HB

36

COMMITTEE REPORT

SENATE

FURTHER: None

4/9/81

Date: June 12, 1981

Mr. President:

The Committee on JUDICIARY has had CSHB 36 (Judiciary) privilege not to disclose sources of information

under consideration and (a majority of the committee) (the committee) reports it back with the following recommendations:

[ ] do pass [ ] do not pass

[ ] do pass with attached amendments(s)

[X] replace with CS for CSHB 36 [X] same title [ ] new title

and ~~recommends~~ HAS NO RECOMMENDATION

[ ] AND attaches a "Letter of Intent" [ ] New Fiscal Note

[ ] reports it back without recommendation

[ ] referred to the ______ Committee

MEMBERS SIGNING DO PASS

MEMBERS HAVING OTHER RECOMMENDATIONS:

[signatures]

[signature]

CHAIRMAN

Alaska State Legislature

Senate

Judiciary Committee

Official Business

Pouch V
State Capitol
Juneau, Alaska 99811

A G E N D A
Wednesday, May 27, 1981 1:30 p.m.
Butrovich Committee Room

CALL TO ORDER

LEGISLATION BEFORE COMMITTEE:

SB 167	"An Act relating to election campaigns and to the composition and responsibilities of the Alaska Public Offices Commission; and providing for an effective date."
SB 485	"An Act permitting the videotaping of testimony of young victims of sexual assault or sexual abuse of a minor; and changing Rule 804, Alaska Rules of Evidence relating to exceptions to the hearsay rule."
SB 535	"An Act relating to the criminal laws of the state."
B 49	"An Act relating to limited entry to commercial fisheries; and providing for an effective date."
SCSCSHB 36	"An Act relating to the privilege not to disclose sources of information; and providing for an effective date."

SCHEDULED TESTIMONY (See Attached Schedule)

ADJOURN

SCHEDULED TESTIMONY:

SB 167	Richard Listowski, Commissioner Theda Pittman, Director Alaska Public Offices Commission
SB 485	Dana Fabe, Public Defender Russ Webb, Program Analyst - Department of Health & Social Services Barry Stern, Assistant Attorney General
SB 535	Dana Fabe Barry Stern
SB 49	John Williams, Commissioner Commercial Fisheries Entry Commission Mary Jablonski Rodger Painter

Alaska State Legislature

Senate

Judiciary Committee

Official Business

Pouch V
State Capitol
Juneau, Alaska 99811

M E M O R A N D U M

TO: Senator Bennett
Senator Hohman
Senator Parr
Senator Ray

FROM: Senator Rodey

DATE: May 26, 1981

SUBJECT: CSHB36 "An Act relating to the privilege not to disclose information or sources of information; and providing for an effective date."

Please find attached a new draft based upon the comments forwarded to me on the first proposed committee substitute. This legislation will be before the committee on Wednesday, May 27.

PMR/ods
Attachment

Alaska State Legislature

Senate

Judiciary Committee

Official Business

Pouch V
State Capitol
Juneau, Alaska 99811

M E M O R A N D U M

TO: Senator Bennett
Senator Hohman
Senator Parr
Senator Ray
Senator Rodey

FROM: Kevin Bruce
Committee Aide

DATE: May 13, 1981

SUBJECT: CSHB 36 "An Act relating to the privilege not to disclose sources of information; and providing for an effective date."

For your review, I have attached a copy of the committee substitute for the above-referenced legislation. The amendments, as discussed in committee, are highlighted.

KKB/ods
Attachment

PRIVACY PROTECTION ACT OF 1980

For Legislative History of Act, see p. 7347

An Act to limit governmental search and seizure of documentary materials possessed by persons, to provide a remedy for persons aggrieved by violations of the provisions of this Act, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Privacy Protection Act of 1980".

Privacy Protection Act of 1980.
42 USC 2000aa note.

TITLE I—FIRST AMENDMENT PRIVACY PROTECTION

PART A—UNLAWFUL ACTS

SEC. 101. (a) Notwithstanding any other law, it shall be unlawful for a government officer or employee, in connection with the investigation or prosecution of a criminal offense, to search for or seize any work product materials possessed by a person reasonably believed to have a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication, in or affecting interstate or foreign commerce; but this provision shall not impair or affect the ability of any government officer or employee, pursuant to otherwise applicable law, to search for or seize such materials, if—

Work product materials, search or seizure.
42 USC 2000aa.

(1) there is probable cause to believe that the person possessing such materials has committed or is committing the criminal offense to which the materials relate: *Provided, however,* That a government officer or employee may not search for or seize such materials under the provisions of this paragraph if the offense to which the materials relate consists of the receipt, possession, communication, or withholding of such materials or the information contained therein (but such a search or seizure may be conducted under the provisions of this paragraph if the offense consists of the receipt, possession, or communication of information relating to the national defense, classified information, or restricted data under the provisions of section 793, 794, 797, or 798 of title 18, United States Code, or section 224, 225, or 227 of the Atomic Energy Act of 1954 (42 U.S.C. 2274, 2275, 2277), or section 4 of the Subversive Activities Control Act of 1950 (50 U.S.C. 783)); or

(2) there is reason to believe that the immediate seizure of such materials is necessary to prevent the death of, or serious bodily injury to, a human being.

(b) Notwithstanding any other law, it shall be unlawful for a government officer or employee, in connection with the investigation or prosecution of a criminal offense, to search for or seize documentary materials, other than work product materials, possessed by a person in connection with a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication, in or affecting interstate or foreign commerce; but this provision shall not impair or affect the ability of any government

officer or employee, pursuant to otherwise applicable law, to search for or seize such materials, if—

(1) there is probable cause to believe that the person possessing such materials has committed or is committing the criminal offense to which the materials relate: *Provided, however,* That a government officer or employee may not search for or seize such materials under the provisions of this paragraph if the offense to which the materials relate consists of the receipt, possession, communication, or withholding of such materials or the information contained therein (but such a search or seizure may be conducted under the provisions of this paragraph if the offense consists of the receipt, possession, or communication of information relating to the national defense, classified information, or restricted data under the provisions of section 793, 794, 797, or 798 of title 18, United States Code, or section 224, 225, or 227 of the Atomic Energy Act of 1954 (42 U.S.C. 2274, 2275, 2277), or section 4 of the Subversive Activities Control Act of 1950 (50 U.S.C. 783));

(2) there is reason to believe that the immediate seizure of such materials is necessary to prevent the death of, or serious bodily injury to, a human being;

(3) there is reason to believe that the giving of notice pursuant to a subpena duces tecum would result in the destruction, alteration, or concealment of such materials; or

(4) such materials have not been produced in response to a court order directing compliance with a subpena duces tecum, and—

(A) all appellate remedies have been exhausted; or

(B) there is reason to believe that the delay in an investigation or trial occasioned by further proceedings relating to the subpena would threaten the interests of justice.

Affidavit.

(c) In the event a search warrant is sought pursuant to paragraph (4)(B) of subsection (b), the person possessing the materials shall be afforded adequate opportunity to submit an affidavit setting forth the basis for any contention that the materials sought are not subject to seizure.

