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**HOUSE OF REPRESENTATIVES
COMMITTEE ON
CIVIL JUSTICE & CLAIMS
BILL ANALYSIS & ECONOMIC IMPACT STATEMENT**

BILL #: CS/HB 71

RELATING TO: Professional Journalist's Privilege

SPONSOR(S): Representatives Rojas and Diaz de la Portilla

STATUTE(S) AFFECTED: s. 90.5015, F.S.

COMPANION BILL(S): SB 304 by Senator Sullivan (s)

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

- (1) CIVIL JUSTICE & CLAIMS YEAS 8 NAYS 1
- (2) CIVIL JUSTICE & CLAIMS YEAS 8 NAYS 0
- (3)
- (4)
- (5)

I. SUMMARY:

This bill would create s. 90.5015, F.S. It would codify and expand the journalist's privilege. It would shield journalists from compelled disclosure of sources and other information during judicial proceedings and investigative hearings.

Specifically, this bill would establish a qualified privilege for journalists pertaining to information obtained while gathering news. This qualified privilege could be overcome by a clear and specific showing that: (1) the information is relevant to a pending issue, (2) the information is not available from other sources, and (3) a compelling interest supports disclosure.

The fiscal impact of this bill on the courts and private sector is uncertain. 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 organizations. However, in both criminal and civil actions, the qualified privilege provided under this bill could impede the discovery of media-held evidence.

This bill was carried over from the 1997 session pursuant to Rule 96.

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

1. **Balancing the "Search for Truth" with the Journalist's Privilege** - State and federal precedent suggests that if a compelling need supports disclosure, the government can require members of the media to testify before grand juries, testify at criminal trials, produce evidence, or reveal sources. Zurher v. Stanford Daily, 436 U.S. 547 (1978)(upholding a search of newspaper offices for evidence); Branzburg v. Hayes, 408 U.S. 665 (1972); Herbert v. Lando, 441 U.S. 153 (1979)(holding that no First Amendment privilege protects a liable defendant from inquiry into the defendant's editorial process and state of mind); Miami Herald Publishing Co. v. Morejon, 561 So.2d 577 (Fla. 1990); Gold Coast Publications, Inc. v. State, 669 So.2d 316 (Fla. 4th DCA 1996). The Supreme Court of the United States has indicated, "the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability." Branzburg, 408 U.S. at 681. The journalist's privilege is qualified because a balance must be struck "between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct." Id. at 710 (Powell, J., concurring). In its reasoning, the Court relied upon a prior decision, Associated Press v. NLRB, 301 U.S. 103, 132-133 (1937), wherein the Court noted, "The publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others." The Branzburg Court, concluding that the journalists privilege does not protect a news person from compelled grand jury testimony, explained:

A number of States have provided newsmen a statutory privilege of varying breadth, but the majority have not done so, and none has been provided by federal statute. Until now the only testimonial privilege for unofficial witnesses that is rooted in the Federal Constitution is the Fifth Amendment privilege against compelled self-incrimination. We are asked to create another by interpreting the First Amendment to grant newsmen a testimonial privilege that other citizens do not enjoy. This we decline to do. Fair and effective law enforcement aimed at providing security for the person and property of the individual is a fundamental function of government, and the grand jury plays an important, constitutionally mandated role in the process. On the records now before us, we perceive no basis for holding that the public interest in law enforcement and in ensuring effective grand jury proceedings is insufficient to override the consequential, but uncertain, burden on news gathering that is said to result from insisting that reporters, like other citizens, respond to relevant questions put to them in the course of a valid grand jury investigation or criminal trial. Id. at 689-691.

In many cases, a defendant's right to a fair trial outweighs the journalist's common law privilege. CBS, Inc. v. Jackson, 578 So.2d 698 (Fla. 1991); Satz v. News and Sun-Sentinel Co., 484 So.2d 590 (Fla. 4th DCA 1985); In re Farber, 394 A.2d 330 (N.J. 1978), review denied sub nom., New York Times Co. v. New Jersey, 439 U.S. 997 (1978). According to the Supreme Court of the United States, a media defendant may also be forced to reveal a reporter's investigatory leads in a defamation suit. Herbert v. Lando, 441 U.S. 153 (1979).

