SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based only on the provisions contained in the legislation as of the latest date listed below.)

Date: March 22, 1998 Revised: 3/24/98

Subject: Journalism: Qualified Privilege

	Analyst	Staff Director	Reference	Action
1.	Nebelsiek	Wilson	GO	Fav/1 amendment
2.				
3.				
4.				
5.				

I. Summary:

Senate Bill 150[1] provides for codification of a qualified privilege for certain information obtained by professional journalists gathering news. It would shield journalists from compelled disclosure of sources and "information" during judicial proceedings and investigative hearings. A party seeking to overcome the privilege can do so if a three part test is satisfied. However, overcoming the qualified privilege extends only to the portion of the information supported by the three part test. This bill may expand the common law journalist's privilege recognized in Florida by narrowly construing existing case law.

The bill would enhance the media's ability to collect news by promoting and protecting confidentiality. It might also reduce the number of subpoenas served upon media gathering organizations. However, in both criminal and civil actions, the qualified privilege provided for under this bill could impede the discovery of evidence held by journalists.

During the 1993 Legislative Session, a similar bill was passed but was vetoed by the Governor[2] because it contained an absolute privilege for journalists.

This bill creates section 90.5015, Florida Statutes.

[1]A similar bill, CS/HB 71, was carried over from the 1997 Session in the House of Representatives.

[2]During the 1993 Regular Session, CS/SB 1256 was laid on the table, but companion CS/HB 463 passed.

II. Present Situation:

The First Amendment to the United States Constitution provides that Congress shall make no law abridging the freedom of speech or the freedom of the press. It has also been held that the Fourteenth Amendment makes the First Amendment applicable to the states. Furthermore, s. 4, Art. I, State Constitution, provides that "[n]o law be passed to restrain or abridge the liberty of speech or the press." Freedom of the press, in particular, is said to secure the widest possible dissemination of news and information from diverse sources.

The issue of freedom of the press and the ability of the press to refuse to disclose the identity of a *confidential* source was an issue that was initially addressed by the United States Supreme Court in *Branzburg v. Hayes*, 408 U.S. 665 (1972). In *Branzburg*, a majority of the Supreme Court held that a subpoena compelling a reporter to appear and to testify before a state or federal grand jury on confidential matters did not abridge the freedom of speech and press guaranteed by the First Amendment. The opinion, however, did acknowledge that news gathering does qualify for some First Amendment protection since "without some protection, freedom of the press could be eviscerated." Id. at 681. The Supreme Court established a test to be applied on a case-by-case basis which required a balance between the freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct.[3] 408 U.S. at 710.

Subsequent to *Branzburg*, the trend among the courts that have addressed the issue of confidential sources is to recognize that a limited or qualified privilege does exist to protect the identity of such sources from forced disclosure absent a showing of compelling interest outweighing that privilege. In fact, twenty-nine states have enacted some form of journalist's or reporter's privilege. Seven of those states have enacted an absolute privilege,[4] however, most states with a shield law have opted for a qualified privilege.[5]

A privilege, as discussed herein, operates to exclude evidence that might otherwise be admissible. The Florida Legislature has not adopted any statutory reporters' privilege or "shield" statute. Therefore, in Florida, any journalist's privilege that currently exists is based on common law derived from state and federal constitutional protections. In the Florida Statutes, several privileges are recognized: for accident reports,[6] information relating to patients hospitalized under the Baker Act,[7] certain records made during the treatment of alcoholics,[8] and certain information obtained

[3]The court opined that every claim of privilege should be judged on its facts by striking a proper balance between constitutional and societal interests. 408 U.S. at 710

[4]California, Kentucky, Montana, Nebraska, New York, Ohio, and Pennsylvania have attempted to grant journalist's an absolute privilege, although judicial interpretation has produced varying degrees of "absolute" protection.

[5]Alaska, Arizona, Colorado, Delaware, Georgia, Illinois, Louisiana, Maryland, Minnesota, New Jersey, Oklahoma, Oregon, Rhode Island, South Carolina, and Tennessee have in various forms codified a qualified privilege for journalists or reporters.

[6]Section 316.066(4), F.S.

[7]Section 394.459(9), F.S.