PART B—REMEDIES, EXCEPTIONS, AND DEFINITIONS

Customs laws.
42 USC 2000aa-5.

SEC. 105. This Act shall not impair or affect the ability of a government officer or employee, pursuant to otherwise applicable law, to conduct searches and seizures at the borders of, or at international points of, entry into the United States in order to enforce the customs laws of the United States.

Damages, civil actions.
42 USC 2000aa-6.

SEC. 106. (a) A person aggrieved by a search for or seizure of materials in violation of this Act shall have a civil cause of action for damages for such search or seizure—

(1) against the United States, against a State which has waived its sovereign immunity under the Constitution to a claim for damages resulting from a violation of this Act, or against any other governmental unit, all of which shall be liable for violations of this Act by their officers or employees while acting within the scope or under color of their office or employment; and

(2) against an officer or employee of a State who has violated this Act while acting within the scope or under color of his office or employment, if such State has not waived its sovereign immunity as provided in paragraph (1).

(b) It shall be a complete defense to a civil action brought under paragraph (2) of subsection (a) that the officer or employee had a reasonable good faith belief in the lawfulness of his conduct. Defense.

(c) The United States, a State, or any other governmental unit liable for violations of this Act under subsection (a)(1), may not assert as a defense to a claim arising under this Act the immunity of the officer or employee whose violation is complained of or his reasonable good faith belief in the lawfulness of his conduct, except that such a defense may be asserted if the violation complained of is that of a judicial officer.

(d) The remedy provided by subsection (a)(1) against the United States, a State, or any other governmental unit is exclusive of any other civil action or proceeding for conduct constituting a violation of this Act, against the officer or employee whose violation gave rise to the claim, or against the estate of such officer or employee.

(e) Evidence otherwise admissible in a proceeding shall not be excluded on the basis of a violation of this Act. Evidence.

(f) A person having a cause of action under this section shall be entitled to recover actual damages but not less than liquidated damages of $1,000, and such reasonable attorneys' fees and other litigation costs reasonably incurred as the court, in its discretion, may award: *Provided, however,* That the United States, a State, or any other governmental unit shall not be liable for interest prior to judgment. Damage recovery.

(g) The Attorney General may settle a claim for damages brought against the United States under this section, and shall promulgate regulations to provide for the commencement of an administrative inquiry following a determination of a violation of this Act by an officer or employee of the United States and for the imposition of administrative sanctions against such officer or employee, if warranted. Attorney General, claims settlement; regulations.

(h) The district courts shall have original jurisdiction of all civil actions arising under this section. Jurisdiction.

SEC. 107. (a) "Documentary materials", as used in this Act, means materials upon which information is recorded, and includes, but is not limited to, written or printed materials, photographs, motion picture films, negatives, video tapes, audio tapes, and other mechanically, magentically or electronically recorded cards, tapes, or discs, but does not include contraband or the fruits of a crime or things otherwise criminally possessed, or property designed or intended for use, or which is or has been used as, the means of committing a criminal offense. Definitions. 42 USC 2000aa-7.

(b) "Work product materials", as used in this Act, means materials, other than contraband or the fruits of a crime or things otherwise criminally possessed, or property designed or intended for use, or which is or has been used, as the means of committing a criminal offense, and—

(1) in anticipation of communicating such materials to the public, are prepared, produced, authored, or created, whether by the person in possession of the materials or by any other person;

(2) are possessed for the purposes of communicating such materials to the public; and

(3) include mental impressions, conclusions, opinions, or theories of the person who prepared, produced, authored, or created such material.

(c) "Any other governmental unit", as used in this Act, includes the District of Columbia, the Commonwealth of Puerto Rico any terri-

tory or possession of the United States, and any local government, unit of local government, or any unit of State government.

Effective date. 42 USC 2000aa note.

SEC. 108. The provisions of this title shall become effective on January 1, 1981, except that insofar as such provisions are applicable to a State or any governmental unit other than the United States, the provisions of this title shall become effective one year from the date of enactment of this Act.

TITLE II—ATTORNEY GENERAL GUIDELINES

42 USC 2000aa-11.

SEC. 201. (a) The Attorney General shall, within six months of date of enactment of this Act, issue guidelines for the procedures to be employed by any Federal officer or employee, in connection with the investigation or prosecution of an offense, to obtain documentary materials in the private possession of a person when the person is not reasonably believed to be a suspect in such offense or related by blood or marriage to such a suspect, and when the materials sought are not contraband or the fruits or instrumentalities of an offense. The Attorney General shall incorporate in such guidelines—

(1) a recognition of the personal privacy interests of the person in possession of such documentary materials;

(2) a requirement that the least intrusive method or means of obtaining such materials be used which do not substantially jeopardize the availability or usefulness of the materials sought to be obtained;

(3) a recognition of special concern for privacy interests in cases in which a search or seizure for such documents would intrude upon a known confidential relationship such as that which may exist between clergyman and parishioner; lawyer and client; or doctor and patient; and

(4) a requirement that an application for a warrant to conduct a search governed by this title be approved by an attorney for the government, except that in an emergency situation the application may be approved by another appropriate supervisory official if within 24 hours of such emergency the appropriate United States Attorney is notified.

Report to congressional committees

(b) The Attorney General shall collect and compile information on, and report annually to the Committees on the Judiciary of the Senate and the House of Representatives on the use of search warrants by Federal officers and employees for documentary materials described in subsection (a)(3).

Society of Professional Journalists

Farthest North Chapter
Box 74573
Fairbanks, Ak. 99707

Sigma Delta Chi

May 11, 1981

Sen. Charlie Parr
Alaska State Legislature
Pouch V
Juneau, Alaska 99811

Dear Charlie:

I promised you a letter on why we would prefer action be delayed until next session of the Legislature on HB 36.

The shield law, which is amended by HB 36, is an imperfect instrument at best currently. To my knowledge, no decision has ever been rendered that depended on AS 09.25.150-220. In only once instance that I am aware of has the privilege been invoked by a news person and that was by Robert Porterfield of the Anchorage Daily News. In that case the privilege was never tested since the court ruled that the information the reporter had was not essential to the case. So the shield has never been tested in Alaska.

Some of our members believe that a limited shield law such as Alaska presently has is of limited value to the press and would like to see the statute completely redone. Since it has not been a pressing matter, the Freedom of Information Task Force placed it third on its list of priorities, behind an FOI bill and modifications of the open meetings law (which we have not begun to work on either).

HB 36 was designed to extend the reporter's privilege to photographers and radio and television broadcasters. SCS CSHB 36(SA) seems to us to go beyond that. Now we are no longer talking about disclosing the source of information, but we are also talking about disclosing notes and other documents prepared or obtained while acting as a reporter. I am concerned about the phrase on page 1 line 17 "while acting as a reporter." I would much rather this be phrased "while gathering and/or publishing news." I am not sure what "acting as a reporter" means, but I have a pretty good idea of what it means to gather and/or publish the news.