2. **Judicial Construction of the Journalist's Privilege in Florida** - The Florida Legislature has not codified the journalist's privilege. Instead, court decisions have defined its contours.
 - a. **Florida Courts Recognize a Qualified Privilege for Confidential Sources** - In most United States jurisdictions, including Florida, reporters enjoy a qualified privilege for information obtained from confidential sources. However, this privilege can be overcome if: (1) the information sought is relevant to a pending issue, (2) the information sought cannot be obtained from another source, and (3) a compelling need supports disclosure. Garland v. Torre, 259 F.2d 545 (2d Cir. 1958), cert. denied, 358 U.S. 910; CBS, Inc. v. Cobb, 536 So.2d 1067 (Fla. 2d DCA 1988); Gadsden County Times, Inc. v. Horne, 426 So.2d 1234 (Fla. 1st DCA 1983), review denied, 441 So.2d 631.
 - b. **Florida Courts Do Not Recognize a Privilege for Nonconfidential Sources** - Some jurisdictions have extended a qualified testimonial privilege to journalists for information obtained from nonconfidential sources. E.g., Shoen v. Shoen, 5 F.3d 1289 (9th Cir. 1993); United States v. LaRouche Campaign, 841 F.2d 1176 (1st Cir. 1988); United State v. Blanton, 534 F.Supp. 295 (S.D. Fla. 1982). However, most Florida courts do not recognize the journalist's privilege under such circumstances. Kidwell v. State, 696 So.2d 399 (Fla. 4th DCA 1997); Gold Coast Publications, Inc. v. State, 669 So.2d 316, 317 (Fla. 4th DCA 1996); Tampa Television, Inc. v. Norman, 647 So.2d 904 (Fla. 2d DCA 1994); Carroll Contracting, Inc. v. Edwards, 528 So.2d 951, 953 (Fla. 5th DCA 1988).

The Florida Supreme Court, in Miami Herald Publishing Co. v. Morejon, 561 So.2d 577 (Fla. 1990), determined that the journalist's privilege did not protect eyewitness observations. Citing Herbert v. Lando, 441 U.S. 153 (1979), the court noted, "Evidentiary privileges in litigation are not favored, and even those rooted in the constitution must give way in proper circumstances." Id. at 581. The court reasoned that excepting eyewitness observations from the journalist's privilege would not hamper news gathering, because "there is no confidential source . . . which may 'dry up' if revealed." Id.

Recently, in Kidwell v. State, 696 So.2d 399 (Fla. 4th DCA 1997), the Fourth District Court of Appeal had an opportunity to examine the journalist's privilege as it pertains to nonconfidential sources of information. The court determined that a reporter's jailhouse interview with a murder defendant was not privileged under the First Amendment. The court noted that:

[N]onconfidential 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. The reporter here has made no plausible showing that even nonconfidential sources will dry up if not protected by a qualified privilege. To recur to Justice White, the press in this republic has thrived for more than 2 centuries without any protection of this kind for either confidential or nonconfidential sources. Id. at 406.

Additionally, the Kidwell court refused to distinguish between information obtained as a result of an interview and information obtained through

eyewitness observations. Both types of nonconfidential information, it confirmed, were not protected by the journalist's privilege. As a result, the court held that the journalist could properly be held in contempt for refusing to testify. The court explained:

The 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. The process for summoning witnesses would soon lack any compulsion if witnesses could refuse compliance with subpoenas issued to procure their testimony. Id. at 400-401.

Other recent decisions have applied parallel reasoning and arrived at similar results. In Davis v. State, 692 So.2d 924 (Fla. 2d DCA 1997), the Second District Court of Appeal held that the journalist's privilege has no application in a criminal proceeding unless the information was obtained from a confidential source. The court reasoned that, "A victim's explanation of how a crime occurred is an event relevant to the criminal proceeding. Equally relevant is a criminal defendant's confession." The court consequently held that the trial court should have upheld the defendant's motion to compel discovery. In Gold Coast Publications, Inc. v. State, 669 So.2d 316, 317 (Fla. 4th DCA 1996), the Fourth District Court of Appeal stated, "the qualified journalist privilege protects only a journalist's confidential sources." In Tampa Television, Inc. v. Norman, 647 So.2d 904 (Fla. 2d DCA 1994), the Second District Court of Appeal discounted the idea that the "privilege protects not only a reporter's confidential sources, but also the entire yield of the reporter's news gathering efforts." Id. at 905. The Norman court reiterated, "Since the confidential source materials are no longer an issue in this case, we conclude that the trial court did not depart from the essential requirements of law by ordering production of the remaining material sought." Id. In Carroll Contracting, Inc. v. Edwards, 528 So.2d 951, 953 (Fla. 5th DCA 1988), the Fifth District Court of Appeal noted that "neither the Florida Supreme Court nor the United States Supreme Court has as yet extended the First Amendment protection in the form of a qualified privilege to nonconfidential news sources." But see In re Investigation: Florida Statute 27.04, Subpoena of Roche, 589 So.2d 978 (Fla. 4th DCA 1991)(using a three-part balancing test and eventually ordering disclosure, where it was unclear whether a confidential source was involved); Waterman Broadcasting of Florida, Inc. v. Reese, 523 So.2d 1161 (Fla. 2d DCA 1988)(decided before Morejon, cited with disfavor in Davis); Tribune v. Green, 440 So.2d 484 (Fla. 2d DCA 1983), review denied, 447 So.2d 886 (Fla. 1984)(decided before Morejon, retreated from in Norman, and cited as "no longer viable" in Davis, 692 So.2d at 926).

