

2009 DRAFTING REQUEST

Bill

Received: **02/25/2009**

Received By: **rnelson2**

Wanted: **As time permits**

Identical to LRB:

For: **Joe Parisi (608) 266-5342**

By/Representing: **Mike**

This file may be shown to any legislator: **NO**

Drafter: **mglass**

May Contact:

Adl. Drafters: **rnelson2**

Subject: **Courts - limitations
Courts - evidence**

Extra Copies: **1 - RPN
2 - RLR**

Submit via email: **YES**

Requester's email: **Rep.Parisi@legis.wisconsin.gov**

Carbon copy (CC:) to:

Pre Topic:

No specific pre topic given

Topic:

Information gathered by news media

Instructions:

See 07 AB946 and attached changes

Drafting History:

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/?	rnelson2 02/27/2009			_____			
/P1	mglass 03/04/2009 mglass 05/15/2009	bkraft 03/05/2009	jfrantze 03/05/2009	_____	mbarman 03/05/2009		
/1	rnelson2 05/15/2009	bkraft 05/18/2009	rschluet 05/18/2009	_____	cduerst 05/18/2009		

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/2	mglass 05/21/2009	bkraft 05/21/2009	jfrantze 05/21/2009	_____	mbarman 05/21/2009	lparisi 06/15/2009	

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Handwritten signatures and dates:
3/21 3/21

Vers. Drafted Reviewed Typed Proofed Submitted Jacketed Required

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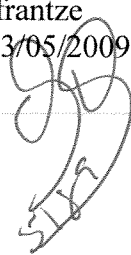
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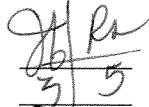
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FE Sent For:

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ASSEMBLY BILL 946

1. SECTION 1. 885.14 of the statutes is created to read:

2. **885.14 Disclosure of news person or news media sources, news, and**
3. **information. (1)** In this section:

4. (a) "News media" means any business or organization that, by means of print,
5. broadcast, photographic, mechanical, electronic, or other medium, disseminates
6. news or information to the public, including a newspaper, magazine, or other
7. periodical; book publisher; news agency; wire service; radio or television station or
8. network; cable or satellite network, service or carrier; or audio or audiovisual
9. production company; and a parent, subsidiary, division, or affiliate of any of these
10. businesses or organizations.

11. (b) "News person" means any person who is or has been engaged in gathering,
12. receiving, preparing, or disseminating news or information to the public for a news
13. media, including any person supervising or assisting the person in gathering,
14. receiving, preparing, or disseminating news or information to the public for a news
15. media.

16. (2) Except as provided in sub. (3), no person having the power to issue a
17. subpoena may issue a subpoena compelling a news person or news media to testify
18. about or produce or disclose any of the following:

19. (a) The identity of a confidential source of any news or information.

20. (b) Any information that would tend to identify the confidential source of any
21. news or information.

22. (c) Any news or information obtained or prepared in confidence by a news
23. person or news media in gathering, receiving, or preparing news or information for
24. potential dissemination to the public.

ASSEMBLY BILL 946

1 (d) ~~the~~ ^{Any} news ^{or} information, or ^{the} identity of any source of any news or information,
2 that is not described in par. (a), (b), or (c) and that is obtained or prepared by a news
3 person or news media in its capacity in gathering, receiving, or preparing news or
4 information for potential dissemination to the public.

5 *nm conf.* (3) (a) Subject to par. (b), a circuit court may issue a subpoena compelling a
6 news person or news media to disclose news, information, or ^{the} identity of a source of
7 any news or information, described in sub. (2) (d), if the court finds, after notice to
8 and an opportunity to be heard by the news person or news media, that the person
9 requesting the subpoena established one of the following by clear and convincing
10 evidence:

11 1. In a criminal investigation or prosecution, except as provided under sub. (4)
12 (c), based on information obtained from a person other than from that news person
13 or news media that there are reasonable grounds to believe that a crime has occurred.

14 2. In a civil action or proceeding, based on information obtained from a person
15 other than from that news person or news media that there appears, on the face of
16 the complaint, to be a cause of action.

17 (b) A circuit court may issue a subpoena compelling a news person or news
18 media to disclose the news, information, or identity of a source of any news or
19 information, under par. (a), only if all of the following apply:

20 1. The news, information, or identity of the source of any news or information
21 is highly material and relevant to the investigation, prosecution, action, or
22 proceeding.

23 2. The news, information, or identity of the source of any news or information
24 is critical or necessary to the maintenance of a party's claim, defense, or proof of an
25 issue material to the investigation, prosecution, action, or proceeding.

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1 3. The news, information, or identity of the source of any news or information
2 is not obtainable from any alternative source for the investigation, prosecution,
3 action, or proceeding.

4 4. There is an overriding public interest in the disclosure of the news,
5 information, or identity of the source of any news or information.

6 (4) (a) The prohibition under sub. (2) applies to a subpoena ^{directed to} requested by a 3rd
7 party that seeks records, information, or other communications relating to a
8 business transaction between the 3rd party and the news person or news media if ^{the}
9 that subpoena ^{is to} may discover the identity of a source or obtain news or information ^{purpose}
10 ~~from the news person or news media.~~ ^{described in sub. (2).}

11 (b) Whenever ^{anyone seeks to} a 3rd party ~~requests~~ a subpoena ~~that seeks~~ records, information,
12 or other communications relating to a business transaction between the 3rd party
13 and the news person or news media, the news person or news media shall be given
14 reasonable and timely advance notice of the request and an opportunity to be heard
15 before a circuit court before the subpoena is issued. The circuit court may allow
16 issuance of a subpoena under this subsection only if the ^{party seeking the subpoena} 3rd party establishes that
17 all of the conditions specified in sub. (3) (b) 1. to 3. are met.

