

S.96
Draft of strike-all amendment for discussion purposes
Senate Committee on Government Operations
Tuesday, March, 13, 2017

Sec. 1. 12 V.S.A. § 1616 is added to read:

Explanation:

- *Placed with other testimonial privileges in Title 12, Part 4 (evidence), Chapter 61 (witnesses), Subchapter 1 (qualification, privileges, and credibility). This location may be more logical than prior location in Part 10 (oaths and forms).*

§ 1616. JOURNALIST PRIVILEGE

(a) Definitions. As used in this section:

(1) “Journalist” means:

(A) an individual or organization engaging in journalism or assisting an individual or organization engaging in journalism at the time the information sought to be compelled pursuant to subsection (b) of this section was obtained; or

(B) any supervisor, employer, parent company, subsidiary, or affiliate of an individual or organization engaging in journalism at the time the information sought to be compelled pursuant to subsection (b) of this section was obtained.

Explanation:

- *As the Senate Gov. Ops. Committee requested the key defined terms are “journalism” and “journalist,” as opposed to “news media”. “News media” is therefore no longer a defined term and has been removed from the bill.*
- *The term “journalist” is used, as opposed to “a person engaging in journalism” or “a covered person,” to read more cleanly.*
- *The above definition is broad and includes paid and unpaid journalists.*
- *(A): language concerning “at the time the information sought to be compelled ... was obtained” was added to address the situation where an individual may no longer be working in journalism, but would still be protected by the privilege if he or she had been at the time the information was obtained. See effective date section.*

- (A) also includes a person “assisting” another individual. This is taken from the “model absolute shield law.”
- Language in (B) is largely taken from “model absolute shield law.”

(2) “Journalism” means:

(A) investigating events of public interest for the purpose of reporting, publishing, or distributing news or information to the public, whether or not the news or information is ultimately published or distributed; or

(B) preparing news or information concerning events of public interest for publishing or distributing to the public, whether or not the news or information is ultimately published or distributed.

Explanation:

- *This language is a combination of concepts and language from the “model absolute shield law” and other sources.*
- *“[O]f public interest for the purpose of reporting” is included in an effort to narrow the definition of “journalism” to exclude the “Facebook crank.”*
- *However, it is unclear if this effort is successful and this is still a very broad definition. The Committee may want to consider if it sweeps too broadly and think of potential unintended consequences. See below.*

(b) Compelled disclosure.

(1) No court or legislative, administrative, or other body with the power to issue a subpoena shall compel a journalist to disclose information obtained or received in confidence, including:

(A) the identity of the source of that information;

(B) information that may indirectly reveal the identity of the source of that information; or

(C) information that is not published or disseminated, including notes, outtakes, photographs, photographic negatives, video or audio recordings, film, or other data.

(2) No court or legislative, administrative, or other body with the power to issue a subpoena shall compel a journalist to disclose information that was not obtained or received in confidence unless it finds that the party seeking the news or information establishes by clear and convincing evidence that:

(A) the news or information is highly material or relevant to a significant legal issue before the court or other body;

(B) the news or information could not, with due diligence, be obtained by alternative means; and

(C) there is a compelling need for disclosure.

Explanation:

- *Replaces the two-tier test in S.96 as introduced (source v. information) with a different two-tier test modeled on N.Y. law (confidential v. non-confidential).*
- *This bill is quite broad, and provides an absolute privilege as to source or information “obtained ... in confidence”.*
 - ✓ *This may incentivize all information being obtained, or claimed to having been obtained, in confidence.*
 - ✓ *How will it be determined if information was obtained in confidence?*
- *As to information not obtained in confidence, the standard is higher than in the bill as introduced. (2)(A) adds “highly material,” which is taken from N.Y. law.*
- *In (2) (C) “compelling need” replaces “overriding public interest” in the as introduced version of the bill.*
- *One potential area not explicitly addressed: When a journalist happens to witness something, or hear something, in the public realm.*
 - ✓ *Journalist happens to witness something when he or she is not performing journalism. Does not fit within definition of “engaging in journalism”?*
 - ✓ *Spooner v. Town of Topsham and WCAX.*

(c) No implication of waiver. The publication or dissemination of news or information shall not constitute a waiver of the protection from compelled disclosure as provided in subsection (b) of this section.

Sec. 2. EFFECTIVE DATE

This act shall take effect on passage.

Explanation:

- *Under this bill, the triggering event is when a court or other body seeks to compel a journalist to divulge information, regardless of when that information was obtained.*
- *The bill, effective upon passage, will apply to all current, and future, court cases or other efforts to compel a reporter to disclose such information.*
- *Therefore, in response to the Committee's concern, it is not necessary to include language specifying that this law will apply to information obtained before effective date. It will, assuming the triggering event occurs after passage.*

DRAFT