Some circuit courts, relying on Green, continue to apply a three-part balancing test with respect to nonconfidential information. E.g., State of Florida v. Nelson, 95-911-CF-A-WJN (Fla. 20th Cir. 1995); State of Florida v. Morales, 94-876-CF (Fla. 5th Cir. 1994). The overriding trend, however, has been to eliminate the journalist's privilege under such circumstances. Where the journalist's privilege does not apply, courts may simply compel disclosure by journalists and media organizations.

- c. **Florida Courts Do Not Recognize a Privilege for Physical Evidence of Crime** - Florida courts do not permit media organizations to use the journalist's privilege to withhold physical evidence of crime. 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). Therefore, video tapes, photographs, and other physical evidence that do not reveal confidential sources must be disclosed. When discussing the media's obligation to produce physical evidence, the Florida Supreme Court has stated:

What [the respondent] seeks to discover is physical evidence of the events surrounding his arrest. His request does not implicate any sources of information. We see no realistic threat of restraint or impingement on the news-gathering process by subjecting the videotapes to discovery. Although the media may be somewhat inconvenienced by having to respond to such discovery requests, mere inconvenience neither eviscerates freedom of the press nor triggers the application of the journalist's qualified privilege. Because the qualified privilege does not apply under the circumstances of this case, we need not balance the respective interests involved. CBS, Inc. v. Jackson, 578 So.2d 698, 700 (Fla. 1991).
 - d. **Florida Courts Do Not Recognize a Privilege for Eyewitness Observations** - In Miami Herald Publishing Co. v. Morejon, 561 So.2d 577, 580 (Fla. 1990), the Florida Supreme Court held that "there is no privilege, qualified, limited, or otherwise, which protects journalists from testifying as to their eyewitness observations of a relevant event in a subsequent court proceeding." The court declined to treat journalist witnesses differently from lay witnesses.
3. **Other Privileges in Florida** - The Florida Statutes set forth eight evidentiary privileges. These are listed below. In a broad sense, the qualified privilege accorded by This bill is similar to the privileges listed below: It protects relationships deemed important by society. The relationship between reporters and sources is crucial for ensuring the free flow of information. In two respects, however, the privilege granted by this bill differs from the privileges listed below. First, existing privileges are generally held by clients and victims, not by the professionals with whom they consult. The bill would invert this arrangement. Second, privileges currently delineated in the statutes protect only confidential communications. The privilege conferred by this bill would protect nonconfidential information.
 - a. **The Psychologist-Patient Privilege** - According to s. 90.503, F.S., a patient may refuse to disclose, and may prevent others from disclosing, "confidential" communications made to a psychologist for diagnosis and treatment.
 - b. **The Attorney-Client Privilege** - Section 90.502, F.S., provides that a client may refuse to disclose, and may prevent others from disclosing, "confidential" communications made to an attorney during the receipt of legal services.
 - c. **The Sexual Assault Counselor-Victim Privilege** - A "confidential" communication between a sexual assault counselor and a victim may not be disclosed without the written consent of the victim. Section 5035, F.S.