18 (c) If the subpoena ^{directed to} requested by a 3rd party is in connection with a criminal
19 investigation in which the news person or news media is the subject, and advance
20 notice under this paragraph would pose a clear and substantial threat to the
21 integrity of the investigation, the government agency in charge of the investigation
22 shall certify that threat to the circuit court when requesting the issuance of the
23 subpoena. The circuit court may order that a subpoena requested under this
24 paragraph be issued without giving the news person or news media advance notice
25 of the request for a subpoena and the opportunity to be heard if the court determines

Rep Parisi / Russ W.

from 07 AB 944
file

SECTION 1. COMPELLED DISCLOSURE PROHIBITED.

Except as provided in Section 2, no judicial, legislative, administrative, or other body with the power to issue a subpoena or other compulsory process may compel the news media to testify, produce or otherwise disclose:

- (a) the confidential source of any news or information or any information that would tend to identify the confidential source, or any news or information obtained or prepared in confidence by the news media in its capacity in gathering, receiving or processing news or information for potential communication to the public, including, but not limited to, any notes, drafts, outtakes, photographs, video or sound tapes, film or other data of whatever sort in any medium now known or hereafter devised; or
- (b) any source, news or information not otherwise described in Section 1(a) obtained or prepared by the news media in its capacity in gathering, receiving or processing news or information for potential communication to the public, including, but not limited to, any notes, drafts, outtakes, photographs, video or sound tapes, film or other data of whatever sort in any medium now known or hereafter devised.

SECTION 2. CONDITIONS FOR COMPELLED DISCLOSURE.

A court may compel disclosure of the identity of a source, news or information described in Section 1(b) if the court finds, after notice to and an opportunity to be heard by the news media, that the party seeking the identity of such source or such news or information established by clear and convincing evidence –

- (a) in a criminal investigation or prosecution, based on information obtained from other than the news media, that there are reasonable grounds to believe that a crime has occurred; or
- (b) in a civil action or proceeding, based on information obtained from other than the news media, that there is a prima facie cause of action; and
- (c) in all matters, whether criminal or civil, that:
 - (1) the identity of the source or the news or information is highly material and relevant;
 - (2) the identity of the source or the news or information is critical or necessary to the maintenance of a party's claim, defense or proof of an issue material thereto;
 - (3) the identity of the source or the news or information is not obtainable from any alternative source; and
 - (4) there is an overriding public interest in the disclosure.

SECTION 3. COMPELLED DISCLOSURE FROM THIRD PARTIES.

The protection from compelled disclosure contained in Section 1 shall also apply to any subpoena issued to, or other compulsory process against, a third party that seeks records, information or other communications relating to business transactions between such third

party and the news media for the purpose of discovering the identity of a source or obtaining news or information described in Section 1. Whenever a subpoena is issued to, or other compulsory process is initiated against, a third party that seeks records, information or other communications on business transactions with the news media, the affected news media shall be given reasonable and timely notice of the subpoena or compulsory process before it is executed or initiated, as the case may be, and an opportunity to be heard. In the event that the subpoena to, or other compulsory process against, the third party is in connection with a criminal investigation in which the news media is the express target, and advance notice as provided in this section would pose a clear and substantial threat to the integrity of the investigation, the governmental authority shall so certify to such a threat in court and notification of the subpoena or compulsory process shall be given to the affected news media as soon thereafter as it is determined that such notification will no longer pose a clear and substantial threat to the integrity of the investigation.

SECTION 4. NON-WAIVER.

Publication or dissemination by the news media of news or information described in Section 1, or a portion thereof, shall not constitute a waiver of the protection from compelled disclosure that is contained in Section 1.

SECTION 5. INADMISSIBILITY.

The source of any news or information or any news or information obtained in violation of the provisions hereunder shall be inadmissible in any action, proceeding, or hearing before any judicial, legislative, administrative or other body.

SECTION 6. DEFINITIONS.¹

The term "news media" means:

- (a) any newspaper, magazine or other periodical, book publisher, news agency, wire service, radio or television station or network, cable or satellite or other transmission system or carrier, or channel or programming service for such station, network, system or carrier, or audio or audiovisual production company that disseminates news or information to the public by any means, including, but not limited to, print, broadcast, photographic, mechanical, electronic or other means now known or hereafter devised;
- (b) any person or entity who is or has been engaged in gathering, preparing or disseminating news or information to the public for any of the entities listed in subsection (a) above or any other person supervising or assisting such a person or entity with gathering, preparing or disseminating news or information; or
- (c) any parent, subsidiary, division or affiliate of the entities listed in subsections (a) or (b) above to the extent the subpoena or other compulsory process seeks the identity of a source or the news or information described in Section 1.

¹ We recommend that you review the law in your state to see if any of the terms listed in the definition of "news media" have prescribed meanings under the laws of your state.

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D-Note

2007 ASSEMBLY BILL 946

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Inserts

March 11, 2008 - Introduced by Representatives PARISI, ZEPNICK, BOYLE, POPE-ROBERTS, MASON, BERCEAU, A. WILLIAMS and SHERIDAN, cosponsored by Senators LEHMAN, RISSER and MILLER. Referred to Committee on Judiciary and Ethics.

regen.

