

**STORAGE NAME:** h0071.cjcl  
**DATE:** January 31, 1997

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

**BILL #:** 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  
**ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:**  
(1) CIVIL JUSTICE & CLAIMS  
(2)  
(3)  
(4)  
(5)

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**I. SUMMARY:**

HB 71 would create s. 90.5015, F.S. This section would codify and expand the journalist's privilege. It would shield journalists from compelled disclosure of certain sources, evidence, and information during judicial proceedings and investigative hearings. The bill would recognize two privileges.

First, HB 71 would grant journalists an absolute privilege pertaining to information obtained from confidential sources while gathering news. Without exception, HB 71 would allow journalists to refuse to testify about or disclose evidence thus acquired.

Second, HB 71 would establish a qualified privilege for journalists pertaining to information obtained from nonconfidential sources while gathering news. This qualified privilege could be overcome by 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.

HB 71's fiscal impact on the courts and private sector is uncertain. The bill would enhance the media's ability to collect news by promoting and protecting confidentiality. HB 71 could limit discovery in defamation suits against media defendants and could affect the ability of businesses to protect trade secrets. In criminal prosecutions, it could restrict the power of the state and defendant to obtain relevant evidence.

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. *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978); *Branzburg v. Hayes*, 408 U.S. 665 (1972); *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 United States Supreme Court 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 many cases, therefore, 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 civil 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 Appear to 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). Most Florida courts have refused to recognize such a privilege. *CBS, Inc. v. Jackson*, 578 So.2d 698 (Fla. 1991); *Gold Coast Publications, Inc. v. State*, 669 So.2d 316 (Fla. 4th DCA 1996); *Tampa Television, Inc. v. Norman*, 647 So.2d 904 (Fla. 2d DCA 1994). In *Carroll Contracting, Inc. v. Edwards*, 528 So.2d 951, 953 (Fla. 5th DCA 1988), a 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 (using

balancing test where it was unclear whether a nonconfidential source was involved); *Johnson v. Bentley*, 475 So.2d 505 (Fla. 2d DCA 1984)(subsequently disapproved by the Florida Supreme Court in *CBS, Inc. v. Jackson*, 578 So.2d 698, 701 n.3 (Fla. 1991)). Even those courts which have recognized a privilege for information obtained from nonconfidential sources, have tended to discount the privilege in criminal proceedings. 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, 513-514 (1992). Where such a privilege is not recognized, courts need not apply a balancing test and may simply compel disclosure by journalists and media organizations.

- c. **Florida Courts Do Not Recognize a Privilege for Physical Evidence** - Florida courts have not permitted 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 must be disclosed. When discussing the media's obligation to produce physical evidence, the Florida Supreme Court has stated, "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." *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.

## B. EFFECT OF PROPOSED CHANGES:

1. Scope of Proposed Changes - If it were to become law, HB 71 would significantly strengthen the common law journalist's privilege. It's provisions would apply during judicial proceedings and investigative hearings. In effect, the bill would establish two privileges:
  - a. **Absolute Privilege for Information Obtained from Confidential Sources** - HB 71 would grant journalists an absolute privilege pertaining to information obtained from confidential sources during the course of gathering news. It would allow journalists to refuse to testify or otherwise disclose evidence, including physical evidence, thus acquired. As indicated above, Florida courts currently recognize only a qualified privilege for such information. Additionally, Florida courts have specifically refused to extend the journalist's privilege to cover physical evidence of crime. If given full effect by the courts, HB 71 would modify these precepts. However, HB 71's absolute privilege would not apply to eyewitness observations by journalists, because it only covers information obtained under a promise of confidentiality.
  - b. **Qualified Privilege for Other Information** - HB 71 would also create a qualified privilege pertaining to information obtained from nonconfidential sources during

the course of gathering news. As indicated above, most Florida courts do not currently recognize such a privilege. The qualified privilege created by HB 71 could be overcome by 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. HB 71's qualified privilege could shield journalists from testifying about events personally witnessed.

2. Impact of Proposed Changes

a. **News Gathering** - HB 71 would enhance the media's ability to gather and report news. (see "Application of Principles: Increased Freedom")

b. **Criminal Justice System:**

(1) **Impact on the State's Case** - In some instances, HB 71 would impede the state's ability to prosecute crime. If given full effect by the courts, HB 71's absolute privilege would prevent the government from discovering evidence of criminal conduct obtained by journalists from confidential sources. Without alternative witnesses or other evidence, the state might be forced to drop certain prosecutions. Potentially, this outcome could reduce the deterrent effect conveyed by an effective criminal justice system.

