LFC Requester:	Gaussoin, Helen

AGENCY BILL ANALYSIS - 2025 REGULAR SESSION

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SECTION I: GENERAL INFORMATION

{Indicate if analysis is on an original bill, amendment, substitute or a correction of a previous bill}

Date Prepared: 1/29/25 *Check all that apply:*
Bill Number: HB 153 Original X Correction __
Amendment __ Substitute __

Agency Name and Code Number: AOC 218

Sponsor: Rep. Sarah Silva
Short Title: Protect Reporters from Exploitative Spying Act

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SECTION II: FISCAL IMPACT

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY25	FY26		
None	None	Rec.	General

(Parenthesis ( ) indicate expenditure decreases)

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY25	FY26	FY27		
Unknown	Unknown	Unknown	Rec.	General

(Parenthesis ( ) indicate revenue decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY25	FY26	FY27	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total	Unknown	Unknown	Unknown	Unknown	Rec.	General

(Parenthesis ( ) Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to: None.

Duplicates/Relates to Appropriation in the General Appropriation Act: None.

SECTION III: NARRATIVE

BILL SUMMARY

Synopsis: HB 153 enacts the "Protect Reporters from Exploitative State Spying Act" (PRESS Act), to create a qualified statutory privilege that protects covered journalists from being compelled by a state entity to reveal confidential sources and information. Specifically, HB 153 prohibits a state entity, in a matter arising under state law, from compelling a covered journalist to disclose protected information unless a court in the judicial district in which the subpoena or other compulsory process is, or will be, issued determines by a preponderance of the evidence, after providing notice and an opportunity to be heard to the covered journalist, that disclosure is necessary to prevent, or to identify any perpetrator of, an act of terrorism; or that disclosure of the protected information is necessary to prevent a threat of imminent violence, significant bodily harm or death, including specified offenses against a minor.

HB 153 defines "protected information" to mean "any information identifying a source who provided information as part of engaging in journalism and any records, contents of a communication, documents or information that a covered journalist obtained or created as part of engaging in journalism".

HB 153 defines "covered journalist" to mean

> …a person who regularly gathers, prepares, collects, photographs, records, writes, edits, reports, investigates or publishes news or information that concerns local, national or international events or other matters of public interest for dissemination to the public

HB 153 also defines "journalism" to mean "gathering, preparing, collecting, photographing, recording, writing, editing, reporting, investigating or publishing news or information that concerns local, national or international events or other matters of public interest for dissemination to the public".

HB 153 defines "state entity" to mean an entity or employee of the executive branch or an administrative agency of the state government with the power to issue a subpoena or issue other compulsory process.

HB 153 also provides a privilege for a covered service provider from being compelled by a state entity to disclose testimony or documents stored by the provider on behalf of a covered journalist or relating to the covered journalist's personal account or personal technology device, unless a court determines by a preponderance of the evidence that there is a reasonable threat of imminent violence unless the testimony or document is provided and issues and order authorizing the state entity to compel the disclosure of the testimony or document. HB 153 requires a state entity seeking to compel disclosure to inform the court that the testimony or document relates to a covered journalist. The state entity is required to provide the covered journalist with notice and an opportunity to be heard. HB 153, however, permits a delay of not more than 45 days if the court involved determines there is clear and

convincing evidence that notice would pose a clear and substantial threat to the integrity of a criminal investigation or would present an imminent risk of death or serious bodily harm, including specified offenses against a minor. HB 153 provides for an extension of the 45-day period if the court makes a new and independent determination that there is clear and convincing evidence that providing notice to the covered journalist would pose a clear and substantial threat to the integrity of a criminal investigation or would present an imminent risk of death or serious bodily harm under current circumstances.

HB 153 defines "covered service provider" to mean

> a person that, by an electronic means, stores, processes or transmits information in order to provide a service to customers of the person, including:
> (1) a telecommunications carrier and a provider of an information service;
> (2) a provider of an interactive computer service and an information content provider;
> (3) a provider of a remote computing service; and
> (4) a provider of an electronic communication service to the public

HB 153 provides limitations on the content of protected information that is compelled, requiring that it not be "overbroad, unreasonable or oppressive" and be limited to the purpose of verifying published information or describing any surrounding circumstances relevant to the accuracy of the published information, and that it be "narrowly tailored" in subject matter and period of time covered so as to avoid compelling the production of peripheral, nonessential or speculative information.