Currently, the only thing a reporter can be compelled to do is disclose the source of information if the privilege is denied. Under the State Affairs Substitute, the reporter would have to divulge notes, documents, photos, negatives and tapes if the privilege is denied. I don't think our membership is likely to agree with all of that and would like to see it either stricken from the bill or modified to guarantee that all possible efforts will be made to seek the information elsewhere before the courts deny the privilege and force the news person to disclose.

Essentially, I am asking for more time to study the matter so that we have the advantage of seeking information from other states and developing a piece of legislation that will serve all interests in the best manner possible.

Since I know of no abuse of the privilege, I see no hurry to pass this out this session and I think we could devise a better bill given more time to adequately study the matter and consult more widely with our members.

Any help you can give us in this matter would be greatly appreciated.

Sincerely yours,

Dean M. Gottehrer
Chairman
Alaska Freedom of Information Task Force

Original sponsors: Brown and Rogers

Offered: 3/12/81
Referred: Rules

IN THE HOUSE BY THE JUDICIARY COMMITTEE

CS FOR HOUSE BILL NO. 36 (Judiciary)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWELFTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act relating to the privilege not to disclose sources of information; and providing for an effective date."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 09.25.150 is repealed and reenacted to read:

Sec. 09.25.150. CLAIMING OF PRIVILEGE BY PUBLIC OFFICIAL OR REPORTER. Except as provided in AS 09.25.160 - 09.25.220,

(1) a public official may not be compelled to disclose the source of information obtained by him while acting in the course of his duties as a public official; and

(2) a reporter may not be compelled to disclose the source of information obtained by him, nor may he be required to produce photographs, photographic negatives, or audio or video tapes.

* Sec. 2. AS 09.25.160(a) is amended to read:

(a) When a public official or reporter claims the privilege in a cause being heard before the supreme court or a superior court of this state, a person who has the right to question [him] THE P.O. OR R. in that proceeding, or the court on its own motion, may challenge the claim of privilege. The court shall make or cause to be made whatever inquiry the court thinks necessary to a determination of the issue. The inquiry may be made immediately [INSTANTER] by way of questions put to the witness claiming the privilege and a decision then rendered, or the court may require the presence of other witnesses or documentary showing or may order a special hearing for the determination of the issue of privilege.

* Sec. 3. AS 09.25.160(b) is amended to read:

(b) The court may deny the privilege and may order the public official or the reporter to testify, or may order a reporter to produce photographs, photographic negatives, or audio or video tapes, OR OTHER DOCUMENTS imposing whatever limits upon the testimony and upon the right of cross-examination of the witness as may be in the public interest or in the interest of a fair trial or a fair hearing, if it finds the withholding of the testimony would

[(1)] result in a miscarriage of justice or the denial of a fair trial or a fair hearing to those who challenge the privilege [; OR

(2) BE CONTRARY TO THE PUBLIC INTEREST].

* Sec. 4. AS 09.25.170(b) is amended to read:

(b) If, in a hearing, a public official or a reporter should refuse to divulge the source of his information, or a reporter should refuse to produce photographs, photographic negatives, or audio or video tapes, the agency, [BODY,] person, official, or party seeking the information may apply to the superior court for an order divesting the official or reporter of the privilege. When the issue is raised before the supreme or a superior court, the application must be made to that court.

* Sec. 5. AS 09.25.190 is amended to read:

Sec. 09.25.190. EXTENT OF PRIVILEGE. When a public official or reporter claims the privilege conferred by AS 09.25.150 - 09.25.220, and the public official or reporter has not been divested of the privilege by order of the supreme or superior court, the public official, the reporter or [NEITHER HE NOR] the news organization with which he was associated may not thereafter be permitted to plead or prove the sources of information withheld, and a reporter may not be required to produce photographs, photographic negatives, or audio or video tapes,

unless the informant consents in writing or in open court.

* Sec. 6. AS 09.25.220(4)(A)(ii) is amended to read:

(ii) providing newsreels, audio or video tapes, or other motion picture news for public showing; or

* Sec. 7. This Act takes effect immediately in accordance with AS 01.10.-070(c).

Alaska State Legislature

Senate

Committee on State Affairs

Pouch V
State Capitol
Juneau, Alaska 99811

Official Business

April 2, 1981
1:30 p.m.

Behrends Bldg.
Juneau

MEMBERS PRESENT: SENATOR FISCHER, CHAIR
SENATOR COLLETTA
SENATOR STIMSON

AGENDA: CSHB 36 (Jud) "An Act relating to the privilege not to disclose sources of information; and providing for an effective date."

SB 93 "An Act relating to the decentralization of the executive branch of the state government; and providing for an effective date."

SB 227 "An Act designating programs and activities for review and termination under AS 44.66; and providing for an effective date."

SB 323 Taken up at evening hearing on this date

Chairman Fischer called the meeting to order at 1:48 p.m. and invited testimony on CSHB 36 (Jud).

Representative Fred Brown, prime sponsor of the original and Chair of the House Judiciary Committee which provided a committee substitute, presented an overview of the bill. Discussion centered around the purpose of the legislation (to extend the conditional privilege not to disclose sources of information now enjoyed by reporters to still and TV news photographers) and on the House Judiciary Committee's determination that no change in Court Rules would be required. There had been some consideration given to changing Rule #501 to prevent a conflict arising between the provisions of the bill and rules governing court procedure under which the privilege is invoked in court. It was determined (and explained in the House Judiciary Committee's letter of intent) that the bill addresses the substantive law which defines when a privilege does or does not exist on the part of a journalist or a public official.

Chairman Fischer interjected that the Alaska Newspaper Association had sent written testimony in support of the legislation, and included some constructive suggestions to correct potential problems in

the language in Section 2; this section would permit a judge to deny privilege merely by finding that withholding testimony or evidence would be "contrary to the public interest".

Chairman Fischer stated that he felt the measure was an important one; he cited the importance of protecting news sources and the freedom of the press in order that the public should have adequate information. He suggested that notes of reporters, computer tapes and "any other documentation of news stories should also be protected.

Rep. Brown stated that the AG's office had described the language of the bill as both expanding and limiting. It is not clear from the language in the bill exactly what is meant by materials gathered while one is "acting in the course of his duties as a reporter".

Committee members determined that the definition of "reporter" should be expanded to include camera operators, production crews, editors and publishers of news organizations. Chairman Fischer recommended a letter of intent accompany the bill to reference House findings, and that a committee substitute be drafted which would reflect discussion at the hearing.

SB 193

Senator Parr, prime sponsor of Senate Bill 93, provided testimony in support of the measure, intended to address the problem of over-centralization of state functions. The bill requires decentralization and requires that regional/local offices be established so that only 15% of the state employees would be working in the capital. Enactment of the measure would promote decentralization of the decision making process in addition to personnel. The location of the capital, he stated, was not applicable to the bill. In response to the question, "What kinds of obstacles have you run into, what opposition?" Senator Parr stated that it was regarded by some people as a "pro-move" bill; if fully implemented it would considerably reduce the number of state employees in Juneau. A safeguard mechanism in the bill is gubernatorial approval of the plan.