- 1 AN ACT *to create* 885.14 of the statutes; **relating to:** limiting disclosure of information gathered by news persons ~~or news media.~~
- 2

Analysis by the Legislative Reference Bureau

Under the Supreme Court's interpretation of article 1, section 3, of the Wisconsin Constitution, prohibiting any law that restrains the liberty of the press, a member of a news media, such as a reporter, has a qualified privilege to refuse to disclose sources of information received in confidence. The privilege is qualified because the reporter may be required to reveal the source if proof is presented showing that the source may have information that is competent, relevant, material, and favorable to the requester and that there are no other reasonable and adequate alternative sources for the information. The Supreme Court has held that the value of freedom of the press must be balanced against the societal values favoring disclosure, which requires a review of the facts in each case to determine whether to allow a reporter to refuse to disclose a confidential source.

This bill creates a statutory prohibition against any person, including a judge, from issuing a subpoena to compel a person or business engaged in gathering or disseminating news or information to the public (news media) to testify about or disclose any of the following:

- 1. The identity of, or information that would tend to identify, a confidential source.
- 2. Any news or information obtained in confidence by news media in gathering and preparing news or information for the public.

ASSEMBLY BILL 946

3. Any news, information, or identity of any source of news or information, other than those listed in items 1. or 2., above, that is obtained in gathering or preparing news or information for the public.

The bill provides exceptions to the prohibition. Under the bill, a person may request a circuit court to compel the news media to provide the news, information, or identity described in item 3., above. The bill requires the circuit court to have a hearing on the request. If there is a criminal investigation or prosecution ongoing, the requester must establish by clear and convincing evidence, based on information from a person other than the news media, that there are reasonable grounds to believe that a crime occurred. In a civil matter, the bill requires the requester to, based on information from a person other than the news media, establish that there is a cause of action.

Under the bill, if the requester meets the burden of proof regarding the criminal or civil action, the circuit court may compel the news media to provide news, information, or an identity described in item 3., above, only if all of the following apply:

1. The news, information, or identity is highly material and relevant.
2. The news, information, or identity is critical or necessary to the maintenance of a party's claim, defense, or proof of an material issue.
3. The news, information, or identity is not obtainable from any alternative source.
4. There is an overriding public interest in the disclosure of the news, information, or identity.

The bill also prohibits the issuance of a subpoena requested by a third party who is seeking records, information, or other communications relating to a business transaction between the third party and the news media. The prohibition applies if the identity of a source or news or information may be discovered as a result of the subpoena. The court may issue the subpoena after a hearing if the third party establishes that the news, information, or identity is highly material and relevant, critical or necessary for the third party's claim, and not obtainable from other sources.

Under the bill, if there is a criminal investigation of a news media, the court may issue a subpoena compelling the news media to reveal records, information, or other communications without giving the news media notice of the request for the subpoena or an opportunity for a hearing before the subpoena is issued. The court may issue a subpoena in this situation only if the prosecution shows that providing the news media notice and an opportunity to be heard would pose a clear and substantial threat to the integrity of the criminal investigation.

Under the bill, the news, information, or identity of a confidential source that is obtained in violation of the prohibition is inadmissible in any judicial, legislative, or administrative proceeding or hearing.

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The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

ASSEMBLY BILL 946

DEFINITION CS

sources

of information and sources by B

1 SECTION 1. 885.14 of the statutes is created to read:

2 885.14 Disclosure of news person or news media sources, news, and

3 information. (1) In this section news person means any of the following:

4 (a) Any (a) "News media" means any business or organization that, by means of print,
5 broadcast, photographic, mechanical, electronic, or other medium, disseminates
6 news or information to the public, including a newspaper, magazine, or other
7 periodical; book publisher; news agency; wire service; radio or television station or
8 network; cable or satellite network, service or carrier; or audio or audiovisual
9 production company; and a parent, subsidiary, division, or affiliate of any of these
10 businesses or organizations.

11 (b) "News person" means any person who is or has been engaged in gathering,
12 receiving, preparing, or disseminating news or information to the public for a news
13 media, including any person supervising or assisting the person in gathering,
14 receiving, preparing, or disseminating news or information to the public for a news
15 media.

SUBPOENAS ISSUED TO NEWS PERSON (a) Prohibition I

16 (2) Except as provided in sub. (3), no person having the power to issue a
17 subpoena may issue a subpoena compelling a news person or news media to testify
18 about or produce or disclose any of the following:

19 1. (a) The identity of a confidential source of any news or information.

20 2. (b) Any information that would tend to identify the confidential source of any
21 news or information.

22 3. (c) Any news or information obtained or prepared in confidence by a news
23 person or news media in gathering, receiving, or preparing news or information for
24 potential dissemination to the public.

ASSEMBLY BILL 946

SECTION 1

1 40 (d) ^{Any e} The news, information, or identity of any source of any news or information
 2 that is not described in ^{Subd 1 of 209 or 30} par. (a), (b), or (c) and that is obtained or prepared by a news
 3 person ~~or news media~~ ^{of the news persons} in its capacity in gathering, receiving, or preparing news or
 4 information for potential dissemination to the public.

5 (3) (a) Subject to par. (b), a circuit court may issue a subpoena ^{to compel} compelling a
 6 news person ~~or news media~~ ^{testify} to disclose news, information, or identity of a source of
 7 any news or information, described in sub. (2) (d), if the court finds, after notice to
 8 and an opportunity to be heard by the news person or news media, that the person
 9 requesting the subpoena established one of the following by clear and convincing
 10 evidence:

11 1. In a criminal ^{prosecution or} investigation ~~or prosecution~~, ~~except as provided under sub. (4) (3)~~
 12 ~~(c), based on information obtained from a person other than from that news person~~
 13 ~~or news media~~ that there are reasonable grounds to believe that a crime has occurred.

