

11103686D

HOUSE BILL NO. 2199

Offered January 12, 2011

Prefiled January 12, 2011

A BILL to amend the Code of Virginia by adding a section numbered 2.2-4022.1, by adding in Article 5 of Chapter 14 of Title 8.01 a section numbered 8.01-410.1, and by adding in Chapter 16 of Title 19.2 an article numbered 3, consisting of sections numbered 19.2-282.1 through 19.2-282.8, relating to journalists as witnesses.

 Patron—Comstock

 Referred to Committee for Courts of Justice

Be it enacted by the General Assembly of Virginia:

1. That the Code of Virginia is amended by adding a section numbered 2.2-4022.1, by adding in Article 5 of Chapter 14 of Title 8.01 a section numbered 8.01-410.1, and by adding in Chapter 16 of Title 19.2 an article numbered 3, consisting of sections numbered 19.2-282.1 through 19.2-282.8, as follows:

§ 2.2-4022.1. Provisions that apply to administrative as well as civil cases.

Section 8.01-410.1 shall apply to administrative proceedings as well as to civil cases.

§ 8.01-410.1. Journalists as witnesses.

A. As used in this section, unless the context requires a different meaning:

"Communications service provider" means a person or the parent, subsidiary, division, or affiliate of a person who transmits information chosen by a customer by electronic means, including (i) a telecommunications carrier, as defined by the Communications Act of 1934, 47 U.S.C. § 153(44), as amended; (ii) a provider of information service, as defined by the Communications Act of 1934, 47 U.S.C. § 153(20), as amended; (iii) a provider of interactive computer service, as defined by the Communications Act of 1934, 47 U.S.C. § 230(f)(2), as amended; and (iv) an information content provider, as defined by the Communications Act of 1934, 47 U.S.C. § 230(f)(3), as amended.

"Journalist" means a person, including a parent, subsidiary, division, or affiliate of a person, who for a substantial portion of the person's livelihood or for substantial financial gain gathers, compiles, prepares, collects, photographs, records, writes, edits, reports, investigates, processes, or publishes news or information that is disseminated by a news medium or communication service provider and includes:

1. A person who supervises or assists in gathering, preparing, and disseminating the news or information; or

2. Notwithstanding the foregoing, a person who is or was a journalist, scholar, or researcher employed by an institution of higher education at the time he obtained or prepared the requested information, or a person who at the time he obtained or prepared the requested information:

(a) Earned a significant portion of his livelihood by obtaining or preparing information for dissemination by a news medium or communication service provider; or

(b) Served as an agent, assistant, employee, or supervisor of a news medium or communication service provider.

"News medium" means a newspaper; magazine or periodical; book publisher; news agency; wire service; radio or television station or network; cable, satellite, or other transmission system or carrier or channel; or a channel or programming service for a station, network, system, or carrier; audio or audiovisual production company; Internet company or provider; or the parent, subsidiary, division, or affiliate of such entity, that disseminates news or information to the public by any means, including print, television, radio, photographic, mechanical, electronic, and other means, known or unknown, that are accessible to the public.

"Official proceeding" means any type of administrative, executive, legislative, or judicial proceeding that may be conducted before a public servant.

"Public servant" means a person elected, selected, appointed, employed, or otherwise designated as one of the following, even if the person has not yet qualified for office or assumed the person's duties:

1. An officer, employee, or agent of government;

2. A juror;

3. An arbitrator, referee, or other person who is authorized by law or private written agreement to hear or determine a cause or controversy;

4. An attorney or notary public when participating in the performance of a governmental function; or

5. A person who is performing a governmental function under a claim of right, although the person

INTRODUCED

HB2199

59 is not legally qualified to do so.

60 B. Except as otherwise provided by this section, a body with the authority to issue a subpoena or
61 other compulsory process may not compel a journalist to testify regarding or to produce or disclose in
62 an official proceeding (i) any confidential or nonconfidential information, document, or item obtained or
63 prepared while acting as a journalist or (ii) the source of any information, document, or item described
64 by clause (i).