Chairman Fischer suggested that state agencies be asked to respond substantively to the proposed legislation; it needs to be determined where employess are located in the state, where the decision making process takes place and a game plan needs to be developed for decentralization.

Senator Parr knew of no agency offhand which now meets the intention of the bill.

SB 227

Senator Sturgulewski, chair of the Legislative Budget and Audit Committee, provided testimony on this legislation, which falls in the category of "sunset legislation". She outlined the process

and purpose of sunset review, and stated support for the concept of having the ability to critically review a program.

Senator Colletta stated that programs could not be reviewed in this manner unless one took the position of considering terminating the program, thus forcing one to take positive action (by recreating a worthwhile program). He stated support for the measure.

Senator Fischer stated a need for conducting a policy and performance review of Health and Social Services.

Merle Jensen, of the Division of Legislative Audit, answered questions of Committee members relating to the conduct of audits, including those done on entire departments; one of the more common means of doing this is through a financial compliance audit, which measures compliance with the law in spending and accountability.

Allen Korhonern, of the Department of Health and Social Services, provided committee members with a letter describing the programs and indicated the Department's support of the activity. He declared his willingness to provide information and to work with auditors if the bill becomes law.

Meeting adjourned.

WITNESSES FOR
SENATE STATE AFFAIRS COMMITTEE

DATE: 4-2-81

Name	Address/Phone	Representing
Rep. Fred Flowers	Ponder	Prime Sponsor SB 331
Barry Stern		Dept. of Law
Sen Parr		prime sponsor SB 93
Merle Jensen		Legislative Audit
Allen Carlson		DHES

Alaska State Legislature

House of Representatives

Committee on Judiciary

Official Business

Pouch V
State Capitol
Juneau, Alaska 99811

DATE: March 11, 1981

TO: The Honorable Jim Duncan, Speaker
House of Representatives

FROM: Rep. Fred Brown, Chairman
House Judiciary Committee

LETTER OF INTENT
CSHB 36 (Judiciary)

The Committee on Judiciary has had under consideration HB 36, "An Act extending the conditional privilege of reporters as to sources of information", and has provided you with a committee report recommending that it be replaced with our committee substitute for that bill, and that committee substitute do pass.

Additionally, we wanted to point out certain matters involving the nature of the privilege addressed by the bill.

The bill addresses the substantive law which defines when a privilege does or does not exist on the part of a journalist or a public official.

The bill does not address the procedure under which that privilege is invoked in the court, except to restate existing law on that subject because of the requirements of good legislative drafting.

This is an important point. During the committee's deliberations, some members of the committee were concerned as to whether there should be a separate section relating to a change in a Rule of Court.

However, in examing Rule 501 of the Rules of Evidence of the State of Alaska, and in consulting with attorneys on the subject, the committee has concluded that the Legislature can rightly stake claim to jurisdiction over all of the substantive law of privilege, even though it does relate to court proceedings.

Professor Stephen A. Saltzburg, Professor of Law at the University of Virginia who was reporter to our Supreme Court's

Advisory Committee on the rules of evidence, is of the same opinion. In a letter from Mr. Saltzburg to legislative staff, he notes:

> When I drafted and the Advisory Committee approved Rule 501 and the Commentary, I believe that we all had in mind avoiding conflicts between the Legislature and the courts. One obvious way of doing this was to incorporate statutory privileges into Rule 501, which we did. The first sentence of the Commentary accompanying Rule 501 makes clear, I think, that we foresaw that the legislature might enact new privilege statutes.

Rule 501 states in its entirety:

> Except as otherwise provided by the Constitution of the United States or of this State, by enactments of the Alaska Legislature, or by these or other rules promulgated by the Alaska Supreme Court, no person, organization, or entity has a privilege to:
>
> (1) refuse to be witness; or
> (2) refuse to disclose any matter; or
> (3) refuse to produce any object or writing; or
> (4) prevent another from being a witness or disclosing any matter or producing any object or writing.

The language to which Prof. Saltzburg referred to in the Commentary, states that:

> This rule codifies the existing law that privileges are not recognized in the absence of statutes or rules specifically providing for them. No attempt is made in these rules to incorporate the constitutional provisions which relate to the admission and exclusion of evidence, whether denominated as privileges or not. Similarly, privileges created by specific statutes generally are not within the scope of these rules. [emphasis supplied] E.g., AS 09.25.150-220 (Public officials, reporters); AS 24.55.260 (Ombudsman).

Admittedly, the issue is not an absolutely clearcut one. Staff counsel from the Legislative Affairs Agency's Legal Services Division were evenly divided as to whether a rules change would be required, even in light of Prof. Saltzburg's letter and the commentary language.

However, it appears clear to the members of the committee (which includes laymen and lawyers) that if we specifically acknowledge that we are intentionally legislating in this area, as a matter of substantive law, and are not merely inadvertantly overlooking the question of the rules change, the courts will uphold our action.

To some extent the Legislature is charged as well as is the Judiciary with interpreting the Constitution. In this area we strongly believe that the definition of the privilege, and substantive matters relating to who should have the privilege, are all matters of substantive law which should be reachable by the Legislature without the burden of a two-thirds vote. How the courts procedurally apply the privilege in any particular case is entirely within the parlance of the Supreme Court's rule-making power, as long as the implementatation by the courts give full respect to the privilege as a matter of substance.

Therefore the Judiciary Committee has concluded that no rule change is necessary to adopt the provisions of committee substitute for HB 36.

Respectfully submitted,

Rep. Fred Brown, Chairman
Committee on Judiciary

Alaska Newspaper Association
c/o Box 710, Fairbanks, AK 99707

MEMBERS
1980

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ANNING

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GEN

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SIS

February 9, 1981

Rep. Fred Brown, chairman
Judiciary Committee
House of Representatives
Pouch V
Juneau, AK 99811

Re: HB36 extension of privilege

Dear Fred:

We support the basic thrust of this legislation as we understand it: to extend the conditional privilege now enjoyed by reporters to still and TV news photographers.

In performance of their duties, news reporters and photographers must move freely throughout a community. This means coming into contact with sources from various economic and social strata including, occasionally, criminals and others on the fringe of society. In a less dramatic vein, it also means coming into contact with otherwise law-abiding citizens who have grievances against established government authorities, or are suspicious of them.

Without the right to claim a privilege of withholding information or raw, unpublished and unbroadcast film, reporters and photographers would run the risk of being used against their will as tools of law enforcement. Reporters and photographers forced into these unwilling roles could face curtailment of their ability to move freely through a community if their sources viewed them as agents of police.

In Section 2, may I suggest a second look at language that permits a judge to deny privilege merely by finding that withholding testimony or evidence would be "contrary to the public interest."

Certainly, it is reasonable to assume a privilege claimed under the First Amendment would be scrutinized critically if it conflicted with the Sixth Amendment's right to a fair trial. However, an assertion of "public interest" in this case seems unnecessarily broad and ill-defined.