14 2. In a civil action or proceeding, ~~based on information obtained from a person~~
 15 ~~other than from that news person or news media that there appears, on the face of~~
 16 ~~the complaint, to be a cause of action.~~ ^{that} ~~states a claim upon which relief~~
 17 ~~may be granted~~

18 (b) A circuit court may issue a subpoena ~~compelling a news person or news~~
 19 ~~media to disclose the news, information, or identity of a source of any news or~~
 20 ~~information,~~ under par. (a), ^{(b) e} only if all of the following ^{conditions are met} apply:

21 1. The news, information, or identity of the source ~~of any news or information~~
 22 is highly ~~material and~~ relevant to the investigation, prosecution, action, or
 23 proceeding.

24 2. The news, information, or identity of the source ~~of any news or information~~
 25 is critical or necessary to the maintenance of a party's claim, defense, or ^{father} proof of an
 issue material to the investigation, prosecution, action, or proceeding.

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ASSEMBLY BILL 946

1 3. The news, information, or identity of the source of any news or information
2 is not obtainable from any alternative source for the investigation, prosecution,
3 action, or proceeding.

4 4. There is an overriding public interest in the disclosure of the news,
5 information, or identity of the source of any news or information.

6 (4) (a) The prohibition under sub. (2) applies to a subpoena requested by a 3rd
7 party that seeks records, information, or other communications relating to a
8 business transaction between the 3rd party and the news person or news media if
9 that subpoena may discover the identity of a source or obtain news or information
10 from the news person or news media. *MS*

11 (b) Whenever a 3rd party requests a subpoena that seeks records, information,
12 or other communications relating to a business transaction between the 3rd party
13 and the news person or news media, the news person or news media shall be given
14 reasonable and timely advance notice of the request and an opportunity to be heard
15 before a circuit court before the subpoena is issued. The circuit court may allow
16 issuance of a subpoena under this subsection only if the 3rd party establishes that
17 all of the conditions specified in sub. (3) (b) 1. to 3. are met. *under par. (b)*

18 (c) If ^athe subpoena requested by a 3rd party ^{is} in connection with a criminal
19 investigation in which the news person ^{or news media} is the subject, ^{of the investigation} and advance
20 notice ^{under this paragraph} ^{under par. (b)} would pose a clear and substantial threat to the
21 integrity of the investigation, the ^{party requesting the subpoena} government agency in charge of the investigation
22 shall certify that threat to the circuit court when requesting the issuance of the
23 subpoena. The circuit court may order that a subpoena requested under this
24 paragraph be issued without giving the news person or news media advance notice
25 of the request for a subpoena ^{or an} and the opportunity to be heard if the court determines

ASSEMBLY BILL 946

SECTION 1

1 that providing that notice and opportunity would pose a clear and substantial threat
 2 to the integrity of the criminal investigation. The governmental agency shall notify
 3 the news person or news media of the subpoena as soon as possible after the
 4 governmental agency determines that the notification no longer poses a clear and
 5 substantial threat to the integrity of the investigation.

6 (5) The news person's or news media's publication or dissemination of news or
 7 information described in sub. (2) (a) to (d) does not constitute a waiver of the
 8 protection from compelled disclosure under sub. (2).

9 (6) The news, information, or identity of a source of any news or information
 10 obtained in violation of this section is inadmissible for any purpose in any judicial,
 11 legislative, or administrative action, proceeding, or hearing.

(END)

party that requested the subpoena

party

of news or information

Any

or the identity of any source as described in sub. (2) (a) to (d)

INS 6-8

Any

records, communications, or the

release

PUBLICATION

D-note

(5) (B)

CS

INADMISSIBILITY

2009-2010 DRAFTING INSERT
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-2225/?ins
MGG:.....

1 **Insert ANL**

→2 This is a preliminary draft. An analysis will be provided in a later version.

3 **Insert 4-11**

4 (b) *Procedure before courts.* Subject to par. (c), a circuit court may issue a
5 subpoena to compel a news person to testify about or disclose or produce any news,
6 information, or identity of any source as specified in par. (a) 4. if the court finds, after
7 notice to and an opportunity to be heard by the news person that the person
8 requesting the subpoena established, based on information obtain from a person
9 other than the news person, one of the following by clear and convincing evidence:

10 **Insert 6-8**

11 (3) SUBPOENAS ISSUED TO PERSONS OTHER THAN NEWS PERSONS. (a) *Prohibition.*

12 Except as provided in par. (b), no person having the power to issue a subpoena may
13 issue a subpoena to compel a party other than a news person to testify about or
14 produce or disclose, information, records, or communications relating to a business
15 transaction between that person and the news person if the purpose of the subpoena
16 is to discover any of the items listed in sub. (2) (a) 1. to 4.

17 (b) *Procedure before courts.* A circuit court may issue a subpoena requested by
18 a district attorney or attorney general in a criminal investigation or prosecution or
19 a civil action or proceeding to compel a person other than a news person to testify
20 about or produce or disclose information, records, or communications as specified in
21 par. (a), only if all of the following apply:

22 1. The court gives reasonable and timely notice to the person and the news
23 person and holds a hearing on the issue, except as provided in par. (c).

LPS-
Please 3
change
component 4
to
anal:prelim 5

2. The court finds that all of the following conditions are met.

a. The information, records, or communications are highly ~~material and~~ relevant to the ~~prosecution,~~ investigation prosecution, action, or proceeding.

b. The information, records, or communications are necessary to the maintenance of a party's claim, defense, or proof of an issue material to the ~~prosecution,~~ investigation prosecution, action, or proceeding.

c. The information, records, or communications are not obtainable from any alternative source available to the ~~prosecution,~~ investigation, action, or proceeding.