[8]Section 396.112, F.S.

during the inspection of dairy farms and milk plants.[9] Additionally, the Florida Evidence Code also recognizes a number of evidentiary privileges, including, for example, attorney-client privilege,[10] husband-wife privilege,[11] trade secrets privilege,[12] and psychotherapist-patient privilege.[13] These privileges[14] are based on the recognition that certain relationships are so important to society that the confidential communications engendered by such relationships must be protected.[15] The question is whether the relationship between a professional journalist and his or her sources is so important to society that it rises to the level of the privileged communications between, for example, a husband and wife.

The Florida Supreme Court first recognized a qualified privilege to protect journalists from revealing a confidential source in *Morgan v. State*, 337 So.2d 951 (Fla. 1976). In *Morgan*, the court adopted the *Branzburg* view that every claim of a journalist's privilege should be judged on its facts by striking a proper balance between constitutional and societal interests. Most Florida courts, however, have not extended a qualified privilege to journalists for information obtained from *nonconfidential* sources. Recently, the Fourth District Court of Appeal examined this issue in *Kidwell v. State*, 696 So.2d 399 (Fla. 4th DCA 1997) where it determined that a reporter's jailhouse interview with a murder defendant was not privileged.[16] The issue of whether information obtained by a journalist from a nonconfidental source is privileged in a criminal proceeding is currently under review by the Florida Supreme Court.[17] Whether information obtained by a journalist from a nonconfidential source in a civil proceeding is privileged has not yet been determined.

[9]Section 502.222, F.S.

[10]Section 90.502. F.S.

[11]Section 90.504, F.S.

[12]Section 90.506, F.S.

[13]Section 90.503, F.S.

[14]Other privileges recognized by the Florida Evidence Code include: sexual assault counselor-victim privilege, s. 90.5035, F.S.; domestic violence advocate-victim privilege, s. 90.5036, F.S.; accountant-client privilege, s. 90.5055, F.S.; and the privilege with respect to communication to clergy, s. 90.505, F.S.

[15]See generally, Charles W. Erhardt, Florida Evidence, s. 501.1 (1996 ed.).

[16]The court noted that: "[t]he criminal justice system would founder at the very beginning of the process if witnesses with relevant and unprivileged knowledge could decide when they shall be required to testify and the subjects about which they can permissibly be examined. Our system has long recognized the right of both the state and the defendant to "every man's evidence" and has provided compulsory process for the attendance and testimony of witnesses . . . nonconfidential sources willingly speak to the press for their own reasons. The mere fact that these reasons appear in retrospect to be ill-advised when the comments are sought to be adduced in the criminal trial as admissions is surely no reason to shield the admissions with a reporter's privilege." *Kidwell*, 696 So.2d at 400-401, 406.

[17]*Davis v. State*, 692 So.2d 924 (Fla. 2d DCA 1997), *review granted*, 700 S.2d 687 (Fla. 1997).

Florida courts do not recognize a qualified privilege for journalist's eyewitness observations,[18] nor for physical evidence of a crime.[19]

III. Effect of Proposed Changes:

Subsection (1) of s. 90.5015, F.S., broadly defines "professional journalist," "information," and "news." Subsection (2) of s. 90.5015, F.S., provides that professional journalist has a *qualified privilege* not to be a witness concerning, and not to disclose "information" including the identity of any source obtained while the journalist is actively gathering news. The privilege is qualified because it applies only to "information or eyewitness observations obtained within the normal scope of employment," but not to physical evidence of a crime.

Subsection (2) of s. 90.5015, F.S., also provides that a challenging party may overcome the privilege if that party successfully shows that the information is relevant and material to unresolved issues that have been raised in the proceeding for which the information is sought, the information cannot be obtained from alternative sources, and a compelling interest exists for requiring the disclosure of information. This is based on the balancing test first articulated in *Branzburg*.[20] The bill does not establish a standard for the challengers burden of proof, that is, whether competent substantial evidence, a preponderance of the evidence, or any other standard of proof is required to overcome the privilege.

Pursuant to subsection (3) of s. 90.5015, F.S., a hearing must be held to determine whether the test is met and the court must make clear and specific findings as to why the privilege is overcome. When a challenging party successfully overcomes the privilege, only the portions of information for which the showing is applicable, must be disclosed.

Subsection (4) of s. 90.5015., F.S., provides that the disclosure of information as a result of a successful challenge to the privilege does not create a waiver of the privilege pursuant to s. 90.507, F.S.[21] Subsection (5) of s. 90.5015, F.S., limits construction of the statute.

Subsection (6) of s. 90.5015, F.S., contains a severance clause.