- d. **The Domestic Violence Advocate-Victim Privilege** - According to s. 90.5036, F.S., a "confidential" communication between a domestic violence advocate and a victim, relating to an incident of domestic violence, may not be disclosed without the consent of the victim.
 - e. **The Clergy-Parishioner Privilege** - Section 90.505, F.S., provides that a person may refuse to disclose, and may prevent disclosure of, "confidential" communications made to a member of the clergy.
 - f. **The Husband-Wife Privilege** - Either spouse may assert a privilege pertaining to "confidential" communications between husband and wife. Section 90.504, F.S.
 - g. **The Trade Secrets Privilege** - According to s. 90.506, F.S., "A person has a privilege to refuse to disclose, and to prevent other persons from disclosing, a trade secret owned by that person if the allowance of the privilege will not conceal fraud or otherwise work injustice."
 - h. **The Accountant-Client Privilege** - Section 90.5055, F.S., protects "confidential" communications between clients and accountants. Clients hold the privilege.
4. **Laws in Other States** - About half of the states have enacted some type of journalist's shield law. Olga C. Puerto, When Reporters Break Their Promises to Sources: Towards a Workable Standard in Confidential Source/Breach of Contract Cases, 47 U. MIAMI L. REV. 501, 527 n.198 (1992). At least twelve states have established shield laws which are less flexible than the qualified privilege provided by this bill.
- a. **Absolute Privileges** - Some state legislatures, including those of California, Kentucky, Montana, Nebraska, New York, Ohio, and Pennsylvania, have attempted to grant an absolute privilege to journalists. Courts in several of these states have not given full effect to the statutory language but, instead, have balanced the interests affected. Two approaches are discussed below.
 - (1) **New York's "Shield Law"** - New York Civil Rights Law, s. 71-h (McKinney 1976 & Supp. 1989), precludes courts from holding journalists in contempt for refusing to reveal information obtained from confidential sources. In this respect, it bestows an absolute privilege. New York's shield law also protects information obtained from nonconfidential sources through a qualified privilege. Courts have strictly construed New York's journalist's privilege and have sometimes refused to enforce it in a manner which would defeat civil claims or criminal prosecutions. E.g., Scott v. Cooper, 642 N.Y.S.2d 935 (1996); Matter of Sullivan, 635 N.Y.S.2d 437 (1995); People v. Craver, 569 N.Y.S.2d 859 (1990); Knight-Ridder Broadcasting, Inc. v. Greenberg, 518 N.Y.S.2d 595 (1987); In re Pennzoil Co., 485 N.Y.S.2d 533 (1985); People v. Korkala, 472 N.Y.S.2d 310 (1984). On other occasions, though, grand jury investigations, criminal prosecutions, and civil actions have been affected. E.g., In re Application to Quash Subpoena to National Broadcasting Co., Inc., 79 F.3d 346 (2d Cir. 1996); In re Subpoena Duces Tecum to Ayala, 616 N.Y.S.2d 575 (1994); In re Grand Jury Subpoenas to

Maguire, 615 N.Y.S.2d 848 (1994); Matter of Grand Jury Investigation, 460 N.Y.S.2d 227 (1983); Oak Beach Inn Corp. v. Babylon Beacon, Inc., 459 N.Y.S.2d 819 (1983), aff'd, 476 N.Y.S.2d 269, cert. denied, 469 U.S. 1158. Under New York's shield law, a journalist's voluntary disclosure of the information sought waives the journalist's privilege.

- (2) **Ohio's "Shield Law"** - Ohio Revised Code s. 2739.12 (Baldwin 1991), provides that "No person engaged in the work of . . . gathering, procuring, compiling, editing, disseminating, or publishing news shall be required to disclose the source of any information procured or obtained by such person in the course of his employment" The Ohio law thus appears to bestow an absolute testimonial privilege upon journalists. However, Ohio courts have treated s. 2739.12 as though it grants a conditional privilege. John M. Tkacik, Jr., Protecting Trade Secrets and Confidential Information from Media Disclosure: Removing the Reporter's Shield, 41 CLEV. ST. L. REV. 175, 198 (1993).

b. **Qualified Privileges** - Most states confer a qualified evidentiary privilege upon journalists. Some states, including Alaska, Arizona, Colorado, Delaware, Georgia, Illinois, Louisiana, Maryland, Minnesota, New Jersey, Oklahoma, Oregon, Rhode Island, South Carolina, and Tennessee, have put their qualified privileges into statutory form. Many of these states apply a three-part test similar to that provided within this bill. Two approaches are discussed below.