(c) *Procedure; news person as subject.* In a criminal investigation in which the news person is the subject of the investigation, if the district attorney or attorney general requesting a subpoena under par. (b) believes that advance notice to the news person would pose a clear and substantial threat to the integrity of the investigation, the district attorney or attorney general shall certify that threat to the circuit court when requesting the subpoena. The circuit court may order that the subpoena be issued without giving the news person advance notice of the request or an opportunity to be heard if the court determines that the threat exists. The district attorney or attorney general shall notify the news person of the existence of the subpoena as soon as possible after the district attorney or attorney general determines that notification to the news person no longer poses such a threat.

(4) **DISTRIBUTION.** A disclosure to another person or dissemination to the public of news, information, or the identity of a source as described in sub. (2) (a) 1. to 4. by a news person does not constitute a waiver of the protection from compelled disclosure under sub. (2) or (3).

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-2225/ndn

MGG:.....

P1
Lbjk

Date

This is a major redraft of 2007 Assembly Bill 946. I found this redraft necessary to improve the bill's organization, and to make the language clearer and more consistent. Please review carefully to make sure I have not inadvertently strayed from the intent of the bill.

I have reorganized this bill and have used titles to make it clear that s. 885.14 (2) applies to subpoenas issued directly to the news persons and that s. 885.14 (3) applies to other persons. Note that in s. 885.14 (2) the items sought are described as the "identity of sources", "news", and "information". In s. 885.14 (3) the items sought are "information", "records", and "communications". None of these terms is defined, but each term under the statutory rules of construction would be interpreted by courts to mean something different. I left this dichotomy in the draft so that you could consider it, and let me know if you want any changes.

In an effort to eliminate redundancy I consolidated the definition of "news persons" to include the concept of "news media". I used "news person" as the defined term instead of "news media" because it works better with articles (an, a, the) and can be used easily in the singular as well as the plural.

Note that the burden of proof for a subpoena under s. 885.14 (2) (against a news person) is "clear and convincing evidence" for both criminal and civil proceedings. Absence any specific language, I think in civil proceedings it would be by a preponderance of the evidence and in criminal proceeding probable cause would be necessary. See s. 968.135. "Preponderance of the evidence" is a lesser burden than "clear and convincing evidence"; "probable cause" is greater. Also, note that section 885.14 (3) (against 3rd persons) does not contain any specific burden of proof so the regular applicable burden probably would apply depending on the type of proceeding. Let me know if you want any changes.

Note that I changed "government agency" in the provisions under s. 885.14 (3) to district attorneys and attorney generals since I believe they are the only persons who would appear in court in a criminal investigation.

Note that in s. 885.14 (4) I expanded the cross reference to include the protections from disclosure under both s. 885.14 (2) and (3).

Mary Gibson-Glass
Senior Legislative Attorney
Phone: (608) 267-3215

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-2225/P1dn
MGG:bjk:jf

March 5, 2009

This is a major redraft of 2007 Assembly Bill 946. I found this redraft necessary to improve the bill's organization, and to make the language clearer and more consistent. Please review carefully to make sure I have not inadvertently strayed from the intent of the bill.

I have reorganized this bill and have used titles to make it clear that s. 885.14 (2) applies to subpoenas issued directly to the news persons and that s. 885.14 (3) applies to other persons. Note that in s. 885.14 (2) the items sought are described as the identity of "sources" and "news" and "information." In s. 885.14 (3) the items sought are "information," "records," and "communications." None of these terms is defined, but each term under the statutory rules of construction would be interpreted by courts to mean something different. I left this dichotomy in the draft so that you could consider it, and let me know if you want any changes.

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Note that the burden of proof for a subpoena under s. 885.14 (2) (against a news person) is "clear and convincing evidence" for both criminal and civil proceedings. Absent any specific language, I think in civil proceedings it would be by a preponderance of the evidence and in criminal proceeding probable cause would be necessary. See s. 968.135. "Preponderance of the evidence" is a lesser burden than "clear and convincing evidence"; "probable cause" is greater. Also, note that s. 885.14 (3) (against 3rd persons) does not contain any specific burden of proof so the regular applicable burden probably would apply depending on the type of proceeding. Let me know if you want any changes.

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Note that in s. 885.14 (4) I expanded the cross-reference to include the protections from disclosure under both s. 885.14 (2) and (3).

Mary Gibson-Glass
Senior Legislative Attorney
Phone: (608) 267-3215



5/15
State of Wisconsin
2009 - 2010 LEGISLATURE

LRB-2225/P1

MGG:bjk:jf

stays

E. RPN

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

2009 Bill

SA

gen.
D R

1 AN ACT *to create* 885.14 of the statutes; **relating to:** limiting disclosure of
2 information gathered by news persons.

Analysis by the Legislative Reference Bureau

This is a preliminary draft. An analysis will be provided in a later version.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

3 SECTION 1. 885.14 of the statutes is created to read:

4 **885.14 Disclosure of information and sources by news person. (1)**

5 DEFINITION. In this section, "news person" means any of the following:

6 (a) Any business or organization that, by means of print, broadcast,
7 photographic, mechanical, electronic, or other medium, disseminates news or
8 information to the public, including a newspaper, magazine, or other periodical; book
9 publisher; news agency; wire service; radio or television station or network; cable or
10 satellite network, service, or carrier; or audio or audiovisual production company;

1 and a parent, subsidiary, division, or affiliate of any of these businesses or
2 organizations.

3 (b) Any person who is or has been engaged in gathering, receiving, preparing,
4 or disseminating news or information to the public for an entity described in par. (a),
5 including any person supervising or assisting the person in gathering, receiving,
6 preparing, or disseminating such news or information.