(2) **Impact on Criminal Defendants** - If given full effect by the courts, HB 71's absolute privilege could deprive some criminal defendants of exculpatory evidence held by the media.

c. **Defamation Suits** - In defamation suits against media defendants, HB 71's absolute privilege would limit the ability of plaintiffs to examine media witnesses and discover media-held information. 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). In other words, the plaintiff must show that the defendant knew the statement was false, or acted with reckless disregard as to the statement's truth or falsity. 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). HB 71 would therefore prevent some parties from protecting their reputations through suit.

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.

d. **Protection of Trade Secrets** - The absolute privilege provided by HB 71 could make it more difficult for Florida businesses to protect trade secrets. (see below, "Federal Constitutional Issues: Protection of Contractual Obligations")

- e. **Judicial Process** - In cases which involve media-held evidence, HB 71 could make additional hearings necessary, slowing the adjudicatory process. A criminal defendant is guaranteed the right to a speedy trial under Article I, Section 16(a), of the state constitution and the Sixth Amendment of the federal constitution.
3. **Legal Analysis** - The changes proposed within HB 71 touch upon several rights guaranteed by the federal and state constitutions. However, HB 71 contains a severability clause which would allow courts to disregard invalid applications and enforce the remainder of the bill.
    - a. **Federal Constitutional Issues** - As noted under "Present Situation," the United States Supreme Court has only recognized a qualified privilege for information obtained by journalists from confidential sources. The Court has never reviewed an absolute journalist's privilege. Furthermore, the Court has suggested that, where a journalist's privilege is recognized, competing interests should be balanced on a case-by-case basis. See generally *Branzburg v. Hayes*, 408 U.S. 665 (1972). Four provisions of the federal constitution could affect judicial interpretations of HB 71. These are discussed below.
      - (1) **Due Process** - The Due Process Clause of the Fourteenth Amendment is implicated when a person is deprived of a constitutional or statutory right through state action. See, e.g., *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982)(finding a property interest in a statutorily-created cause of action). In civil and criminal proceedings, due process encompasses the right to examine witnesses and the right to obtain relevant information through discovery. In civil proceedings, HB 71 would limit the ability of litigants to examine media witnesses and discover media-held information. In criminal proceedings, this limitation could deprive the defense of exculpatory evidence. Opponents of HB 71 could argue that the bill's absolute privilege trespasses upon due process protections.
      - (2) **Right to Obtain and Confront Witnesses** - Both the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment protect a criminal defendant's right to obtain favorable witnesses and confront adverse witnesses. In cases which involve media-held evidence or media witnesses, HB 71 could limit the defendant's ability to obtain and confront witnesses.
      - (3) **Freedom of the Press** - The First Amendment 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 privileges accorded by HB 71 would enhance the media's ability to gather news. Journalists would not be forced to compromise sources and would not face contempt charges for refusing to testify about confidential communications. Sources would probably be 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). However, “[w]hile some sources legitimately request confidentiality in order to protect their jobs or their lives, in some situations, promises of confidentiality are elicited by clever sources who wish to disguise their intended maneuverings of the press.” 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, 513-514 (1992).

- (4) **Protection of Contractual Rights and Remedies (Trade Secrets and Proprietary Information)** - Article 1, Section 10, of the federal constitution provides that “No State shall . . . pass any . . . Law impairing the Obligation of Contracts.” Florida businesses have long been permitted to contract with employees and others to restrain the dissemination of trade secrets and proprietary information. If courts were to uphold HB 71’s absolute privilege, the media could publish such information without divulging the identity of the informant in subsequent legal proceedings. Because HB 71’s absolute privilege would insulate “confidential” informants from exposure, it could retroactively divest businesses of remedies for breach of contract. One article notes that when an employee or former employee leaks trade secrets:

Locating the guilty party can be a difficult task for most companies. This task is more critical but further complicated when the disclosure is made to a member of the media which may result in the publication of the confidential information. A company’s inability to determine the identity of the wrongdoer can lead to the continued publication of valuable corporate information that can seriously threaten the existence of the business. John M. Tkacik, Jr., *Protecting Trade Secrets and Confidential Information from Media Disclosure: Removing the Reporter’s Shield*, 41 CLEV. ST. L. REV. 175, 202 (1993).

- b. **Florida Constitutional Issues** - The rights enumerated in Article I of the Florida Constitution are similar to many rights addressed in the Bill of Rights of the federal constitution. However, the Florida Constitution provides several additional rights. Six rights enumerated in the Florida Constitution could influence judicial interpretations of HB 71. These are discussed below.