65 A subpoena or other compulsory process may not compel the parent, subsidiary, division, or affiliate
66 of a communications service provider or news medium to disclose the information, documents, or items
67 or the source of any information, documents, or items that are privileged from disclosure under this
68 subsection.

69 C. After notice and an opportunity to be heard, a court may compel a journalist, a journalist's
70 employer, or a person with an independent contract with a journalist to testify regarding or to produce
71 or disclose any information, document, or item or the source of any information, document, or item
72 obtained while acting as a journalist, if the person seeking the information, document, or item or the
73 source of any information, document, or item makes a clear and specific showing that:

74 1. All reasonable efforts have been exhausted to obtain the information from alternative sources;

75 2. The subpoena is not overbroad, unreasonable, or oppressive and, when appropriate, will be
76 limited to the verification of published information and the surrounding circumstances relating to the
77 accuracy of the published information;

78 3. Reasonable and timely notice was given of the demand for the information, document, or item;

79 4. In this instance, the interest of the party subpoenaing the information outweighs the public interest
80 in gathering and dissemination of news, including the concerns of the journalist;

81 5. The subpoena or compulsory process is not being used to obtain peripheral, nonessential, or
82 speculative information; and

83 6. The information, document, or item is relevant and material to the proper administration of the
84 official proceeding for which the testimony, production, or disclosure is sought and is essential to the
85 maintenance of a claim or defense of the person seeking the testimony, production, or disclosure.

86 An order to compel testimony, production, or disclosure to which a journalist has asserted a
87 privilege under this section may be issued only after timely notice to the journalist, the journalist's
88 employer, or a person who has an independent contract with the journalist and a hearing. The order
89 shall include clear and specific findings as to the showing made by the person seeking the testimony,
90 production, or disclosure and the clear and specific evidence on which the court relied in issuing the
91 court's order.

92 D. Publication or dissemination by a news medium or communications service provider of
93 information, documents, or items privileged under this section is not a waiver of the journalist's
94 privilege.

95 E. Extrinsic evidence of the authenticity of evidence as a condition precedent to the admissibility of
96 the evidence in a proceeding is not required with respect to a recording that purports to be a broadcast
97 by a radio or television station that holds a license issued by the Federal Communications Commission
98 at the time of the recording. The court may take judicial notice of the recording license.

99 Article 3.

100 Journalists as Witnesses.

101 § 19.2-282.1. Provisions that apply to criminal as well as civil cases.

102 A. Terms used in this article shall have the same meaning ascribed to them in subsection A of
103 § 8.01-410.1.

104 B. Subsection E of § 8.01-410.1 shall apply to criminal proceedings as well as to civil cases.

105 § 19.2-282.2. Privilege generally.

106 A. Except as otherwise provided by this article, a body with the authority to issue a subpoena or
107 other compulsory process may not compel a journalist to testify regarding or to produce or disclose in
108 an official proceeding (i) any confidential or nonconfidential unpublished information, document, or item
109 obtained or prepared while acting as a journalist or (ii) the source of any information, document, or
110 item described by clause (i).

111 B. A subpoena or other compulsory process may not compel the parent, subsidiary, division, or
112 affiliate of a communications service provider or news medium to disclose the unpublished information,
113 documents, or items or the source of any information, documents, or items that are privileged from
114 disclosure under subsection A.

115 § 19.2-282.3. Privilege concerning confidential sources.

116 A. A court may compel a journalist to testify regarding or to disclose the confidential source of any
117 information, document, or item obtained while acting as a journalist if the person seeking the testimony,
118 production, or disclosure makes a clear and specific showing that the source of any information,
119 document, or item:

120 1. Was observed by the journalist committing a felony criminal offense and the subpoenaing party

has exhausted reasonable efforts to obtain from alternative sources the confidential source of any information, document, or item obtained or prepared while acting as a journalist;

2. Is a person who confessed or admitted to the journalist the commission of a felony criminal offense and the subpoenaing party has exhausted reasonable efforts to obtain from alternative sources the confidential source of any information, document, or item obtained or prepared while acting as a journalist;

3. Is a person for whom probable cause exists that the person participated in a felony criminal offense and the subpoenaing party has exhausted reasonable efforts to obtain from alternative sources the confidential source of any information, document, or item obtained or prepared while acting as a journalist; or

4. Is reasonably necessary to stop or prevent reasonably certain death or substantial bodily harm.

B. If the criminal conduct alleged in subdivision A 1, A 2, or A 3 is the act of communicating, receiving, or possessing the information, document, or item, this section does not apply, and § 19.2-282.4 governs.