7 (2) SUBPOENAS ISSUED TO NEWS PERSON. (a) *Prohibition*. Except as provided in
8 par. (b), no person having the power to issue a subpoena may issue a subpoena
9 compelling a news person to testify about or produce or disclose any of the following:

10 1. The identity of a confidential source of any news or information.

11 2. Any information that would tend to identify the confidential source of any
12 news or information.

13 3. Any news or information obtained or prepared in confidence by a news
14 person in gathering, receiving, or preparing news or information for potential
15 dissemination to the public.

16 4. Any news, information, or identity of any source of any news or information
17 that is not described in subd. 1., 2., or 3. and that is obtained or prepared by a news
18 person in the news person's capacity in gathering, receiving, or preparing news or
19 information for potential dissemination to the public.

20 (b) *Procedure before courts*. Subject to par. (c), a circuit court may issue a
21 subpoena to compel a news person to testify about or disclose or produce any news,
22 information, or identity of any source as specified in par. (a) 4. if the court finds, after
23 notice to and an opportunity to be heard by the news person that the person
24 requesting the subpoena established, based on information obtain from a person
25 other than the news person, one of the following by clear and convincing evidence:

1 1. In a criminal prosecution or investigation that there are reasonable grounds
2 to believe that a crime has occurred.

3 2. In a civil action or proceeding that the complaint states a claim upon which
4 relief may be granted.

5 (c) A circuit court may issue a subpoena under par. (b) only if all of the following
6 conditions are met:

7 1. The news, information, or identity of the source is highly relevant to the
8 investigation, prosecution, action, or proceeding.

9 2. The news, information, or identity of the source is critical or necessary to the
10 maintenance of a party's claim, defense, or to the proof of an issue material to the
11 investigation, prosecution, action, or proceeding.

12 3. The news, information, or identity of the source is not obtainable from any
13 alternative source for the investigation, prosecution, action, or proceeding.

14 4. There is an overriding public interest in the disclosure of the news,
15 information, or identity of the source.

16 **(3) SUBPOENAS ISSUED TO PERSONS OTHER THAN NEWS PERSONS.** (a) *Prohibition.*
17 Except as provided in par. (b), no person having the power to issue a subpoena may
18 issue a subpoena to compel a party other than a news person to testify about or
19 produce or disclose, information, records, or communications relating to a business
20 transaction between that person and the news person if the purpose of the subpoena
21 is to discover any of the items listed in sub. (2) (a) 1. to 4.

22 (b) *Procedure before courts.* A circuit court may issue a subpoena requested by
23 a district attorney or attorney general in a criminal investigation or prosecution or
24 a civil action or proceeding to compel a person other than a news person to testify

1 about or produce or disclose information, records, or communications as specified in
2 par. (a), only if all of the following apply:

3 1. The court gives reasonable and timely notice to the person and the news
4 person and holds a hearing on the issue, except as provided in par. (c).

5 2. The court finds that all of the following conditions are met:

6 a. The information, records, or communications are highly relevant to the
7 investigation, prosecution, action, or proceeding.

8 b. The information, records, or communications are necessary to the
9 maintenance of a party's claim, defense, or proof of an issue material to the
10 investigation, prosecution, action, or proceeding.

11 c. The information, records, or communications are not obtainable from any
12 alternative source available to the investigation, prosecution, action, or proceeding.

13 (c) *Procedure; news person as subject.* In a criminal investigation in which the
14 news person is the subject of the investigation, if the district attorney or attorney
15 general requesting a subpoena under par. (b) believes that advance notice to the news
16 person would pose a clear and substantial threat to the integrity of the investigation,
17 the district attorney or attorney general shall certify that threat to the circuit court
18 when requesting the subpoena. The circuit court may order that the subpoena be
19 issued without giving the news person advance notice of the request or an
20 opportunity to be heard if the court determines that the threat exists. The district
21 attorney or attorney general shall notify the news person of the existence of the
22 subpoena as soon as possible after the district attorney or attorney general
23 determines that notification to the news person no longer poses such a threat.

24 (4) DISTRIBUTION. A disclosure to another person or dissemination to the public
25 of news, information, or the identity of a source as described in sub. (2) (a) 1. to 4. by

1 a news person does not constitute a waiver of the protection from compelled
2 disclosure under sub. (2) or (3).

3 (5) INADMISSIBILITY. Any news, information, records, communications, or the
4 identity of a source of any news or information obtained in violation of this section
5 are inadmissible for any purpose in any judicial, legislative, or administrative action,
6 proceeding, or hearing.

7 (END)

2009-2010 DRAFTING INSERT
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-2225/1ins
RPN&MGG:bjk:jf

insert anl:

Under the Supreme Court's interpretation of article I, section 3, of the Wisconsin Constitution, which prohibits any law that restrains the liberty of the press, a member of a news media has a qualified privilege to refuse to disclose sources of information received in confidence. The privilege is qualified because the reporter may be required to reveal the source if proof is presented showing that the source may have information that is competent, relevant, material, and favorable to the requester and that there are no other reasonable and adequate alternative sources for the information. The Supreme Court has held that the value of freedom of the press must be balanced against the societal values favoring disclosure, which requires a review of the facts in each case to determine whether to allow a reporter to refuse to disclose a confidential source.

This bill prohibits a person, other than a court, from issuing a subpoena compelling a news person to testify or produce information about any of the following:

1. The identity of a confidential news source.
2. Any information that would tend to identify a confidential news source.
3. Any information obtained in confidence by a news person in gathering or preparing information for potential dissemination to the public.
4. Any other information or identity of a source of information that is obtained by a news person in gathering or preparing information for potential dissemination to the public.