HB 153 provides exceptions to the protections of the PRESS Act and allows for investigation of a covered journalist or organization that is:

- suspected of committing a crime;
- a witness to a crime unrelated to engaging in journalism;
- suspected of being an agent of a foreign power;
- an individual or organization designated under Executive Order 13224 (50 U.S.C. 1701);
- a specially designated terrorist; or
- a terrorist organization.

HB 153 also defines "document", "personal account of a covered journalist" and "personal technology device of a covered journalist".

HB 153 repeals Section 38-6-7 NMSA 1978, governing news sources and information, prohibiting mandatory disclosure and detailing a special procedure for prevention of injustice.

The effective date of the Act is July 1, 2025.

FISCAL IMPLICATIONS

There will be a minimal administrative cost for statewide update, distribution and documentation of statutory changes. Any additional fiscal impact on the judiciary would be proportional to the enforcement of this law and commenced hearings and proceedings required under the law, as well as challenges to the law. New laws, amendments to existing laws and new hearings have the

potential to increase caseloads in the courts, thus requiring additional resources to handle the increase.

SIGNIFICANT ISSUES

1) HB 153 is substantially similar to the federal bill H.R. 4330, the Protect Reporters from Exploitative State Spying Act (PRESS Act), introduced in 2022. (The bill passed the U.S. House of representatives unanimously, but failed in the Senate in early December 2024. https://pen.org/press-release/after-journalist-shield-bill-fails-in-u-s-senate-pen-america-urges-passage-by-years-end/ .)

   In addition to publishing the text of the PRESS Act, Congress published the following "Purpose and Summary":

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H.R. 4330, the ``Protect Reporters from Exploitative State
Spying Act'' or the ``PRESS Act,'' would create a qualified
federal statutory privilege that protects covered journalists
from being compelled by a federal entity (i.e., an entity or
employee of the judicial or executive branch of the federal
government with power to issue a subpoena or other compulsory
process) to reveal confidential sources and information. It
would provide a similar privilege for a covered service
provider (such as a telecommunications carrier, interactive
computer service, or remote computing service) from being
compelled by a federal entity to disclose testimony or
documents stored by the provider on behalf of a covered
journalist or relating to the covered journalist's personal
account or personal technology device. The measure also
contains exceptions to the covered journalist's privilege where
a court determines, by a preponderance of the evidence and
pursuant to notice and hearing requirements, that disclosure of
information is necessary to prevent or identify any perpetrator
of an act of terrorism or to prevent a threat of imminent
violence, significant bodily harm, or death. Similarly, the
bill allows a federal entity to overcome the privilege for a
covered service provider when a court determines, after the
federal entity seeking the information provides the affected
covered journalist with notice and an opportunity to be heard
in court, that there is a reasonable threat of imminent
violence, and the court issues an order authorizing the federal
entity to compel the disclosure. The bill contains a number of
other measures clarifying its scope and applicability. The
Committee concludes that this legislation is necessary to
ensure that the constitutional guarantees of press freedom and
freedom of speech are protected from unwarranted government
compulsion that threatens to chill the exercise of such rights.
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See https://www.congress.gov/congressional-report/117th-congress/house-report/354/1 . See also this source for a complete recitation of the "Background and Need for the Legislation," including citations to relevant case law. See also, *The PRESS Act: What it is, and why it's important to get it passed*, https://www.spj.org/the-press-act-what-it-is-and-why-its-important-to-get-it-passed/ , *Senate GOP blocks bill to protect journalists after Trump opposes it*, December 10, 2024, https://www.cnn.com/2024/12/10/politics/senate-gop-blocks-press-protections-bill/index.html and *Cotton blocks federal shield law for journalists*, December 10, 2024, https://thehill.com/homenews/senate/5033592-cotton-blocks-federal-shield-law-journalists/ . But see, *The PRESS Act would endanger national security secrets*, November 22, 2024, https://www.penncerl.org/the-rule-of-law-post/the-press-act-would-endanger-national-security-secrets/ .

