THE ATTORNEY GENERAL OF TEXAS

AUSTIN, TEXAS 78711

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April 12, 1973

RQ 125

Honorable Price Daniel, Jr.
Speaker of the House of Representatives
Texas State Capitol Building
Austin, Texas

Letter Advisory No. 8

Re: Constitutionality of House Bill 10 and Senate amendments thereto.

Dear Speaker Daniel:

House Bill 10, as amended by the Senate and submitted with your request for our opinion provides that professional newsmen shall not be compelled to disclose information they have received or the source of such information. It further provides, however, that the privilege so created shall not be available in several specific instances, not pertinent to your request, and that:

> " . . . any person acting within the scope of a legal proceeding under Section (a) of this article, or any private citizen acting in his own behalf, who is seeking information or the source thereof protected under this article may petition the Texas Supreme Court for an original writ of mandamus compelling such disclosure and the Supreme Court may issue the writ of mandamus or any other mandatory or compulsory writ or process if it is proven by a preponderance of the evidence that the information cannot be obtained by any alternative means and that the withholding of such information would cause or threaten substantial harm or injury, endanger public health and welfare, or cause substantial injustice . . . ."

Mandamus is a legal remedy available to compel action on the part of those who are charged with positive duties by virtue of their official

positions as in the case of public officers, or quasi-official positions as in the case of corporate officers. It is not available to compel discretionary acts, but is limited to directing the performance of ministerial acts only. The right to have the act performed must be beyond dispute. It must be clear and unquestioned, and, should it appear that it depends upon a disputed question of fact, the Supreme Court must decline jurisdiction. A writ of mandamus may not be against an individual except to enforce performance of a public or quasi-public duty and it has been held to be an inappropriate remedy to require inspection of private papers.

Although there are indications of a tendency to disregard technical distinctions between writs of mandamus and mandatory injunctions, the distinction is a real one and cannot be disregarded when dealing with the jurisdiction of the Supreme Court. Section 3 of Article 5 of Constitution is as follows:

> "The Supreme Court shall have appellate jurisdiction only except as herein specified, which shall be co-extensive with the limits of the State. Its appellate jurisdiction shall extend to questions of law arising in cases of which the Courts of Civil Appeals have appellate jurisdiction under such restrictions and regulations as the Legislature may prescribe. Until otherwise provided by law the appellate jurisdiction of the Supreme Court shall extend to questions of law arising in the cases in the Court of Civil Appeals in which the Judges of any Court of Civil Appeals may disagree, or where the several Courts of Civil Appeals may hold differently on the same question of law or where a statute of the State is held void. The Supreme Court and the Justices thereof shall have power to issue writs of habeas corpus, as may be prescribed by law, the said courts and the Justices thereof may issue the writs of mandamus, procedendo, certiorari and such other writs as may be necessary to enforce its jurisdiction. The Legislature may confer original jurisdiction on the Supreme Court to issue writs of quo warranto and mandamus in such cases as may be specified, except as against the Governor of the State.
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> "The Supreme Court shall also have power, upon affidavit or otherwise as by the court may be determined, to ascertain such matters of fact as may be necessary to the proper exercise of its jurisdiction.

> "The Supreme Court shall appoint a clerk, who shall give bond in such manner as is now or may hereafter, be required by law, and he may hold his office for four years and shall be subject to removal by said court for good cause entered of record on the minutes of said court who shall receive compensation as the Legislature may provide." (Emphasis added)

The Legislature is empowered only to confer original jurisdiction to issue writs of quo warranto and mandamus. There is no authority for the Legislature to permit the Supreme Court to issue injunctions as part of its original jurisdiction and it is well established that the Legislature cannot confer jurisdiction upon the Supreme Court not permitted by the Constitution.

The amendment to House Bill 10 calls for the issuance of "the writ of mandamus or any other mandatory or compulsory writ or process". Calling the writ a writ of mandamus does not make it one and since the amended bill also calls for the determination of questions of fact and for application of the writ to persons who are not officials or quasi-officials of the State, the writ is not a writ of mandamus but rather would be a mandatory injunction. The Legislature may not confer original jurisdiction upon the Supreme Court to grant such a writ or to grant "any other nam- datory or compulsory writ or process".

The first question which you have submitted to us is in two parts. The first part asks whether the Supreme Court may be given original jurisdiction to issue a compulsory writ directed to a private party such as a professional newsman. As indicated, our answer would be that the Supreme Court may be given original jurisdiction to issue a true writ of mandamus or a writ of quo warranto against a private party who is exercising a quasi-official duty required of him by the law. The second part of the question asks whether the remedy contemplated by the Senate amendments is within the meaning of a writ of mandamus over which the Legislature may confer original jurisdiction upon the Supreme Court. We must answer that it is not, inasmuch as it contemplates much more than falls within the meaning of a writ of mandamus and calls for a man- datory injunction which cannot constitutionally be incorporated in the

original jurisdiction of the Supreme Court.

Your second question is: "May the Legislature by law provide a method by which the Supreme Court may ascertain matters of fact, as provided in the Senate amendments?" The jurisdiction of the Supreme Court is appellate. Ordinarily, it may not determine questions of fact. Since a writ of mandamus such as would fall within the original jurisdiction of the Supreme Court may not depend upon questions of fact but must be one to which the parties are entitled as a matter of right, the Supreme Court may not be authorized to ascertain facts in connection with such a writ.

Your third question asks whether findings that the withholding of information "would cause or threaten substantial harm or injury, endanger public health and welfare, or cause substantial injustice" may constitutionally be made by the judiciary. As we have stated, no fact-findings are authorized to be made by the Supreme Court. We have no proposed legislation before us which seeks to lodge such authority in any other part of the judiciary and we can, therefore, express no opinion.

We conclude that House Bill 10 may not confer upon the Supreme Court original jurisdiction to compel disclosure of a matter otherwise privileged, by a writ of mandamus.

See, 6 Texas Practice Remedies (2d Ed. 1973) § 302, p. 292, et seq.; 37 Tex. Jur. 2d, Mandamus § 1, p. 584; Cobra Oil and Gas Corp. v. Sadler, 447 S. W. 2d 887 (Tex. 1969); Shamrock Fuel and Oil Sales v. Tunks, 416 S. W. 2d 779 (Tex. 1967); Mauzy v. Legislative Redistricting Board, 471 S. W. 2d 570 (Tex. 1971); Depoyster v. Baker, 34 S. W. 106 (Tex. 1896); Furnish v. Robison, 157 S. W. 744 (Tex. 1913); Sherman v. Hatcher, 299 S. W. 227 (Tex. 1927); Mattinson v. McDonald, 109 S. W. 2d 457 (Tex. 1937); Jackson v. McClendon, 187 S. W. 2d 374 (Tex. 1945); 55 CJS, Mandamus, § 239, p. 451; Winfree v. May, 52 S. W. 2d 357 (Tex. Civ. App., Galveston, 1932, no writ); Boston v. Garrison, 256 S. W. 2d 67 (Tex. 1953); Texas Employers Insurance Ass'n. v. Kirby, 152 S. W. 2d 1073 (Tex. 1941); Lane v. Ross, 249 S. W. 2d 591 (Tex. 1952); Ramsey v. Gardner, 279 S. W. 2d 584 (Tex. 1955); Love v. Wilcox, 28 S. W. 2d 515 (Tex. 1930); In re House Bill 537, 256 S. W. 573 (Tex. 1923); Moody v. City of University Park, 278 S. W. 2d 912 (Tex. Civ. App., Dallas, 1955, err. ref., n. r. e.).

Very truly yours,

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