- (1) **Alaska's "Shield Law"** - Alaska has conferred a privilege upon reporters at s. 09.25.300, AK ST. However, according to s. 09.25.310, AK ST, a court may deny the privilege if it finds that exercise of the privilege would "result in a miscarriage of justice," or "the denial of a fair trial," or if nondisclosure would be "contrary to the public interest."
- (2) **Colorado's "Shield Law"** - West's Colorado Revised Statutes Annotated, s. 13-90-199, reads in part:
 - (2) Notwithstanding any other provision of law to the contrary and except as provided by subsection (3) of this section, no newsperson shall, without such newsperson's express consent, be compelled to disclose, be examined concerning refusal to disclose, be subjected to any legal presumption of any kind, or be cited, held in contempt, punished, or subjected to any sanction in any judicial proceedings for refusal to disclose any news information received . . . while acting in the capacity of a newsperson; except that the privilege of nondisclosure shall not apply to the following:
 - (a) News information received at a press conference;
 - (b) News information which has actually been published or broadcast
 - (c) News information based on a newsperson's personal observation of the commission of a crime if substantially similar news information cannot reasonably be obtained
 - (3) Notwithstanding the privilege . . . granted in subsection (2) . . . any party . . . may subpoena a newsperson in order to obtain news information by establishing by a preponderance of the evidence
 - (a) That the news information is directly relevant to a substantial issue . . .
 - (b) That the news information cannot be obtained by any other reasonable means; and
 - (c) That a strong interest of the party . . . outweighs the interests under the first amendment to the United States Constitution

B. EFFECT OF PROPOSED CHANGES:

1. **Scope of Proposed Changes** - If it were to become law, this bill would codify and strengthen the common law journalist's privilege. Its provisions would protect journalists from forced disclosure during judicial proceedings and investigative hearings. This bill would preserve the current structure of the journalist's privilege related to information obtained from confidential sources. However, it would also extend the journalist's privilege to several new areas.
 - a. **Would Protect Nonconfidential Information** - This bill would extend the journalist's privilege to nonconfidential information. Currently, most Florida courts only apply the journalist's privilege to information obtained from confidential sources.
 - b. **Might Protect Some Eyewitness Observations** - It is unclear whether this bill's qualified privilege would shield journalists from testifying about events personally witnessed. Such matters seem to fall within the bill's definition of protected material: "information . . . received in the course of gathering news" Presently, Florida courts do not apply the journalist's privilege to eyewitness observations.
 - c. **Might Protect Some Physical Evidence** - It is unclear whether this bill's qualified privilege would shield journalists from producing physical evidence. The bill protects journalists from having to "disclose any matter or produce any writing or recording" In some instances, recordings may constitute physical evidence. See, e.g., CBS, Inc. v. Jackson, 578 So.2d 698 (Fla. 1991)(refusing to apply the journalist's privilege to "physical evidence" consisting of a television journalist's video tape). Courts could also interpret the phrase "any matter" to include physical evidence.
 - d. **Could Be Overcome by Meeting Three-Part Test** - This bill's qualified privilege could be overcome by a "clear and specific" showing that: (1) the information is needed to resolve pending legal issues, (2) the information is not available from other sources, and (3) a compelling interest supports disclosure. A "clear and specific" standard must be met by the party seeking disclosure.
 - e. **Would Not Be Waived by Voluntary Disclosure** - According to the language of the bill, the privilege created by this bill would not be waived by a journalist's full or partial disclosure of the information sought.
2. **Impact of Proposed Changes**
 - a. **Would Enhance News Gathering** - The First Amendment of the federal constitution states that "Congress shall make no law . . . abridging the freedom . . . of the press" Justice Powell has warned that "without some protection for seeking out the news, freedom of the press would be eviscerated." Branzburg v. Hayes, 408 U.S. 665, 710 (1972)(Powell, J., concurring). The qualified privilege accorded by this bill would enhance the media's ability to gather news. Because journalists would rarely be forced to compromise sources, certain sources would become more willing to reveal information which

is private or damaging. Such increased cooperation could aid investigative reporting. According to one commentator, confidentiality "helps cultivate news sources, builds trust, and gives confidence and protection to a fearful source who wishes to remain anonymous." Paul H. Gates, Jr., Making the Press Talk after Miami Herald Publishing Co. v. Morejon: How Much of a Threat to the First Amendment?, 17 NOVA L. REV. 497, 498 (1992). By contrast, if "journalists are forced to disclose more information to a burgeoning class of litigants, a significant danger arises that journalists will be seen as an arm of the government." Edward M. Mullins, The Reporter's Right to Remain Silent: A Proposal for Legislation to Codify and Augment the Journalist's Privilege in Florida, 43 FLA. L. REV. 739, 756 (1991). Under such circumstances, sources could become less cooperative, chilling the media's ability to gather news.