The bill gives the court authority, after a hearing, to issue a subpoena to compel a news person to testify or produce information. The court may issue a subpoena if the person who requests the subpoena establishes by clear and convincing evidence, in a criminal investigation, that a crime has occurred, or in a civil action, that the complaint states a claim upon which relief may be granted, and if all of the following conditions apply:

1. The information or identity of the source is highly relevant to the criminal investigation or civil action.
2. The information or identity of the source is critical or necessary to the maintenance of the party's claim, defense, or to the proof of an issue material to the criminal investigation or civil action.
3. The information or identity of the source is not obtainable from any alternative source.
4. There is an overriding public interest in the disclosure of the information or identity of the source.

The bill also restricts the issuance of a subpoena to order a person who is not a news person to testify or produce information related to a business transaction between that person and a news person if the intent is to obtain information that cannot be obtained from the news person. There are exceptions to this restriction under the bill if the information is highly relevant, necessary for the party's claim or defense, and not obtainable from other sources.

The bill allows the court, in a criminal investigation in which a news person is the subject of the investigation, to order the issuance of a subpoena at the request of the prosecutor without giving the news person advance notice of the request and a hearing if the court determines that giving advance notice would pose a substantial threat to the integrity of the investigation.

Nelson, Robert P.

From: Gibson-Glass, Mary
Sent: Wednesday, May 20, 2009 3:57 PM
To: Nelson, Robert P.
Subject: FW: shield law bill
Importance: High
Attachments: 09-22251.pdf

From: Buhrandt, Jeff
Sent: Wednesday, May 20, 2009 3:50 PM
To: Gibson-Glass, Mary
Subject: FW: shield law bill
Importance: High

Mary-

Could you help us address the concern voiced below about the analysis of LRB 2225?

Just want to make sure that have everything in order as the bill is being circulated.

Please let me know if you have any questions-

Jeff

*Jeff Buhrandt
Office of Senator Pat Kreitlow
(608) 266-7511*

From: Peter Fox [mailto:Peter.Fox@wnanews.com]
Sent: Wednesday, May 20, 2009 3:36 PM
To: Buhrandt, Jeff
Cc: Dreps, Robert; blueders@isthmus.com; Murray, Mike
Subject: FW: shield law bill
Importance: High

Jeff,

With Mike Murray on paternity leave, I thought this should go directly to you. In responding to a query on the draft circulating for co-sponsors, Bob Dreps detected that the LRB analysis is incomplete. Here is bob's observation:

"The analysis implies that a court can order production of any of the information in categories 1-4 upon a sufficient showing of need. In fact, the proposal does not authorize a court to order production of the information in categories 1-3, including the identity of a confidential source, under any circumstances."

Can we expect the LRB analysis to be corrected before the proposal is formally introduced? I know that Bob would be willing to consult with anyone at LRB on this.

05/20/2009

Peter

Peter D. Fox, Executive Director
Wisconsin Newspaper Association
Peter.Fox@WNAnews.com
PO Box 259837
Madison, WI 53725-9837
Direct: (608) 283-7621
Main: (608) 283-7620



State of Wisconsin
2009 - 2010 LEGISLATURE

LRB-2225/12
MGG&RPN:bjk:rs

RMR

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2009 BILL

SA

regrin.

1 AN ACT *to create* 885.14 of the statutes; **relating to:** limiting disclosure of
2 information gathered by news persons.

Analysis by the Legislative Reference Bureau

Under the Supreme Court's interpretation of article I, section 3, of the Wisconsin Constitution, which prohibits any law that restrains the liberty of the press, a member of a news media has a qualified privilege to refuse to disclose sources of information received in confidence. The privilege is qualified because the reporter may be required to reveal the source if proof is presented showing that the source may have information that is competent, relevant, material, and favorable to the requester and that there are no other reasonable and adequate alternative sources for the information. The Supreme Court has held that the value of freedom of the press must be balanced against the societal values favoring disclosure, which requires a review of the facts in each case to determine whether to allow a reporter to refuse to disclose a confidential source.

This bill prohibits a person, other than a court, from issuing a subpoena compelling a news person to testify or produce information about any of the following:

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2. Any information that would tend to identify a confidential news source.
3. Any information obtained in confidence by a news person in gathering or preparing information for potential dissemination to the public.
4. Any other information or identity of a source of information that is obtained by a news person in gathering or preparing information for potential dissemination to the public.

BILL

but only the evidence listed in item 40 above

The bill gives the court authority, after a hearing, to issue a subpoena to compel a news person to testify or produce information. The court may issue a subpoena if the person who requests the subpoena establishes by clear and convincing evidence, in a criminal investigation, that a crime has occurred, or in a civil action, that the complaint states a claim upon which relief may be granted, and if all of the following conditions apply:

1. The information or identity of the source is highly relevant to the criminal investigation or civil action.
2. The information or identity of the source is critical or necessary to the maintenance of the party's claim, defense, or to the proof of an issue material to the criminal investigation or civil action.
3. The information or identity of the source is not obtainable from any alternative source.
4. There is an overriding public interest in the disclosure of the information or identity of the source.

The bill also restricts the issuance of a subpoena to order a person who is not a news person to testify or produce information related to a business transaction between that person and a news person if the intent is to obtain information that cannot be obtained from the news person. There are exceptions to this restriction under the bill if the information is highly relevant, necessary for the party's claim or defense, and not obtainable from other sources.