2. HB 153 repeals Section 38-6-7 NMSA 1978, governing news sources and information,

prohibiting mandatory disclosure and detailing a special procedure for prevention of injustice. In the annotations to the bill, the following are listed:

Attempt to create rule of evidence. — The privilege created by this section, insofar as it protects disclosure in a judicial proceeding of information obtained in gathering, receiving or processing of information for any medium of communication to the public, is an attempt to create a rule of evidence. *Ammerman v. Hubbard Broad., Inc.*, 1976-NMSC-031, 89 N.M. 307, 551 P.2d 1354, cert. denied, 436 U.S. 906, 98 S. Ct. 2237, 56 L. Ed. 2d 404 (1978).
Privilege created by Subsection A is constitutionally invalid and cannot be relied upon or enforced in judicial proceedings, under Subsection C or otherwise. *Ammerman v. Hubbard Broad., Inc.*, 1976-NMSC-031, 89 N.M. 307, 551 P.2d 1354, cert. denied, 436 U.S. 906, 98 S. Ct. 2237, 56 L. Ed. 2d 404 (1978).
Scope of privilege. — In holding that this privilege cannot be relied upon or enforced in judicial proceedings, the supreme court explicitly declined to rule on whether the privilege could properly be asserted in proceedings or investigations before or by any legislative, executive or administrative body or person or to decide the validity of the procedures prescribed for making application to the district court for an order of disclosure directed to such proceedings. *Ammerman v. Hubbard Broad., Inc.*, 1976-NMSC-031, 89 N.M. 307, 551 P.2d 1354, cert. denied, 436 U.S. 906, 98 S. Ct. 2237, 56 L. Ed. 2d 404 (1978).

In the congressional document, previously cited, the following information on state press shield laws is contained:

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While the Supreme Court has declined to interpret the First
And Fourth Amendments to provide the basis for a journalist's
privilege from compelled disclosure of sources and information,
most state legislatures and state courts have provided, to
varying degrees, such protection for journalists. In Branzburg
v. Hayes, the Supreme Court made it clear that states are
``within First Amendment limits, to fashion their own
standards.''\9\ Forty states and the District of Columbia have
enacted press shield laws, while others afford similar
privileges through their state constitutions and common
law.\10\ Only Hawaii and Wyoming provide no such privilege
either through statute or common law.\11\ These laws aim to
protect journalists from being compelled to disclose
information under certain circumstances.\12\ They vary in how
they define: (1) who is a journalist; (2) what unpublished
information or type of source is protected; and (3) what
exceptions are permitted.\13\
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\9\ 408 U.S. 665 (1972).
\10\ Introduction to the Reporter's Privilege Compendium, The
Reporters Comm. For Freedom of the Press, https://www.rcfp.org/
introduction-to-the-reporters-privilege-compendium/.
\11\ Id.
\12\ Reporter's Privilege Compendium, The Reporters Comm. For
Freedom of the Press, https://www.rcfp.org/reporters-privilege/.
\13\ Id.
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Press shield laws vary in how they define what it means to
be a journalist--some base their definition by function and
others by employment. For example, Alabama journalists are
protected if they work for newspapers or television stations,
but not magazines.\14\ Others, such as Colorado, broadly
protect ``newspersons''' and define them as individuals who
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participate in the process of disseminating information to the
public.\15\ Meanwhile, other states do not expressly define who
is a ``journalist'' and would provide some measure of
protection so long as the individual is engaged in legitimate
journalistic efforts and protecting journalistic interests.\16\
Some state shield laws, such as Connecticut's, are broad enough
to cover independent contractors, agents, and student
journalists.\17\
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\14\ Jane E. Kirtley, Shield Laws, First Amend. Encyclopedia,
https://www.mtsu.edu/first-amendment/article/1241/shield-laws.
\15\ COLO. REV. STAT. ANN. Sections 24-72.5-101 to 24-72.5-106.
\16\ Me. Rev. Stat. Ann. tit. 16, Sec.  61.
\17\ Conn. Gen Stat Sec.  52-146t.
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The scope of information that is protected by state press
shield laws varies from state to state. For example, Kentucky
provides some protection for reporters from disclosing the
identity of a source and not the information provided by the
source, but only if the information is published or
broadcasted.\18\ Some states, such as North Dakota, do not
distinguish between confidential and non-confidential
information and sources.\19\ In California, the law only
explicitly protects against contempt sanctions, and the
California state courts have interpreted the law to provide
protections, including a four-part test to protect unpublished
information.\20\
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\18\ KY. REV. STAT. ANN. Sec.  421.100.
\19\ N.D. CENT. CODE Sec.  31-01-06.2
\20\ Reporter's Privilege guide: Alabama--Illinois, SPLC, Aug. 29,
2019, https://splc.org/2019/08/reporters-privilege-guide-1/
?_h=97ebff0e-4462-4d05-9a11-18d3ce11b089.
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Most states also allow for journalists' privileges to be
overcome if the material sought meets specific criteria,
including that the material is necessary and relevant; is not
available through less intrusive means; or concerns an
overriding public interest. The most common exceptions are
related to national security interests or libel actions. For
example, Pennsylvania's protection is absolute in civil cases,
but qualified in criminal or defamation cases.\21\
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\21\ 42 PA. CONS. STAT. ANN. Sec.  5942.
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See https://www.congress.gov/congressional-report/117th-congress/house-report/354/1 .