Section 2 provides that the bill will be effective upon becoming law.

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[18]*Miami Herald Publishing Co. v. Morejon*, 561 So.2d 577 (1990).

[19]*CBS, Inc. v. Cobb*, 536 So.2d 1067 (Fla. 2d DCA 1988); *Satz v. News and Sun-Sentinel Co.*, 484 So.2d 590 (Fla. 4th DCA 1985)(en banc)(per curiam).

[20]*Branzburg v. Hayes*, 408 U.S. 665 (1972).

[21]Section 90.507, F.S., provides that a person who has a privilege against the disclosure of a confidential matter or communication waives the privilege if the person voluntarily discloses the information under certain circumstances.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

While confidential sources have enjoyed the protection of a qualified privilege for more than 20 years, it is not clear whether the First Amendment demands that nonconfidential sources also be protected. A case is currently pending before the Florida Supreme Court in which the issue of whether nonconfidential information should be afforded protection with a qualified privilege.[22]

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

If this bill does not pass, it is likely that news organizations will continue to pay legal fees to fight subpoenas. If the bill does pass, it is likely that litigants will incur additional costs in attempting to collect information protected by the qualified privilege.

C. Government Sector Impact:

In cases which involve journalist-held evidence, this bill could make additional hearings necessary, slowing down the adjudicatory process. However, any increased burden on the courts could be offset by reductions in petitions for injunctions to protect journalists and invasion of privacy suits against the media. Thus, the fiscal impact is not readily determinable.

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[22] *Davis v. State*, 692 So.2d 924 (Fla. 2d DCA 1997), *review granted*, 700 S.2d 687 (Fla. 1997). The following question was certified to the Supreme Court by the Second District Court of Appeal: Does Florida law provide a qualified reporter's privilege against the disclosure of non-confidential information relevant to a criminal proceeding?

VI. Technical Deficiencies:

The definition of "professional journalist" is all-encompassing and does not require employment by any institutionalized news gathering organization nor does it impose any professional credentials or qualifications to discretely establish who is and who is not a journalist, although the bill does require demonstration of competent evidence that a "professional journalist" was engaged in gathering the news. On the other hand, the protection extends only to those who are "regularly" engaged in news gathering activities. Although the bill protects only those who gather news "for gain or livelihood," the boundaries of "professional journalist" are not clear and could thus encompass other fields of writing and research.[23]

The word "information" is defined as "information." Such circularity leaves it to the imagination as to what actually constitutes "information."

With the broad definitions of "information" and "news" and the extensive list of news gathering activities which are protected, it is arguable that nearly any observation or information gathered by a journalist is protected, particularly because the bill does not distinguish between confidential and nonconfidential sources.

VII. Related Issues:

There is confusion about the public "right" to know and the rights guaranteed by the First Amendment and the Florida Constitution. The *speech* of individuals and the press is a protected constitutional right. With the exception of the public records law, there is no constitutionally protected "right" to know or to be presented with information in the Florida Constitution. While proponents of the journalist privilege assert that the public has a "right" to certain information and that the journalist's privilege is therefore necessary, there is no such constitutional right.

An internal conflict is created in the bill since the privilege refers to "employment" but the definition of "professional journalist" does not require employment as a journalist. Although the bill does provide that the journalist has a qualifed privilege not to disclose the "identity of any source," the bill does not distinguish between confidential and nonconfidential sources of information, thus, the bill signifcantly broadens current case law by protecting all confidential and nonconfidental sources.

Because journalists would rarely be forced to reveal sources, some sources might be more forthcoming with information which is private or damaging. Such increased cooperation would directly benefit the public in some investigative reporting, but in other contexts the public benefit

[23]In fact, it has been held by some courts that the journalist's privilege is not limited to reporters employed by the institutionalized print or media. See, for example: *von Bulow v. von Bulow*, 811 F.2d 136 (2nd Cir. 1987), cert. denied, 481 U.S. 1015 (1987) and *Shoen v. Shoen*, 5 F.3d 1289 (9th Cir. 1993).

is unclear and the bill may work to the detriment of the public by adversely affecting some criminal prosecutions and impeding discovery in civil suits.

VIII. Amendments:

#1 by Governmental Reform and Oversight:
Amends s. 945.10(1)(b), F.S., to exempt preplea or pretrial intervention records from the public records law, but not presentence or postsentence investigation records.