- b. **Would Reduce the Media's Subpoena Response Burden** - Media organizations are subjected to a relatively high number of subpoenas. This bill could reduce "fishing expeditions" by prosecutors and others who seek to take advantage of information compiled by media organizations. The present system may impose a financial hardship on small publishers and broadcasters. One survey detected a 70.8% increase in subpoenas served upon media organizations during the 21-month period following the Florida Supreme Court's decision in Miami Herald Publishing Co. v. Morejon, 561 So.2d 577 (Fla. 1990). The Brechner Center for Freedom of Information, Study, Subpoenas Issued to News Organizations in Florida Before and After Miami Herald v. Morejon (1992). However, another survey suggests a long-term decline in the number of subpoenas served on media organizations in Florida. Media organizations reported that they had received 333 subpoenas in 1989, 218 subpoenas in 1991, and 216 subpoenas in 1993. The Reporters Committee for Freedom of the Press, Study, Agents of Discovery: A Report on the Incidence of Subpoenas Served on the News Media in 1993 (1995).
- c. **Could Affect Some Criminal Prosecutions** - For both the prosecution and defense, the privilege provided by this bill could impede the discovery of nonconfidential information held by media organizations. This hurdle could be overcome by meeting the three-part test described earlier. Because criminal prosecutions place life or liberty at stake, courts would tend to compel disclosure where the media possesses information vital to either side.
- d. **Could Impede Discovery in Defamation and Invasion of Privacy Suits** - In defamation and invasion of privacy suits against media defendants, the qualified privilege provided by this bill would make it more difficult to discover nonconfidential information. Confidential information is already protected by the common law journalist's privilege.

In defamation suits which involve "public figures," plaintiffs must prove "actual malice" on the part of media defendants. New York Times Co. v. Sullivan, 376 U.S. 254 (1964). The plaintiff must show that the defendant either knew the statement was false, or acted with reckless disregard as to the statement's truth or falsity. According to one article, the actual malice standard, when combined with the reporter's privilege, "creates a double burden on some libel plaintiffs by effectively denying public figures and public officials access to a reporter's sources. This double burden prevents a libel plaintiff from obtaining the very

thing necessary to succeed in a lawsuit: proof of the reporter's or publisher's state of mind." James E. Beaver & Eric A. Assarud, The Reporters Privilege: Protecting the Fourth Estate, 30 WILLAMETTE L. REV. 73, 73-74 (1994)(examining Washington's qualified reporter's privilege and arguing that it infringes upon the plaintiff's right to a jury trial).

In a larger sense, defamation suits may serve to deter the publication of false and misleading information. The erosion of this disincentive could lead to diminished accountability among journalists.

- e. **Could Slow the Judicial Process** - In cases which involve media-held evidence, this bill could make additional hearings necessary, slowing the adjudicatory process.

C. APPLICATION OF PRINCIPLES:

1. Less Government:

- a. Does the bill create, increase or reduce, either directly or indirectly:

- (1) any authority to make rules or adjudicate disputes?

Yes. To some extent, this bill would allow media organizations to set their own rules for revealing sources or divulging information to courts, government authorities, and litigants. At the same time, this bill would impose some restrictions on judicial authority to obtain evidence.

- (2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

Yes. This bill would indirectly create new responsibilities and alternatives for media organizations. The bill's qualified privilege would prevent the government from forcing media cooperation when such cooperation is unnecessary. Because this bill would permit greater self regulation of the media, it contemplates a diminished role for government. This bill could make it more difficult for prosecutors to investigate leads obtained through media reports and could impede discovery in some cases.

- (3) any entitlement to a government service or benefit?

No.

- b. If an agency or program is eliminated or reduced:

- (1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

NA.

- (2) what is the cost of such responsibility at the new level/agency?

NA.

- (3) how is the new agency accountable to the people governed?

NA.

2. Lower Taxes:

- a. Does the bill increase anyone's taxes?

No.

- b. Does the bill require or authorize an increase in any fees?

No.

- c. Does the bill reduce total taxes, both rates and revenues?

No.

- d. Does the bill reduce total fees, both rates and revenues?

No.

- e. Does the bill authorize any fee or tax increase by any local government?

No.

3. Personal Responsibility:

- a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

This bill would place individual responsibility with the publishing and broadcasting industries. It would trust these organizations to direct their own actions.