The Center for Ethics and the Rule of Law at the University of Pennsylvania, however, sees a serious flaw in the PRESS Act:

The absence of a national security exception in the PRESS Act is a serious flaw

Both the PRESS Act and the DoJ regulations fail to provide for the use of compulsory process in pursuing the unauthorized disclosure of classified national security information, especially classified information concerning the communications intelligence activities of the United States. The PRESS Act would codify the lacuna in the existing DoJ regulations that vitiates the ability to enforce 18 U.S.C. § 798, an espionage statute passed by Congress specifically to protect, *inter alia*, the "communications intelligence activities" of the United States. As Harold Edgar and Benno Schmidt observe in their seminal work, "The Espionage Statutes and Publication of Defense Information," § 798 is, at least when compared to other espionage statutes,

including those sections of 18 U.S.C. § 793 that created such controversy in the Assange prosecution, a "model of precise draftsmanship" that (1) makes evident that violation occurs upon knowing engagement in the proscribed conduct, and (2) through its use of the term "publishes" is intended to bar public speech regarding a specific category of classified information that is both "vital and vulnerable to an almost unique degree." When considered by Congress in 1950, this most recent of the nation's espionage laws and the *only* one to specifically criminalize the act of publishing was endorsed by the American Society of Newspaper Editors which, at that time, included as active members leading editors of *The New York Times*.

Despite this history, the government has never employed §798 to prosecute a media entity for publishing "information concerning the communication intelligence activities of the Unites States," and there is nothing to suggest that this is likely to change. Logic suggests that if *The New York Times*' publication revealing the *Stellar Wind* program in 2005 and *The Washington Post*'s publication of the unauthorized Snowden disclosures in 2013, both of which revealed classified information concerning the communications intelligence activities of the United States, prompted no prosecutorial response, it is difficult to conjure a scenario that would rouse the DoJ from its Section 798 torpor. While critics may argue that such a prosecution aimed directly at the act of publication would expose §798 as constitutionally vulnerable, it bears remembering that not only did Congress specifically include "publishes" as a criminal act in §798, but two former Supreme Court justices, Byron White and Potter Stewart, are on record in the Pentagon Papers case as acknowledging that they would have "no difficulty in sustaining convictions under" §798 where a newspaper knowingly published classified communications intelligence information.

Ironically, this reluctance to employ all the criminal sanctions embodied in Section 798 provides the most compelling justification for ensuring that any federal shield law like the PRESS Act include a national security exception that exempts shield protection in those instances where a prosecution is predicated upon an unauthorized disclosure of classified national security information concerning the communications intelligence activities of the United States or any other conduct proscribed by 18 U.S.C. 798. The principal impact of the PRESS Act's creation of a statutory reporter's privilege is most likely to torpedo investigations where the publication of classified information concerning the nation's communications intelligence activities is clearly the product of an unauthorized disclosure by someone with access; i.e.,a leak. In practice, the essence of the vast majority of leak investigations is the pursuit of unknown perpetrators whose unauthorized disclosures come to light only when published by the media, thereby making it readily apparent to investigators that the journalist likely knows the identity of the leaker or has relevant information that will facilitate making that identification. Without a clear exception for investigations involving the unauthorized disclosure of classified information, the PRESS Act effectively immunizes such disclosures because seldom, if ever, will the identity of the leaker making the unauthorized disclosure be known to anyone but the "covered journalist."

One might argue, as *The New York Times* did in its editorial, that the free flow of information and the need to "keep a sharp eye on government" warrants such blanket protections, but prudence and logic dictate that a more balanced approach is justified.