Thank you for the opportunity to testify.

Sincerely,

Kent Sturgis

Kent Sturgis
Chairman, legislative committee

UNIVERSITY OF VIRGINIA
CHARLOTTESVILLE-VIRGINIA-22901

SCHOOL OF LAW

February 18, 1981

Ms. Holli Ploog
Staff Counsel
State Capitol
Room 110
Juneau, Alaska 99811

Dear Ms. Ploog:

Pursuant to our telephone conversation of this morning, I am writing to you to indicate my view of the intent of Alaska Rule 501 as it relates to legislative action to establish or modify evidentiary privileges.

When I drafted and the Advisory Committee approved Rule 501 and the Commentary, I believe that we all had in mind avoiding conflicts between the legislature and the courts. One obvious way of doing this was to incorporate statutory privileges into Rule 501, which we did. And the first sentence of the Commentary accompanying Rule 501 makes clear, I think, that we foresaw that the legislature might enact new privilege statutes.

No one can say with assurance that privileges are more substantive or more procedural. To the extent that they affect out of court behavior they are substantive. To the extent that they control the evidence that courts receive they are procedural. I think that the position that we took in the drafting of Rule 501 was a conscious recognition that privileges were sufficiently procedural so that courts could promulgate rules covering them when they wished and sufficiently substantive that the legislature could enact statutes dealing with them when it wished.

Since privileges can be viewed as sufficiently substantive to be the proper subjects of ordinary legislative action, and since we intended to recognize this in Rule 501, I believe that a privilege rule can be enacted or modified by a majority vote of the legislature. With respect to the newsreporter privilege in particular, a statute would not be in conflict with any court rule. Thus, there would be no occasion for anyone to have to decide whether a two-thirds vote of the legislature would be necessary to make its rule stick as against a court rule.

If the Alaska Supreme Court were to adopt its own newsreporter privilege law and if there were a conflict between it and the legislature's rule, the Alaska Supreme Court might conclude that the privilege is more procedural than substantive and thus require a two-thirds vote of the legislature to make its rule stick. Unless and until this situation arises, a majority vote in support of a statute that is not in conflict with a court rule would seem to suffice.

To be extra-safe, you might insert into the statute some preliminary language suggesting that the statute is intended to foster newsgathering and protect the privacy of the editorial process, which are substantive concerns.

I hope that this opinion is of some help to you.

Sincerely,

Stephen A. Saltzburg
Professor of Law

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99811
907-465-3800

M E M O R A N D U M February 28, 1981

SUBJECT: Reporters' and Public Officials' Privilege (Work Order No. 12-0597)

TO: Senator Pat Rodey

FROM: John B. Chenoweth
Legislative Counsel

I am writing with reference to the bill identified as Work Order 12-0597 and entitled "An Act relating to the privilege of reporters and public officials not to disclose sources of information."

As you no doubt know, the bill which you have not yet introduced is substantially similar to HB 36, introduced by Representative Fred Brown. In conjunction with House Judiciary Committee review of Representative Brown's bill, I had reason to review the constitutional and legal requirements attending adoption and amendment of rules of practice and procedure in Alaska's courts.

For the reasons set out in the attached memorandum, it is my belief that the bill designated by Work Order 12-0597 requires notice in its title and in the body of the bill that the extension of and addition to the rules defining privilege not to testify or provide evidence constitute an amendment of the rules of evidence. I have concluded that the bill is subject to Rule 38(e) of the Legislature's Uniform Rules, and requires adoption by a two-thirds vote as set out in Article IV, sec. 15 of the state constitution.

Please return the bill which you have and I will arrange to add the required information to the title and body of the legislation.

JBC:blg

Enclosures

STATE OF ALASKA
THE LEGISLATURE

POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99811
907-465-3800

LEGISLATIVE AFFAIRS AGENCY

M E M O R A N D U M February 27, 1981

SUBJECT: Application of Rule 38(e) to CSHB 36 (Judiciary)

TO: Representative Donald E. Clocksin
Vice Chairman
House Judiciary Committee

FROM: John B. Chenoweth
Legislative Counsel

The responsibility for adopting and revising rules for the state's courts is committed by the state constitution to the Alaska Supreme Court:

> RULE-MAKING POWER. The supreme court shall make and promulgate rules governing the administration of all courts. It shall make and promulgate rules governing practice and procedure in civil and criminal cases in all courts. . . .

Article IV, section 15. The rules adopted by the Supreme Court may be altered by the legislature "by two-thirds vote of the members elected to each house." Article IV, section 15.

The constitutional requirement, as it affects the legislature's review and adoption of legislation, is incorporated as part of the Uniform Rules of the Legislature. By Rule 38(e)

> If a bill or portion of a bill contains matter changing a supreme court rule governing practice and procedure in civil or criminal cases the bill must contain a section expressly citing the rule and noting what change is being proposed. The section containing the change in a court rule must be approved by an affirmative vote of two-thirds of the membership to which the house

> is entitled. If the section effecting a change in the court rule fails to receive the required two-thirds vote the section is void and without effect and is deleted from the bill. The fact that a bill contains a section which changes a court rule shall also be noted in the title of the bill.

HB 36 and CSHB 36 (Judiciary) revise and extend the conditional privilege relating to giving of testimony and delivery of evidence by reporters and others generally engaged in the work of the press.

You have asked whether amendments contained in CSHB 36 (Judiciary) are subject to the provisions of Rule 38(e) with respect to both the two-thirds vote and the title requirements.

In my opinion, 1/ the requirements of Uniform Rule 38(e) apply to the committee substitute. I have redrafted the committee substitute as presented by the House Judiciary Committee to conform to the conclusion expressed in this memorandum.

1/ There is no unanimity in this division as to whether my conclusion is correct. Two of the four people that I asked to review this opinion in draft said they believed that I was correct, one said that he would have probably come out the other way (i.e., Rule 501 permits the legislature to add one or more privileges without separate notice and a two-thirds vote) and the fourth, disagreeing with all that has been said, suggests that the definition of privileges is "substantive" and wholly within the authority of the legislature to determine by law.

Additional research was undertaken by an extern assigned to assist in the work of this division. Her memorandum turned up little acse law, but evidence of the debate on the privileges not to testify or present evidence are procedural or substantive:

> "In an article by Alfred Clapp, "The Privilege Against Self-Incrimination", 10 Rutgers L.R., 541, substantive

*

Under authority of the constitutional provision earlier cited, the Alaska Supreme Court, by Order No. 364, effective August 1, 1[illegible], adopted Rules of Evidence applicable "in all proceedings [illegible] the courts of the State of Alaska". The material collected in Rules 501 - 512 of the Rules of Evidence establishes certain privileges not to testify or produce evidence, defines the extent of the privileges established (whether by law or by rule), and otherwise describes the relationship between the privileges created and the conduct of discovery or trial. Rule 501 recognizes that the privileges which are covered by the Rules of Evidence may derive from several sources, including legislative enactment:

> "PRIVILEGES RECOGNIZED ONLY AS PROVIDED. Except as otherwise provided by the Constitution of the United States or of this state, by enactments of the Alaska Legislature, or by these or other rules promulgated by the Alaska Supreme Court, no person, organization, or entity has a privilege to:

1/ con't.

law was described as "defining the rights and duties which give rise to a cause of action or to a defense to an action". Procedural law was described as "adjectival", "it provides the litigant with the means or methods by which these rights, duties, and defenses are enforced through the courts." He concluded that rules of evidence are part of the "adjectival machinery" because they are "but regulations fixing appropriate methods . . . for the ascertainment of facts at trial."