- b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

No. Media organizations, media employees, and media informants are the primary beneficiaries of this legislation. The public may derive some indirect benefits from this bill, resulting from enhanced news coverage. Victims of defamatory speech may bear some indirect costs connected with diminished ability to discover evidence from media defendants.

4. Individual Freedom:

- a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

This bill would enhance the editorial freedom enjoyed by media organizations. It would allow journalists to investigate new leads and interview reluctant sources. It would also enhance the "free speech" rights of sources by allowing them to reveal information without fear of exposure. However, elevating the rights of the press could trespass upon the freedoms of those who are injured by press abuses. Defining the proper balance between these interests is the key policy question raised by this legislation.

- b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

This bill would make it somewhat more difficult for plaintiffs to successfully pursue defamation and invasion of privacy claims against media defendants.

5. Family Empowerment:

- a. If the bill purports to provide services to families or children:

(1) Who evaluates the family's needs?

NA.

(2) Who makes the decisions?

NA.

(3) Are private alternatives permitted?

NA.

(4) Are families required to participate in a program?

NA.

(5) Are families penalized for not participating in a program?

NA.

b. Does the bill directly affect the legal rights and obligations between family members?

No.

c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

(1) parents and guardians?

NA.

(2) service providers?

NA.

(3) government employees/agencies?

NA.

D. SECTION-BY-SECTION ANALYSIS:

Section 1. Creates s. 90.5015, F.S., defining "professional journalist" and "news;" granting professional journalists a qualified privilege not to disclose information obtained while gathering news; providing specifications for hearings; providing that voluntary disclosure does not result in waiver of the privilege; providing for severability.

Section 2. Section 2 provides that the act shall take effect upon becoming a law.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

None.

2. Recurring Effects:

This bill would probably increase the number of hearings related to the journalist's privilege. However, any increased burden on the courts could be offset by a reduction in defamation and invasion of privacy suits against media defendants. Therefore, the overall fiscal impact of this bill cannot be readily determined.

3. Long Run Effects Other Than Normal Growth:

None.

4. Total Revenues and Expenditures:

Uncertain.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

None.

2. Recurring Effects:

(see section A, subsection 2, on previous page)

3. Long Run Effects Other Than Normal Growth:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

Where a media defendant or witness is involved, this bill could make litigation more expensive and could slow the adjudicatory process.

2. Direct Private Sector Benefits:

This bill would benefit the publishing and broadcasting industries. It would probably reduce the number of subpoenas served upon media organizations. (see "Effect of Proposed Changes," subsection 2b) By limiting access to information compiled by media organizations, this bill would prevent outsiders from capitalizing upon the efforts of journalists and media organizations.

3. Effects on Competition, Private Enterprise and Employment Markets:

Any increase or decrease in the costs of litigation could affect the ability of Florida businesses to compete.

D. FISCAL COMMENTS:

None.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority that municipalities or counties have to raise revenues in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill would not reduce the percentage of a state tax shared with counties or municipalities. Therefore, it would not contravene the requirements of Article VII, Section 18, of the state constitution.

V. COMMENTS:

Definition of "Professional Journalist" - This bill's definition of "professional journalist" is similar to that provided under New York's "shield law." However, the boundaries of professional journalism are not entirely clear under either provision. In one respect, the New York law is more restrictive because it only protects those who gather news "for gain or livelihood." This bill contains no similar limitation. One New York court has cautioned that the definition of professional journalist should not be stretched to encompass other fields of writing and research. People v. LeGrand, 415 N.Y.S.2d 252 (1979). However, in von Bulow v. von Bulow, 811 F.2d 136 (2nd Cir. 1987), cert. denied, 481 U.S. 1015 (1987), the Court of Appeals for the Second Circuit held that the journalist's privilege was not limited to reporters employed by the institutionalized print or broadcast media. Similarly, in Shoen v. Shoen, 5 F.3d 1289 (9th Cir. 1993), the Court of Appeals for the Ninth Circuit held that a book author was protected under the privilege.

The bill's definition of "professional journalist" appears to cover only those persons *currently* engaged in the collection or dissemination of news. Potentially, litigants who desire to obtain media-held information without meeting the three-part test enumerated in this bill, could delay filing suit until journalists retire or switch jobs.