- (1) **Due Process** - Florida’s Due Process Clause, found at Article I, Section 9, mirrors the Due Process Clause contained in the Fourteenth Amendment of the federal constitution. As suggested previously, HB 71 could deprive plaintiffs of the right to conduct meaningful discovery of media defendants. If courts were to give full effect to its provisions, HB 71 could also deprive criminal defendants of the right to obtain certain evidence and testimony. Courts examining HB 71 would need to determine whether it could lead to deprivations of life, liberty, or property without due process.

- (2) **Right to Compel Witnesses** - Article I, Section 16 of the Florida Constitution guarantees that, “In all criminal prosecutions . . . the accused shall have the right to have compulsory process for witnesses, [and] to confront at trial adverse witnesses . . . .” Because HB 71 would permit journalists to refuse to testify at a criminal trial, it could infringe upon the defendant’s right to compel witnesses. One district court has warned:

The Sixth Amendment to the United States Constitution, as well as Article 1, Section 16, of the Florida Constitution, provides that the accused in a criminal proceeding shall have the right of compulsory process for obtaining witnesses in his favor.

When these constitutional provisions conflict with "shield laws" designed to protect the integrity of the print or broadcast media, some deference must be afforded to the rights of the accused. *CBS, Inc. v. Cobb*, 536 So.2d 1067, 1071 (Fla. 2d DCA 1988).

- (3) **Freedom of the Press** - Florida courts have generally interpreted freedom of the press in accordance with federal First Amendment jurisprudence. Article I, Section 4, of the Florida Constitution provides in part, "Every person may speak, write, and publish his sentiments on all subjects *but shall be responsible for the abuse of that right.*" (emphasis added) Florida courts have rarely mentioned Article I, Section 4, when discussing issues connected with the journalist's privilege. Anthony E. DiResta & Richard E. Fee, *Unanswered Questions Regarding the Journalist's Privilege in Florida*, 64 FLA. BAR J. 26, 28-29 (Oct. 1990).
- (4) **Protection of Contractual Remedies (Trade Secrets and Proprietary Information)** - Article I, Section 10, of the Florida Constitution protects contractual obligations. (see analysis under "Federal Constitutional Issues," subsection (4))
- (5) **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, and justice shall be administered without sale, denial or delay." Where citizens have enjoyed a historical right of access to the courts, the Legislature can only restrict or eliminate a judicial remedy under two circumstances: (1) if there is a valid public purpose coupled with a reasonable alternative, or (2) if an overriding public necessity requires the elimination of the remedy. Florida citizens have enjoyed a historical right to sue media defendants for defamation. However, as indicated above, HB 71 could preclude the exercise of this right under certain circumstances. It could prevent a plaintiff from discovering the source of the allegedly false statement or the scope of facts known to the defendant. See, e.g., *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 (protecting newspaper from disclosing the author of an allegedly defamatory "letter to the editor," as a result of New York State's "shield law"). Additionally, Florida businesses have enjoyed a historical right to protect trade secrets and other proprietary information through tort, agency, and contract remedies. The absolute privilege accorded by HB 71 would leave businesses without the ability to discover the identity of an informant. Because HB 71 would leave certain plaintiffs without a viable cause of action, courts could determine that it denies access to the courts. Cf. *Kluger v. White*, 281 So.2d 1 (Fla. 1973) (discussing application of the right of access to the courts).
- (6) **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 abolish or limit a tort cause of action. The privileges accorded by HB 71 would create significant hurdles for plaintiffs in defamation suits against media defendants. It is unclear whether this arrangement could infringe on the right to a jury trial. See James E. Beaver & Eric A. Assart, *The Reporters Privilege: Protecting the Fourth*

*Estate*, 30 WILLAMETTE L. REV. 73, 95-98 (1994)(examining whether Washington's journalist's privilege violates Washington's constitutional right to a jury trial).