> Any right resting on such a regulation -- as, for example, the right of a witness or party to a privilege or the right of a party to exclude hearsay -- palpably does not give rise to a cause of action. It merely operates the machinery of enforcement."

[10 Rutgers L.R. 541]

(1) refuse to be a witness; or

(2) refuse to disclose any matter; or

(3) refuse to produce any object or writing; or

(4) prevent another from being a witness or disclosing any matter or producing any object or writing."

In commentary to Rule 501 of the Alaska Rules of Evidence, a distinction between legislatively-drawn privileges and those created by Court Rule is noted:

> This rule codifies the existing law that privileges are not recognized in the absence of statutes or rules specifically providing for them. No attempt is made in these rules to incorporate the constitutional provisions which relate to the admission and exclusion of evidence, whether denominated as privileges or not. Similarly, privileges created by specific statutes generally are not within the scope of these rules. E.g., AS 09.24.150 - 220 (public officials, reporters); AS 24.55.260 (ombudsman).

The distinction is maintained in the commentary to Rule 502:

> "In light of Rule 501, Rule 502 is redundant in its reference to the State of Alaska. Rule 501 establishes that privileges can be created by these rules or by enactments of the Alaska legislature. It is therefore clear that even without Rule 502 any privilege provided for by statute would be recognized. Despite the redundancy, Rule 502 serves two purposes not served by Rule 501 in connection with Alaska law. First, it serves to remind the legislature that these rules will not generally provide a privilege in circumstances where the government is requiring a person, organization, or entity to supply information. If a privilege is to be forthcoming, it must be legislatively created. . . .
>
> * * *
>
> "It should be plain that the existence and scope of required records, laws and privileges are dependent upon legislative action. The legislature can eliminate

> any privilege that would exist under this rule." (Emphasis added)

While both the Rule and its commentary recognize that the legislature may establish privileges relating to admission or exclusion of evidence, the constitution bars the legislature from "making" rules governing practice and procedure in the civil and criminal courts of the state, vesting this power in the Supreme Court. Channel Flying, Inc. v. Bernhardt, 451 P.2d 570 (1969):

> Respondents also contend that AS 22.20.022 [relating to the disqualification of a trial judge] is invalid as violating the rule-making power of this court. The Alaska Constitution vests in the supreme court the authority to "make and promulgate rules governing practice and procedure in civil and criminal cases in all courts." The legislature has no power to make rules, but only to change them by two-thirds vote [citing Article IV, section 15, Alaska Constitution]. The question here is whether the disqualification statute constitutes a rule governing practice and procedure in the courts which the legislature had no constitutional authority to make. The answer to that question depends on whether the subject matter of the statute is substantive or procedural. If it is substantive in nature it is a matter within legislative prerogative; if it is procedural, it falls within the ambit of this court's rule-making power. (Emphasis added)

451 P.2d 570, 575 - 576. See also Thomas v. State, 566 P.2d 630 (1977).

Since it is certain from these earlier decisions that the legislature cannot "make" new rules without violating Article IV, section 15, an act of the legislature which adds or extends a privilege, as authorized by the Rules of Evidence, cannot be an "addition" to those rules.

Whether characterized as a rule "created" by law or as an amendment to the privileges recognized by the Rules of Evidence, that which the legislature does by law to add to the number of circumstances in which a privilege against

giving testimony or providing evidence shall be recognized may, as a matter of constitutional law, only be characterized as an amendment or change 2/ of a rule of court relating to civil or criminal practice or procedure, requiring concurrence of two-thirds of the membership of each house. 3/

JBC:ljb

Enclosure

2/ See also Leege v. Martin, 379 P.2d 447 (1963):

> Appellees [challenging a statute recognizing forfeiture of a commercial fishing license] contend that in this situation, when there is no specific rule in a particular procedural area, the legislature has no authority to act; since its constitutional power to change "These rules" is limited to promulgated, existent rules upon which a change may be wrought. On the other hand, the state argues that the rules promulgated by this court must be considered in their totality; that it is the body of those rules as an entity which the legislature is empowered to change; that an addition to the body of rules is no less a "change", within the meaning of the constitution, than a deletion or amendment of a specific, existing rule; and that the legislature therefore does have the power to enact a procedural statute in an area not covered specifically by a rule of this court.

379 P.2d 447, 449.

3/ Without regard to the requirements of the two-thirds vote and separate notice in the bill title, the legislature may act, of course, on matters of substance (as distinguished from procedural concerns wherein the legisalture's power to act is limited). Channel Flying, Inc. v. Bernhardt, 451 P.2d 570, 575 (1969); Thomas v. State, 566 P.2d 630, 637 (1977). There is substantial literature examining without resolving

the question of whether rules of evidence are procedural or substantive. See, for example, "The Coordination of Legislative Bill drafting and Statutory Revision with Judicial Rule-Making in Alaska", Legislative Affairs Agency staff memoranda (July 1, 1960):

> "[T]here is general agreement that most rules of evidence are matters of procedure. Most agree, however, that the rule of evidence should be treated as a unit and be considered as being totally substantive or procedural. Levin and Amsterdam propose that all rules of evidence be the primary responsibility of the court with the opportunity for change by legislative review. This, of course, is the clear advantage of the provision in the Alaska constitution over those of New Jersey and Michigan. Permitting rules of evidence to be considered as procedural in Alaska only permits the court initially to promulgate the rules which are always subject to review by the legislature and change by a two-thirds vote. In the most comprehensive review of the problem if the court's power to promulgate rules of evidence, the Institute of Judicial Administration indicates that in several states which have court rule-making power similar to Alaska, evidentiary rules have been made. . . . [T]he federal courts and at least 12 state courts have promulgated certain rules of evidence on the basis of their power to make rules of court practice and procedure. It would seem that the arguments that were made at the Alaska Constitutional Convention for placing the rule-making power in the court applies to rules of evidence also. The courts are immediately concerned and familiar with the subject matter and could maintain a close and constant watch over the rules of evidence. The courts should have the initial responsibility for delays and injustices in the processing of litigation, which is composed in part of the presentation of evidence. It is therefore suggested that rules of evidence be considered matters of procedure with the initial responsibility in the court subject to legislative change."

Staff memorandum, July 1, 1960, p. 39 - 41.