As SCOTUS has presciently observed, “It is thus not surprising that the great weight of authority is that newsmen are not exempt from the normal duty of appearing before a grand jury and answering questions relevant to a criminal investigation.” Nowhere is this investigative avenue more important than in the area of pursuing the unauthorized disclosure of classified national security information. Moreover, while proponents of a federal privilege also insist that it is essential to shield the anonymity of those confidential sources who choose to breach their nondisclosure obligations by surreptitiously speaking to journalists, other statutory protections exist affording alternative avenues for reporting instances of wrongful conduct. Congress has enacted a series of intelligence community whistleblower provisions specifically designed to furnish a “safe harbor” alternative to avoid wrongdoing going unreported or of classified information being compromised through disclosures made outside of proper channels.

https://www.penncerl.org/the-rule-of-law-post/the-press-act-would-endanger-national-security-secrets/ . See also, *A Reporter’s Shield Law is Vital to Prevent Abuses of Power*, October 14, 2024, https://www.nytimes.com/2024/10/14/opinion/editorials/press-act-reporters-leaks-whistleblower.html .

3. HB 153 differs from the federal bill H.R. 4330, in the following ways:

- Removes the definition of “federal entity” and defines “state entity”
- Changes all references to “federal entity” and “federal law,” etc. to apply to a state entity, state law, etc.
- Does not include the language from the federal bill in Section 3(A) relating to “an act of terrorism against the United States” and says, simply, “an act of terrorism.”
- Does not include, in Section 3(B) a reference to a definition of a “minor” as in done in the federal bill
- Does not include federal bill language in Section 6(1) that provides

> Nothing in this Act shall be construed to –
>
> (1) Apply to civil defamation, slander, or libel claims of defenses under State law, regardless of whether or not such claims or defenses, respectively, are raised in a State or Federal court; or

The current Section 38-6-8 NMSA 1978 does not provide an exception for defamation, slander or libel. Congress provides that

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Most states also allow for journalists' privileges to be
overcome if the material sought meets specific criteria,
including that the material is necessary and relevant; is not
available through less intrusive means; or concerns an
overriding public interest. The most common exceptions are
related to national security interests or libel actions. For
example, Pennsylvania's protection is absolute in civil cases,
but qualified in criminal or defamation cases.\21\
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\21\ 42 PA. CONS. STAT. ANN. Sec.  5942.
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See https://www.congress.gov/congressional-report/117th-congress/house-report/354/1 .

New Mexico is an exception among most states.

4. While the definition of “federal entity” in H.R. 4330 includes an entity or employee of the

judicial branch, in addition to an entity or employee of the executive branch or an administrative agency of the government with the power to issue a subpoena or issue other compulsory process, the HB 153 definition of "state entity" does *not* include an entity or employee of the judicial branch.

5. HB 153, in enacting the PRESS Act, requires various standards of proof to be met, depending upon the circumstances. Under the "preponderance of the evidence" standard, the burden of proof is met when the party with the burden convinces the fact finder that there is a greater than 50% chance that the claim is true. https://www.law.cornell.edu/wex/preponderance_of_the_evidence . "Clear and convincing evidence" is a medium level burden of proof which is a more rigorous standard to meet than the preponderance of the evidence standard, but less rigorous standard to meet than proving evidence beyond a reasonable doubt. In *Colorado v. New Mexico*, 467 U.S. 310 (1984), the U.S. Supreme Court defined "clear and convincing" to mean that the evidence is highly and substantially more likely to be true than untrue. Id.

6. For seeking an otherwise prohibited disclosure, HB 153 requires a court order from a court "in the judicial district in which the subpoena or other compulsory process is, or will be, issued." This language seeks to have a court rule on a matter where there may not be a case opened (i.e. where compulsory process may be issued). As drafted then, it could be read to require the filing of a court case seeking disclosure before any subpoena or compulsory process is filed, reversing the standard procedure.

7. Section 4(D) allows for a court to delay proceedings for forty-five days, but does not establish when the proceeding must originally occur. It could be assumed it is the days provided by rule or statute for responding to subpoenas or other compulsory process, but it is not clearly stated.

8. Under Section 5(A) a judge must limit the content disclosed if the request is "overbroad, unreasonable, or oppressive." This language does not mirror any current legal standard and so exists as a subjective standard that judges will have to interpret. The language as a standard does not lend itself to a consistent interpretation. Such interpretations may vary widely especially prior to any appellate court review.

PERFORMANCE IMPLICATIONS

The courts are participating in performance-based budgeting. This bill may have an impact on the measures of the district courts in the following areas:

- Cases disposed of as a percent of cases filed
- Percent change in case filings by case type

ADMINISTRATIVE IMPLICATIONS

See "Fiscal Implications," above.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

None.

TECHNICAL ISSUES

OTHER SUBSTANTIVE ISSUES

ALTERNATIVES

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

AMENDMENTS