

HOUSE BILL REPORT

SSB 5358

As Reported by House Committee On:
Judiciary

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: Senate Committee on Judiciary (originally sponsored by Senators Kline, Kohl-Welles, Fairley, McCaslin and Marr).

Brief History:

Committee Activity:

Judiciary: 3/28/07 [DP].

Brief Summary of Substitute Bill

- Establishes a privilege from compelled testimony and disclosure of information for members of the news media.

HOUSE COMMITTEE ON JUDICIARY

Majority Report: Do pass. Signed by 9 members: Representatives Lantz, Chair; Goodman, Vice Chair; Rodne, Ranking Minority Member; Flannigan, Kirby, Moeller, Pedersen, Ross and Williams.

Minority Report: Do not pass. Signed by 2 members: Representatives Warnick, Assistant Ranking Minority Member and Ahern.

Staff: Edie Adams (786-7180).

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, including testimonial or evidentiary privileges. Privileges are generally disfavored in the common law because they impede the court's truth-finding function.

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.

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.

More than 30 states and the District of Columbia have enacted statutory reporter shield laws. There is wide variation among these laws: some states provide protection only with respect to confidential sources, either by providing a qualified or absolute privilege; some provide qualified protection for both confidential sources and the reporter's work product; and some provide an absolute privilege for both sources and work product. In addition, state laws vary with respect to whether and how they apply the privilege in different types of proceedings 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 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 certain 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:

- 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;
- the information is highly material and relevant;

- the information is critical or necessary to maintenance of a claim or defense, or proof of a material issue;
- the party seeking the information has exhausted all reasonable and available means of obtaining the information from another source; and
- 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 or information relating to business transactions with the news media where the purpose of seeking the records is to discover the identity of a source or other information protected from disclosure. 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 entities or persons:

- 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 entity in the regular business of news gathering and disseminating news or information to the public by any means;
- any person who is or has been an employee, agent, or independent contractor of any of the above entities, who is or has been engaged in bonafide news gathering for the entity, and who obtained or prepared the information sought while serving in that capacity; and
- a parent, subsidiary, or affiliate of the entities listed above.

Appropriation: None.

Fiscal Note: Not requested.

Effective Date: The bill takes effect 90 days after adjournment of session in which bill is passed.

Staff Summary of Public Testimony:

(In support) There are problems that can be solved only if someone comes forward with information. Washington should be a state with a public policy of encouraging people to come forward with important information.

The definition of news media has been narrowed to focus on those people and entities engaged in the news gathering process, not those that are simply engaged in commentary or the dissemination of information.

(Opposed) The absolute privilege is unnecessary and ill-advised. The media shouldn't be in a position to self-determine what information is protected. If you create an absolute privilege, you are placing the reputation and livelihood of people in the hands of the news media. If the media's judgment is bad or reckless, or if someone wants to take advantage of the media, people can be harmed.

The definition of news media is very important and needs to be as narrow as possible. If you create the absolute privilege, you should use the definition of news media that is contained in HB 1366. That definition is narrower than the definition of news media in this bill.

Persons Testifying: (In support) Senator Kline, prime sponsor; and Mark Allen, Washington State Association of Broadcasters.

(Opposed) Dean Little, King County Bar Association; and Mel Sorensen, Washington Defense Trial Lawyers.

Persons Signed In To Testify But Not Testifying: None.