Historically, the legislative process regarded additions or extensions of privilege occurring before August, 1979, as

amendments to the Code of Civil Procedure, requiring approval by two-thirds vote of the members of each house. See sec. 3, Chapter 32, SLA 1975 (adding the privilege of the ombudsman not to testify).

In promulgating the new Rule 501 of the Rules of Evidence, there is no reason to believe that the Court "changed its mind" and decided that the constitutional provision giving the Supreme Court the authority to "promulgate" rules and the legislature the power to "change" them with a two-thirds vote should be undermined by a reference in Rule 501 to privileges created by enactments of the Alaska Legislature. Certainly, as had been the practice in the past, the Court recognized that the legislature could make changes in the body of the rules by enacting legislation in accordance with the constitutional provision and Rule 38(e) of the Uniform Rules of the Legislature.

The additional commentary provided by Professor Saltzburg is not dispositive:

> "When I drafted and the Advisory Committee approved Rule 501 and the Commentary, I believe that we all had in mind avoiding conflicts between the legislature and the courts. One obvious way of doing this was to incorporate statutory privileges into Rule 501, which we did. And the first sentence of the Commentary accompanying Rule 501 makes clear, I think, that we foresaw that the legislature might enact new privilege statutes.
>
> "No one can say with assurance that privileges are more substantive or more procedural. To the extent that they affect out of court behavior they are substantive. To the extent that they control the evidence that courts receive they are procedural. I think that the position that we took in the drafting of Rule 501 was a conscious recognition that privileges were sufficiently procedural so that courts could promulgate rules covering them when they wished and sufficiently substantive that the legislature could enact statutes dealing with them when it wished.
>
> "Since privileges can be viewed as sufficiently substantive to be the proper subjects of ordinary

> legislative action, and since we intended to recognize this in Rule 501, I believe that a privilege rule can be enacted or modified by a majority vote of the legislature. . . ." (Emphasis added)

Letter of Stephen A. Saltzburg to Holli Ploog, February 18, 1981.

Mr. Saltzburg's letter merely underscores the opposite points of the debate. His suggestion that evidentiary matters have both procedural and substantive characteristics confirms my view that the addition of a rule not to testify or provide evidence to the general body of privileges is a matter of practice or procedure and that legislative activity on the subject may only be interpreted as an alteration requiring a two-thirds vote.

As a matter of legislative drafting, debate may now be foreclosed by the Manual of Legislative Drafting. The authority of the Manual derives from the constitution and from a uniform rule of the legislature. By Article II, section 14 of the constitution, "[t]he legislature shall establish the procedure for enactment of bills into law". The legislature has specified that the procedure for handling bills during their consideration by the legislature shall be as set out in AS 24.30 and the uniform rules. AS 24.30.010. Rule 10 directs that the legislative drafting manual prepared and adopted by the Legislative Council "is to be followed in the preparation . . . of all legislative documents and records". The manual itself suggests that matters of "evidence" relate to a rule of practice and procedure, citing the 1960 staff memorandum:

> The basic problem facing the draftsman is whether a matter to be included in a bill is a matter of "administration" or "practice and procedure" or a matter of substance. Rules of practice and procedure are usually considered to include such matters as forms of action, how an action is commenced, the manner of notice, pleading and motion practice, joinder of causes, parties, pre-trial practice and discovery, calendars, the conduct of the trial, stay of proceedings, the procedures by which a judgment is enforced, post-trial proceedings such as motions for new trial, the assessment of costs, the time of appeal, venue, evidence and procedure involved in special

> proceedings such as adoption and probate. The limitation of actions, burden of proof, presumption, creation of courts, and matters of jurisdiction are, on the other hand, considered matters of substance. (Emphasis added)

1981 Legislative Drafting Manual, p. 20.

THE LEGISLATURE OF THE STATE OF ALASKA
ELEVENTH LEGISLATURE

FISCAL NOTE

I. REQUEST
Bill/Resolution No. SB 480
Title "An Act relating to the privilege not to disclose...into an absolute privilege
Requested by Sen. Mulcahy Date 2/20/80

II. FISCAL DETAIL
Agency Affected Department of Law
Program Category Affected Administration of Justice
BRU, Program, or Subprogram(s) Affected Prosecution
(Note: If more than one budget component is affected, separate line-item amounts and funding for each component in the analysis section.)

EXPENDITURES (Thousands of Dollars)

	FY 80	FY 81	FY 82	FY 83	FY 84	FY 85
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 COMMODITIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS, ETC.						
TOTAL	Ø	Ø	Ø	Ø	Ø	Ø

FUNDING (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER (Specify Fund Source)						

POSITIONS

Ohio Shield Law

1. delete references to "reporter" in 09.25.150 -.220

2. add new language stating that a reporter:
   1. has a priveledge
   2. if info. is aquired in the course of reporting he cannot be compelled to disclose his source(s).
   3. the courts shall not compell disclosure of a reporters sources.

Sec. 09.25.150. Claiming of privilege by public official or reporter. Except as provided in §§ 150—220 of this chapter, no public official or reporter may be compelled to disclose the source of information procured or obtained by him while acting in the course of his duties as a public official or reporter. (§ 1 ch 115 SLA 1967)

Editor's note.—Section 2, ch. 115, SLA 1967, provides: "This bill changes Rule 43(h) of the Supreme Court Rules [of Civil Procedure] by adding to the privileges there listed, the conditional privilege for public officers and reporters as to sources of information."

Sec. 09.25.160. Challenge of privilege. (a) When a public official or reporter claims the privilege in a cause being heard before the supreme court or a superior court of this state, a person who has the right to question him in that proceeding, or the court on its own motion, may challenge the claim of privilege. The court shall make or cause to be made whatever inquiry the court thinks necessary to a determination of the issue. The inquiry may be made instanter by way of questions put to the witness claiming the privilege and a decision then rendered, or the court may require the presence of other witnesses or documentary showing or may

order a special hearing for the determination of the issue of privilege.

(b) The court may deny the privilege and may order the public official or the reporter to testify, imposing whatever limits upon the testimony and upon the right of cross-examination of the witness as may be in the public interest or in the interest of a fair trial, if it finds the withholding of the testimony would

(1) result in a miscarriage of justice or the denial of a fair trial to those who challenge the privilege; or

(2) be contrary to the public interest. (§ 1 ch 115 SLA 1967)

Editor's note.—Section 2, ch. 115, SLA 1967 provides: "This bill changes Rule 43(h) of the Supreme Court Rules [of Civil Procedure] by adding to the privileges there listed, the conditional privilege for public officers and reporters as to source of information."

Sec. 09.25.170. Order divesting public official or reporter of the privilege. (a) This section is applicable to a hearing held under the laws of this state

(1) before a court other than the supreme or a superior court;

(2) before a court commissioner, referee, or other court appointee;

(3) in the course of legislative proceedings or before a commission, agency or committee created by the legislature;

(4) before an agency or representative of an agency of the state, borough, city or other municipal corporation, or other body; or

(5) before any other forum of this state.

(b) If, in a hearing, a public official or a reporter should refuse to divulge the source of his information, the agency body, person, official, or party seeking the information may apply to the superior court for an order divesting the official or reporter of the privilege. When the issue is raised before the supreme or a superior court, the application must be made to that court.