Definition of "Gathering News" - This bill protects only that information "received in the course of gathering news" The point at which a journalist begins to gather news, for purposes of the privilege, is not clear from the language of the bill. This bill broadly defines news as "any information of real public concern or information affecting the public welfare." Arguably, a journalist's observation of almost any event would bring the journalist within the protection of the privilege. The bill leaves this determination to the courts.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

1. Provisions of the Bill as Originally Filed - As originally filed, this bill differed significantly from the committee substitute analyzed above.
 - a. **Two Privileges** - Had the Legislature enacted HB 71 in its original form, the bill would have established two privileges. First, it would have granted journalists an absolute privilege for information obtained from confidential sources. Second, it would have conferred a qualified privilege for other information.
 - b. **Constitutional Issues** - HB 71's attempt to bestow an absolute privilege upon journalists triggered several constitutional concerns. These are reviewed below.
 - (1) **Due Process** - The Due Process Clause of the Fourteenth Amendment of the federal constitution and the Due Process Clause, of Article I, Section 9, of the Florida Constitution require procedural fairness. In civil proceedings, HB 71 would have limited the ability of litigants to examine media witnesses and discover media-held information. In criminal proceedings, this limitation could have deprived the defense of exculpatory evidence.
 - (2) **Right to Obtain and Confront Witnesses** - The Sixth Amendment and the Due Process Clause of the Fourteenth Amendment of the federal constitution, as well as Article I, Section 16, of the Florida Constitution, protect a criminal defendant's right to obtain and confront witnesses. In cases involving media-held evidence, HB 71's absolute privilege could have interfered with this right.
 - (3) **Protection of Contractual Rights and Remedies (Trade Secrets and Proprietary Information)** - Article 1, Section 10, of the federal constitution and Article I, Section 10, of the Florida Constitution protect contractual obligations. Florida businesses often contract with employees and others to restrain the dissemination of trade secrets and proprietary information. However, HB 71's absolute privilege would have allowed the media to publish such information without divulging the identity of the informant in subsequent legal proceedings. Under such circumstances, HB 71's absolute privilege might have divested businesses of the ability to sue for breach of contract.
 - (4) **Right of Access to the Courts** - Article I, Section 21, of the Florida Constitution states, "The courts shall be open to every person for redress of any injury" By preventing meaningful discovery, the absolute privilege accorded by HB 71 would have narrowed the right to sue media defendants for defamation. Additionally, it would have restricted businesses from discovering the identity of persons who divulge trade secrets through the media. Because HB 71 would

have left certain plaintiffs without a viable cause of action, courts might have determined that it denied access to the courts.

(5) **Right to a Jury Trial** - Article I, Section 22, of the Florida Constitution guarantees the right to a trial by jury. Courts have cited this section when examining the Legislature's power to limit a tort cause of action. The absolute privilege accorded by HB 71 would have created a significant hurdle for plaintiffs in defamation suits against media defendants. It is unclear whether this limitation would have infringed upon the right to a jury trial.

2. **Committee Substitute** - At the February 11, 1997 meeting of the House Committee on Civil Justice and Claims, members adopted a committee substitute which removes the absolute privilege contained in the original bill. The removal of the absolute privilege eliminated many of the constitutional concerns listed above. The bill passed by an eight-to-one vote.

The committee substitute also struck the word "object" from subsection (2). In the original bill, this subsection provided: "A professional journalist has a privilege not to . . . disclose any matter or produce any object, writing, or recording"

3. **Amendment** - Because this bill did not pass unanimously, it was examined by the Justice Council. The council again referred the bill to the Committee on Civil Justice and Claims. At its meeting on March 20, 1997, the Committee on Civil Justice and Claims adopted an additional amendment. The amendment made three changes.

a. **Definition of Professional Journalist** - The amendment tightens the definition of professional journalist. It restricts the privilege to those journalists engaged for gain or livelihood. Furthermore, it does not protect book authors and others who are not traditional journalists.

b. **Eyewitness Observations** - The amendment explicitly extends the journalist's privilege to eyewitness observations made within the scope of employment. It was not clear whether the privilege accorded by the committee substitute would have covered eyewitness observations.

c. **Physical Evidence of Crime** - The amendment provides that the journalist's privilege shall not protect physical evidence of crime. It is uncertain whether the committee substitute would have protected physical evidence of crime. It appears that the committee substitute, as amended, might extend the journalist's privilege to protect physical evidence in civil actions.

VII. SIGNATURES:

COMMITTEE ON CIVIL JUSTICE & CLAIMS:

Prepared by:

Legislative Research Director:

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FINAL RESEARCH PREPARED BY COMMITTEE ON CIVIL JUSTICE & CLAIMS:

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