C. Notwithstanding the provisions of subsection B, if the information, document, or item was disclosed or received in violation of a grand jury oath given to either a juror or a witness, a journalist may be compelled to testify if the person seeking the testimony, production, or disclosure makes a clear and specific showing that the subpoenaing party has exhausted reasonable efforts to obtain from alternative sources the confidential source of any information, document, or item obtained. In this context, the court has the discretion to conduct an in camera hearing. The court may not order the production of the confidential source until a ruling has been made on the motion.

D. A subpoena of a journalist issued by an attorney representing the state shall be signed by the Attorney General or attorney for the Commonwealth, as applicable. If such elected attorney has been disqualified or recused or has resigned, the subpoena shall be signed by the person succeeding such elected attorney. If such elected officer is not in the jurisdiction, the highest ranking assistant to such elected officer shall sign the subpoena.

§ 19.2-282.4. Privilege concerning unpublished information, document, or item and nonconfidential sources.

A. After service of subpoena and an opportunity to be heard, a court may compel a journalist, a journalist's employer, or a person with an independent contract with a journalist to testify regarding or to produce or disclose any unpublished information, document, or item or the source of any information, document, or item obtained while acting as a journalist other than as described by § 19.2-282.3, if the person seeking the unpublished information, document, or item or the source of any information, document, or item makes a clear and specific showing that:

1. All reasonable efforts have been exhausted to obtain the information from alternative sources; and

2. The unpublished information, document, or item:

a. Is relevant and material to the proper administration of the official proceeding for which the testimony, production, or disclosure is sought and is essential to the maintenance of a claim or defense of the person seeking the testimony, production, or disclosure; or

b. Is central to the investigation or prosecution of a criminal case and, based on something other than the assertion of the person requesting the subpoena, reasonable grounds exist to believe that a crime has occurred.

B. The court, when considering an order to compel testimony regarding or to produce or disclose any unpublished information, document, or item or the source of any information, document, or item obtained while acting as a journalist, shall consider whether:

1. The subpoena is overbroad, unreasonable, or oppressive;

2. Reasonable and timely notice was given of the demand for the information, document, or item;

3. In this instance, the interest of the party subpoenaing the information outweighs the public interest in gathering and disseminating news, including the concerns of the journalist; and

4. The subpoena or compulsory process is being used to obtain peripheral, nonessential, or speculative information.

C. A court shall not consider a single factor under subsection B as outcome-determinative in the decision whether to compel the testimony or the production or disclosure of the unpublished information, document, or item, or the source of any information, document, or item.

§ 19.2-282.5. Notice.

An order to compel testimony, production, or disclosure to which a journalist has asserted a privilege under this article may be issued only after timely notice to the journalist, the journalist's employer, or a person who has an independent contract with the journalist and a hearing. The order shall include clear and specific findings as to the showing made by the person seeking the testimony, production, or disclosure and the clear and specific evidence on which the court relied in issuing the court's order.

182 § 19.2-282.6. *Publication of privileged information.*

183 *Publication or dissemination by a news medium or communications service provider of information,*
184 *documents, or items privileged under this article is not a waiver of the journalist's privilege regarding*
185 *sources and unpublished information, documents, or items.*

186 § 19.2-282.7. *Published information.*

187 *This article does not apply to any information, document, or item that has at any time been*
188 *published or broadcast by the journalist.*

189 § 19.2-282.8. *Reimbursement of costs.*

190 *The subpoenaing party shall pay a journalist a reasonable fee for the journalist's time and costs*
191 *incurred in providing the information, item, or document subpoenaed.*

192 **2. That the provisions of this act apply only to information, documents, or items or the source of**
193 **any information, document, or item obtained or prepared for publication in a news medium or**
194 **communication service provider on or after the effective date of this act.**