4. Laws in Other States - More than 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). Many set forth a three-part balancing test similar to that provided under the qualified privilege in HB 71. Some have attempted to grant an absolute privilege:
  - a. **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. It also protects information obtained from nonconfidential sources through a qualified privilege. The New York law is structurally similar to HB 71.
    - (1) **Impact of New York's "Shield Law"** - 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. *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); *People v. Bova*, 460 N.Y.S.2d 230 (1983); *People v. LeGrand*, 415 N.Y.S.2d 252 (1979); *People v. Zagarino*, 411 N.Y.S.2d 494 (1978). On other occasions, though, grand jury investigations, criminal prosecutions, and civil actions have been affected by the application of New York's shield law. *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); *Application of Codey*, 589 N.Y.S.2d 400 (1992), appeal granted, 592 N.Y.S.2d 915, reversed on other grounds, 605 N.Y.S.2d 661; *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; *First United Fund, Ltd. v. American Banker, Inc.*, 485 N.Y.S.2d 489 (1985).
    - (2) **Differences between HB 71 and New York's "Shield Law"** - New York's shield law protects former journalists from forced disclosure of information, while HB 71 only applies to persons currently employed as journalists. In New York, a journalist's voluntary disclosure of the information sought waives the journalist's privilege. HB 71 specifically provides that voluntary disclosure does not result in waiver.
  - b. **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. Ohio courts, however, 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).

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. In certain instances, HB 71 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, HB 71 would limit judicial authority to obtain relevant evidence.

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

Yes. HB 71 would indirectly create new responsibilities and alternatives for media organizations. The bill's absolute privilege would prevent the government from forcing media cooperation during investigations and judicial proceedings. As a result, media organizations could fashion their own professional standards or follow the Journalists' Code of Ethics. Because HB 71 would permit greater self regulation of the media, it contemplates a diminished role for government.

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

No.

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

NA.

(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. (see subsection 2 of "Fiscal Impact on State Agencies")

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?

HB 71 would place greater individual responsibility with the publishing and broadcasting industries. It would trust these organizations to direct their own actions and would not require them to breach agreements with sources.

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 HB 71, resulting from enhanced news coverage. However, victims of defamatory speech will likely bear some indirect costs associated with HB 71, through diminished power to recover damages from media defendants. The "actual malice" standard of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), has already reduced the potential liability of media defendants. Non-media businesses may also sustain some indirect costs resulting from a diminished capacity to safeguard proprietary information.

4. Individual Freedom:

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

- (1) **Enhanced Speech and Press Rights** - HB 71 would enhance the editorial freedom enjoyed by media organizations. It would allow journalists to investigate new leads and interview reluctant sources by ensuring confidentiality. 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.
- (2) **Enhanced Contractual Rights between Reporters and Sources** - HB 71 could enhance the power of journalists to enter into enforceable secrecy contracts with sources. See generally 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, 510 (1992)(describing the extent to which such agreements are recognized). The United States Supreme Court has specifically acknowledged the enforceability of such agreements. *Cohen v. Cowles Media Co.*, 111 S. Ct. 2513 (1991).

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

HB 71 would infringe upon the ability of plaintiffs to successfully pursue defamation claims against media defendants. It would also limit the enforcement of contracts protecting trade secrets.

5. Family Empowerment:

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

NA.

- (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?

NA.

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:

NA.

(1) parents and guardians?

NA.

(2) service providers?

NA.

(3) government employees/agencies?

NA.

**D. SECTION-BY-SECTION ANALYSIS:**

This section need be completed only in the discretion of the Committee.

Section 1. Creates s. 90.5015, F.S., defining "professional journalist" and "news;" granting professional journalists a 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 journalist's privileges. However, any increased burden on the courts could be offset by a reduction in defamation suits against media defendants. HB 71 might also make it more difficult to maintain other types of suits and might cause prosecutors to drop certain criminal prosecutions. Therefore, the overall fiscal impact of HB 71 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:

None.

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, HB 71 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 protect media organizations from defamation actions. It might also reduce the number of subpoenas served upon media organizations. One 1990 survey indicated that Florida news organizations received 333 subpoenas during the previous year. Edward M. Mullins, *The Reporter's Right to Remain Silent: A Proposal for Legislation to Codify and Augment the Journalists' Privilege in Florida*, 43 FLA. L. REV. 739 (1991)(citing THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, AGENTS OF DISCOVERY: A REPORT ON THE INCIDENCE OF SUBPOENAS SERVED ON THE NEWS MEDIA IN 1989, 5-6 (1991)).

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

Any increase or decrease in litigation costs 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:

**Coverage of Privilege** - The definition of "professional journalist" appears to cover only those persons *currently* engaged in the collection or dissemination of news. Former media employees might not be shielded by HB 71's proposed privileges. Litigants who desire to obtain media-held information could delay filing suit until journalists retire or switch jobs.

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VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

None.

VII. SIGNATURES:

COMMITTEE ON CIVIL JUSTICE & CLAIMS:

Prepared by:

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Charles R. Boning