(c) Application for an order shall be made by verified petition setting out the reasons why the disclosure is essential to the administration of justice, a fair trial in the instant proceeding, or the protection of the public interest. Upon application, the court shall determine the notice to be given to the public official or reporter and fix the time and place of hearing. The court shall make or cause to be made whatever inquiry the court thinks necessary, and make a determination of the issue as provided for in § 160 of this chapter. (§ 1 ch 115 SLA 1967)

Editor's note.—Section 2, ch. 115, SLA 1967, provides: "This bill changes Rule 43(h) of the Supreme Court Rules [of Civil Procedure] by adding to the privileges there listed, the conditional privilege for public officers and reporters as to sources of information."

Sec. 09.25.180. Order subject to review. An order of the superior court entered under §§ 150—220 of this chapter shall be subject to review by the supreme court, by appeal or by certiorari, as the rules of that court may provide. During the pendency of the appeal, the privilege shall remain in full force and effect. (§ 1 ch 115 SLA 1967)

Editor's note.—Section 2, ch. 115, SLA 1967, provides: "This bill changes Rule 43(h) of the Supreme Court Rules [of Civil Procedure] by adding to the privileges there listed, the conditional privilege for public officers and reporters as to sources of information."

Sec. 09.25.190. Extent of privilege. When a public official or reporter claims the privilege conferred by §§ 150—220 of this chapter and the public official or reporter has not been divested of the privilege by order of the supreme or superior court, neither he nor the news organization with which he was associated may thereafter be permitted to plead or prove the sources of information withheld, unless the informant consents in writing or in open court. (§ 1 ch 115 SLA 1967)

Editor's note.—Section 2, ch. 115, SLA 1967, provides: "This bill changes Rule 43(h) of the Supreme Court Rules [of Civil Procedure] by adding to the privileges there listed, the conditional privilege for public officers and reporters as to sources of information."

Sec. 09.25.200. Application of privilege in other courts. Sections 150—220 of this chapter also apply to proceedings held under the laws of the United States or any other state where the law of this state is being applied. (§ 1 ch 115 SLA 1967)

Editor's note.—Section 2, ch. 115, SLA 1967, provides: "This bill changes Rule 43(h) of the Supreme Court Rules [of Civil Procedure] by adding to the privileges there listed, the conditional privilege for public officers and reporters as to sources of information."

Sec. 09.25.210. Sections 150—220 of this chapter do not abridge other privileges. Sections 150—220 of this chapter may not be construed to abridge any of the privileges recognized under the laws of this state, whether at common law or by statute. (§ 1 ch 115 SLA 1967)

Editor's note.—Section 2, ch. 115, SLA 1967, provides: "This bill changes Rule 43(h) of the Supreme Court Rules [of Civil Procedure] by adding to the privileges there listed, the conditional privilege for public officers and reporters as to sources of information."

Sec. 09.25.220. Definitions. In this chapter, unless the context otherwise requires,

(1) "privilege" means the conditional privilege granted to public officials and reporters to refuse to testify as to a source of information;

(2) "public official" means a person elected to a public office created by the constitution or laws of this state, whether executive, legislative or judicial and who was holding that office at the time of the communication for which privilege is claimed;

(3) "reporter" means a person regularly engaged in the business of collecting or writing news for publication, or presentation to the public, through a news organization; it includes persons who were reporters at the time of the communication, though not at the time of the claim of privilege;

(4) "news organization" means

(A) an individual, partnership, corporation or other association regularly engaged in the business of

(i) publishing a newspaper or other periodical which reports news events, is issued at regular intervals and has a general circulation;

(ii) providing newsreels or other motion picture news for public showing; or

(iii) broadcasting news to the public by wire, radio, television or facsimile,

(B) a press association or other association in individuals, partnerships, corporations, or other associations described in (4)(A)-(i), (ii), or (iii) of this section engaged in gathering news and disseminating it to its members for publication. (§ 1 ch 115 1967)

Editor's note.—Section 2, ch. 115, SLA 1967, provides: "This bill changes Rule 43(h) of the Supreme Court Rules [of Civil Procedure] by adding to the privileges there listed, the conditional privilege for public officers and reporters as to sources of information."

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

POUCH Y · STATE CAPITOL
JUNEAU, ALASKA 99811
907-465-3800

M E M O R A N D U M July 27, 1979

SUBJECT: Ohio "Shield Law," (Work Order 7320)

TO: Senator Patrick Rodey

FROM: John B. Chenoweth
Legislative Counsel

The Ohio "Shield Law" in [Ohio] RD §2739.12:

> "No person engaged in the work of, or connected with, or employed by any newspaper or any press association for the purpose 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, in any legal proceeding, trial, or investigation before any court, grand jury, petit jury, or any officer thereof, before the presiding officer of any tribunal, or his agent, or before any commission, department, division, or bureau of this state, or before any county or municipal body, officer or committee thereof."

The Ohio statute, in contrast to that of Alaska, 1/ allows for no exceptions. And, while there is at least one reported

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1/ The Alaska provisions are AS 09.25.150 - 09.25.220, extracted and set out as an attachment to this memo. Briefly, these provisions describe a conditional reporter's privilege, limited to judicial matters heard in the supreme and superior courts; provide, at length, for procedures by which the reporter's privilege not to testify may be terminated and a decision that he be required to testify may be enforced; and describe the nature and extent of the privilege. Oddly, by AS 09.25.190, the qualified privilege may be remade into one that appears to be absolute as against subsequent disclosure

decision 2/ of an Ohio court narrowing the scope of the exemption by nature of source of information, in practical effect the Ohio law appears virtually absolute in its protection of the confidentiality of most sources on which a journalist would place reliance.

Alaska's provision may be made more nearly like that of Ohio by repealing the language of AS 09.25.150 - 09.25.180 providing for termination of the privilege to refrain from disclosing sources and restating the privilege as one that is absolute, and by extending the privilege to administrative hearings at the state and municipal level. The policy arguments bearing on a decision to submit and support legislation of this kind are, of course, for you to consider.

---

by the reporter himself for his own benefit, for, by that provision, once a reporter claims a privilege and sustains it against a challenge before one or the other court, "neither he nor the news organization with which he was associated may thereafter be permitted to plead or prove the sources of information withheld, unless the informant consents in writing or in open court."

2/ Forest Hills Utility Co. v. City of Heath, 302 NE 2d 593, (Court of Common Pleas, Licking County, 1973), limiting the term "source" to persons, and excluding, from the privilege the information which the reporter requires or information acquired by the reporter from an "inanimate" source.

JBC:slk

Enclosure

CSHB 36

Amend Alaska Shield law -
expand definition of process

reporters footage : video
Concerns:

1. Taking of petition in a news room (not allowed in court room)
2. Shield law never tested; legal opinion is that reporters have no protection.

Amendment is hard. Appears to give court a carte blanche entry to a newsroom.

Dave Grosen