

Committee Activity: Judiciary: 1/09/07, 2/06/07 [DPS, DNP].

SENATE COMMITTEE ON JUDICIARY

Majority Report: That Substitute Senate Bill No. 5358 be substituted therefor, and the substitute bill do pass.

Signed by Senators Kline, Chair; Tom, Vice Chair; Hargrove, Murray, Roach and Weinstein.

Minority Report: Do not pass.

Signed by Senator Carrell.

Staff: Lidia Mori (786-7755)

Background: Washington has no statute that protects a reporter or journalist from being compelled to disclose confidential sources and information he or she has obtained during the process of gathering news. Washington courts have ruled in favor of a qualified protection, based on the First Amendment and common law. In the case of *Senear v. Daily Journal American*, the Washington Supreme Court set forth four conditions that must be met before the common law qualified privilege for news reporters in a civil or criminal proceeding can be defeated. The party seeking discovery must show: (1) the claim is meritorious; (2) the information sought is necessary or critical to the cause of action or the defense pleaded; (3) a reasonable effort has been made to acquire the information by other means; and (4) the interest of the reporter in nondisclosure is supported by a need to preserve confidentiality. Thirty-one states and the District of Columbia have laws that shield the media from compelled disclosure. Federal shield legislation is being considered in Congress. There is concern that compelled disclosure of confidential information by the media has a chilling effect on information availability and that it inhibits whistleblowers from communicating about important issues.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

Summary of Bill: No judicial, legislative, administrative, or other body with subpoena power may compel the news media to testify, produce, or in any way disclose the identity of a source of any news or information where such source has a reasonable expectation of confidentiality. In addition, news or information, other than physical evidence of a crime, obtained or prepared by the news media in its capacity in gathering, receiving, or processing news or information for potential communication to the public may not be compelled to be disclosed or produced, except in the following circumstances: a court may compel disclosure of such news or information if the party seeking the news or information can establish by clear and convincing evidence that: (1) in a criminal investigation or prosecution, based on information other than that sought, there are reasonable grounds to believe a crime has occurred; or (2) in a civil proceeding, based on information other than that sought, there is a prima facie cause of action. In both instances, whether criminal or civil, the party must establish that: (1) the news or information is highly material and relevant; (2) it is critical or necessary to the maintenance of a party's claim, defense, or proof of a material issue; (3) the party seeking the news or information has exhausted all reasonable and available means to obtain it from alternative sources; and (4) there is a compelling public interest in the disclosure. Publication or dissemination by the news media of the identity of a source or of news or information obtained or prepared by the news media does not constitute waiver of the protection from compelled disclosure. If the fact of publication must be proved in any proceeding, that fact and the contents of the publication may be established by judicial notice.

"News media" is defined as, among other things, any newspaper, magazine, book publisher, news agency, radio or television station or network, or any person who is in the regular business of disseminating news or information to the public by any means. It also includes any person who is or has been a journalist, scholar, or researcher employed by an institution of higher education, or other individual who, either at the time he or she obtained or prepared the information sought by compulsory disclosure, was earning or on a professional track to earn a significant portion of his or her livelihood by obtaining or preparing information for dissemination by a news media entity or person. News media also includes any person who obtained or prepared the information that is sought while serving as an agent, assistant, employee, or supervisor of any news media person or entity.

A non-news media party is protected from compelled disclosure when the subpoena or compulsory process seeks records, information, or other communications relating to business transactions between the non-news media party and the news media for the purpose of discovering the identity of a source. When a subpoena or other compulsory process is initiated against a non-news media party seeking information or communications on business transactions with the news media, the affected news media must be given reasonable and timely notice of the compulsory process before it is initiated and be given an opportunity to be heard. If the compulsory process against the non-news media is in connection with a criminal investigation in which the news media is the target, and advance notice would pose a clear and substantial threat to the integrity of an investigation, the governmental authority must state so in court. In such a case, notification of the compulsory process will be given to the affected news media as soon as it is determined that the notice will not pose a clear and substantial threat to the integrity of the investigation.

EFFECT OF CHANGES MADE BY RECOMMENDED SUBSTITUTE AS PASSED COMMITTEE (Judiciary): The definition of "news media" is narrowed such that it

includes entities engaged in news gathering and disseminating news or information to the public. The definition of news media no longer includes any person who is or has been a journalist, a scholar, or researcher employed by any institution of higher education, or other individual who either at the time he or she obtained or prepared the information that is sought was earning or on a professional track to earn a significant portion of his or her livelihood by obtaining or preparing information for dissemination by any person or entity listed in the definition of news media. News media does not include any person who obtained or prepared the information that is sought while serving in the capacity of an agent, assistant, employee, or supervisor of any news media person or entity. The definition of news media includes any person who is or has been an employee, agent, or independent contractor of any entity listed in the definition of news media, who is or has been engaged in bona fide news gathering for such entity, and who obtained or prepared the news or information that is sought while serving in that capacity.

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.

Staff Summary of Public Testimony: PRO: This bill is a way to preserve the relationship between the reporter and the source, to further the free flow of information. It applies only where there is a reasonable expectation of privacy. The reason for believing that this protection is important is respect for the media and the free flow of information. This bill does not give protection to the source or to a thieving reporter; it gives it to the reporter. Some states have had an absolute privilege for years and there have been no abuses, but there have been cases where a reporter has been forced to testify. A reporter should not have to face the threats and financial brow beating that occurs when subpoenaed to testify. There was a judge in Washington who ordered a reporter to jail for refusing to disclose a source, but, that order was ultimately quashed.

CON: It is the absolute privilege that causes concern because it takes away the involvement and discretion of the judge. The definition of "news media" is too broad; it sweeps in too many entities. There should be a uniform definition of "news media" across the country. This bill is not balanced or fair to small contractors.

Persons Testifying: PRO: Bruce Johnson, Davis Wright Tremaine; Dan Satterberg, King County Prosecutor's Office; Mark Allen, Washington State Association of Broadcasters; Susannah Frame, King Broadcasting; Dave Zeeck, The News Tribune; Roland Thompson, Allied Daily Newspapers of Washington.

CON: Mark Rising, King County Bar Association; Jeanne Cushman, Washington Association of Criminal Defense Lawyers; Mel Sorenson, Washington Defense Trial Lawyers; Cliff Webster, Washington Construction Industry Council; Tom McBride, Washington Association of Prosecuting Attorneys.

Signed In, Unable To Testify & Submitted Written Testimony: Tom McBride, Washington Association of Prosecuting Attorneys.