The bill allows the court, in a criminal investigation in which a news person is the subject of the investigation, to order the issuance of a subpoena at the request of the prosecutor without giving the news person advance notice of the request and a hearing if the court determines that giving advance notice would pose a substantial threat to the integrity of the investigation.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

- 1 **SECTION 1.** 885.14 of the statutes is created to read:
- 2 **885.14 Disclosure of information and sources by news person. (1)**
- 3 **DEFINITION.** In this section, "news person" means any of the following:
- 4 (a) Any business or organization that, by means of print, broadcast,
- 5 photographic, mechanical, electronic, or other medium, disseminates news or
- 6 information to the public, including a newspaper, magazine, or other periodical; book
- 7 publisher; news agency; wire service; radio or television station or network; cable or
- 8 satellite network, service, or carrier; or audio or audiovisual production company;

BILL

1 and a parent, subsidiary, division, or affiliate of any of these businesses or
2 organizations.

3 (b) Any person who is or has been engaged in gathering, receiving, preparing,
4 or disseminating news or information to the public for an entity described in par. (a),
5 including any person supervising or assisting the person in gathering, receiving,
6 preparing, or disseminating such news or information.

7 **(2) SUBPOENAS ISSUED TO NEWS PERSON.** (a) *Prohibition.* Except as provided in
8 par. (b), no person having the power to issue a subpoena may issue a subpoena
9 compelling a news person to testify about or produce or disclose any of the following:

10 1. The identity of a confidential source of any news or information.

11 2. Any information that would tend to identify the confidential source of any
12 news or information.

13 3. Any news or information obtained or prepared in confidence by a news
14 person in gathering, receiving, or preparing news or information for potential
15 dissemination to the public.

16 4. Any news, information, or identity of any source of any news or information
17 that is not described in subd. 1., 2., or 3. and that is obtained or prepared by a news
18 person in the news person's capacity in gathering, receiving, or preparing news or
19 information for potential dissemination to the public.

20 (b) *Procedure before courts.* Subject to par. (c), a circuit court may issue a
21 subpoena to compel a news person to testify about or disclose or produce any news,
22 information, or identity of any source as specified in par. (a) 4. if the court finds, after
23 notice to and an opportunity to be heard by the news person that the person
24 requesting the subpoena established, based on information obtain from a person
25 other than the news person, one of the following by clear and convincing evidence:

BILL**SECTION 1**

1 1. In a criminal prosecution or investigation that there are reasonable grounds
2 to believe that a crime has occurred.

3 2. In a civil action or proceeding that the complaint states a claim upon which
4 relief may be granted.

5 (c) A circuit court may issue a subpoena under par. (b) only if all of the following
6 conditions are met:

7 1. The news, information, or identity of the source is highly relevant to the
8 investigation, prosecution, action, or proceeding.

9 2. The news, information, or identity of the source is critical or necessary to the
10 maintenance of a party's claim, defense, or to the proof of an issue material to the
11 investigation, prosecution, action, or proceeding.

12 3. The news, information, or identity of the source is not obtainable from any
13 alternative source for the investigation, prosecution, action, or proceeding.

14 4. There is an overriding public interest in the disclosure of the news,
15 information, or identity of the source.

16 **(3) SUBPOENAS ISSUED TO PERSONS OTHER THAN NEWS PERSONS.** (a) *Prohibition.*
17 Except as provided in par. (b), no person having the power to issue a subpoena may
18 issue a subpoena to compel a party other than a news person to testify about or
19 produce or disclose, information, records, or communications relating to a business
20 transaction between that person and the news person if the purpose of the subpoena
21 is to discover any of the items listed in sub. (2) (a) 1. to 4.

22 (b) *Procedure before courts.* A circuit court may issue a subpoena requested by
23 a district attorney or attorney general in a criminal investigation or prosecution or
24 a civil action or proceeding to compel a person other than a news person to testify

BILL

1 about or produce or disclose information, records, or communications as specified in
2 par. (a), only if all of the following apply:

3 1. The court gives reasonable and timely notice to the person and the news
4 person and holds a hearing on the issue, except as provided in par. (c).

5 2. The court finds that all of the following conditions are met:

6 a. The information, records, or communications are highly relevant to the
7 investigation, prosecution, action, or proceeding.

8 b. The information, records, or communications are necessary to the
9 maintenance of a party's claim, defense, or proof of an issue material to the
10 investigation, prosecution, action, or proceeding.

11 c. The information, records, or communications are not obtainable from any
12 alternative source available to the investigation, prosecution, action, or proceeding.

13 (c) *Procedure; news person as subject.* In a criminal investigation in which the
14 news person is the subject of the investigation, if the district attorney or attorney
15 general requesting a subpoena under par. (b) believes that advance notice to the news
16 person would pose a clear and substantial threat to the integrity of the investigation,
17 the district attorney or attorney general shall certify that threat to the circuit court
18 when requesting the subpoena. The circuit court may order that the subpoena be
19 issued without giving the news person advance notice of the request or an
20 opportunity to be heard if the court determines that the threat exists. The district
21 attorney or attorney general shall notify the news person of the existence of the
22 subpoena as soon as possible after the district attorney or attorney general
23 determines that notification to the news person no longer poses such a threat.

24 (4) **DISTRIBUTION.** A disclosure to another person or dissemination to the public
25 of news, information, or the identity of a source as described in sub. (2) (a) 1. to 4. by

BILL**SECTION 1**

1 a news person does not constitute a waiver of the protection from compelled
2 disclosure under sub. (2) or (3).

3 (5) INADMISSIBILITY. Any news, information, records, communications, or the
4 identity of a source of any news or information obtained in violation of this section
5 are inadmissible for any purpose in any judicial, legislative, or administrative action,
6 proceeding, or hearing.

7 (END)

Parisi, Lori

From: Murray, Mike
Sent: Monday, June 15, 2009 1:32 PM
To: LRB.Legal
Subject: Draft Review: LRB 09-2225/1 Topic: Information gathered by news media

Please Jacket LRB 09-2225/1 for the ASSEMBLY.