



**WISCONSIN LEGISLATIVE COUNCIL
AMENDMENT MEMO**

2009 Assembly Bill 333

**Assembly Substitute
Amendment 1, as Amended by
Assembly Amendment 1**

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Article I, Section 3, Wisconsin Constitution provides in part: “... no laws shall be passed to restrain or abridge the liberty ... of the press.” Wisconsin court interpretation of the Constitutional provision has recognized a qualified journalist’s privilege to refuse to disclose sources of information received in confidence. See, generally, *State v. Knops*, 49 Wis. 2d 647, 183 N.W.2d 93 (1971); *Green Bay Newspaper Co., v. Circuit Court*, 113 Wis. 2d 411, 335 N.W.2d 367 (1983); and *Kurzynski v. Spaeth*, 196 Wis. 2d 182, 538 N.W.2d 554 (Ct. App. 1995). The qualified privilege essentially balances freedom of the press against a litigant’s constitutional right to compulsory process to obtain favorable evidence. In applying the privilege, the court considers whether the party seeking information has exhausted all alternative sources of information; whether the information sought is not cumulative; and whether the information sought is relevant and necessary. If the test is met, then disclosure is required.

The Substitute Amendment, as Amended by Assembly Amendment 1 (“Engrossed Bill”)

The engrossed bill provides an absolute privilege for “news persons,” as defined, to refuse to disclose confidential sources and confidential information.

“News Person”

The engrossed bill defines “news person” as:

1. Any business or organization that, by means of print, broadcast, photographic, mechanical, electronic, or other medium, disseminates on a regular or consistent basis news or information to the public, including a newspaper, magazine, or other periodical; book publisher; news agency; wire service; radio or television station or network; cable or satellite network, service, or carrier; or audio or audiovisual production company; and a parent, subsidiary, division, or affiliate of any of these businesses or organizations.

2. Any person who is or has been engaged in gathering, receiving, preparing, or disseminating news or information to the public for an entity described under 1., including any person supervising or assisting the person in gathering, receiving, preparing, or disseminating such news or information.

Prohibition on Subpoenas Issued to News Persons

Under the engrossed bill, no person may issue a subpoena compelling a news person to testify about or produce or disclose any of the following that is obtained or prepared by the news person in the news person's capacity in gathering, receiving, or preparing news or information for potential dissemination to the public: (1) the identity of a confidential source of any news or information; (2) any information that would tend to identify the confidential source of any news or information; or (3) any news or information obtained or prepared in confidence by the news person.

Any news, information, or the identity of any source of any news or information that is not described under (1) to (3), above, that is obtained or prepared by a news person in the news person's capacity in gathering, receiving, or preparing news or information for potential dissemination to the public is also protected from subpoena but the protection is qualified. The proposal authorizes a court to issue a subpoena to compel a news person to testify about or disclose or produce such information or source if the court finds first, based on information obtained from a person other than the news person, by clear and convincing evidence:

1. In a criminal prosecution or investigation, that there are reasonable grounds to believe that a crime has occurred.
2. In a civil action or proceeding, that the complaint states a claim upon which relief may be granted.

If 1. or 2. are found, the court may issue a subpoena if: (a) the news, information, or identity of the source is highly relevant to the investigation, prosecution, action, or proceeding; (b) the news, information, or identity of the source is necessary to the maintenance of a party's claim or defense or to the proof of an issue material to the investigation, prosecution, action, or proceeding; (c) the news, information, or identity of the source is not obtainable from any alternative source for the investigation, prosecution, action, or proceeding; and (d) there is an overriding public interest in the disclosure of the news, information, or identity of the source.

Prohibition on Subpoenas Issued to Certain Third Persons

The engrossed bill also addresses subpoenas issued to persons other than news persons. The proposal prohibits a person from issuing a subpoena to compel a person other than a news person to testify about or produce or disclose information, records, or communications relating to a business transaction between that person and the news person if the purpose of the subpoena is to discover the news person's confidential information or source of that information. This might apply, for example, to attempts to obtain phone records or hotel records involving the news person from the phone company or hotel.

Disclosure Does Not Constitute Waiver

Disclosure to another person or dissemination to the public of news, information, or the identity of a source by a news person does not constitute a waiver of the subpoena protections provided by the engrossed bill.

Evidence Obtained in Violation of Subpoena Prohibition Not Admissible

The engrossed bill provides that any news, information, records, communications, or the identity of a source of any news or information obtained in violation of the subpoena prohibitions is inadmissible for any purpose in any judicial, legislative, or administrative action, proceeding, or hearing.

Initial Applicability

The proposal would first apply to subpoenas issued on its effective date.

Legislative History

Assembly Substitute Amendment 1 was offered by Representative Parisi. Assembly Amendment 1 to the substitute amendment was offered by Representatives Kessler and Parisi. Both amendments were adopted, and the proposal was passed, by the Assembly on a voice vote.

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