



Testimony to the Twenty -Fourth Legislature, 2008 Session

House Committee on Judiciary
The Honorable Tommy Waters, Chair
The Honorable Blake K. Oshiro, Vice Chair

Tuesday, February 5, 2008, 2:00 p.m.
State Capitol, Conference Room 325

by
Hawaii Supreme Court Standing Committee on the Rules of Evidence

WRITTEN TESTIMONY ONLY

Bill No. and Title: House Bill No. 2557, Relating to Evidence

Judiciary's Position:

The Standing Committee on the Rules of Evidence (Evidence Committee) respectfully requests that this measure be deferred and referred to it for interim study and a report to the 2009 Legislature.

In order to assist the Legislature in its evaluation of new evidence proposals and to enable the Judiciary to fulfill its constitutional responsibility to assert primacy in matters "relating to process, practice, procedure and appeals," Chief Justice Ronald Moon created the Evidence Committee in 1993 with a mandate "to study and evaluate proposed evidence law measures referred by the Hawaii Legislature, and to consider and propose appropriate amendments to the Hawaii Rules of Evidence.

According to Article VI, section 7 of the Hawaii Constitution, the Hawaii Supreme Court has the "power to promulgate rules...relating to process, practice, procedure and appeals, which shall have the force and effect of law." This constitutional mandate includes rules of evidence. Beginning with the promulgation of the Hawaii Rules of Evidence in 1980, the Supreme Court has elected to share this power with the Legislature. See Bowman, *The Hawaii Rules of Evidence*, 2 U. Haw. L. Rev. 431 n.3 (1981)("The cooperative approach was designed in part to avoid a separation of powers struggle between the legislative and judicial branches of

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House Bill No. 2557, Relating to Evidence
House Committee on Judiciary
February 5, 2008
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government"). Evidence rules are thus on the legislative agenda. But the Evidence Committee has a compelling interest in generating and voicing opinions regarding evidence measures such as that contained in House Bill No. 2557.

To assure the Judiciary a fair opportunity to exercise its constitutional function, the House and Senate Judiciary Committees, pursuant to a practice established several years ago, refer all new evidence measures to the Evidence Committee for interim study and a written report to the very next session of the Legislature. In this way the Evidence Committee is able to supply informed opinions to the Legislature, and the Legislature continues to have the final say in these matters. This procedure has worked well for the better part of the past decade. Accordingly, the Evidence Committee requests deferral and referral of House Bill No. 2557, because it is a new measure that has just come to our attention.

Thank you for the opportunity to testify on this measure.

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**TESTIMONY OF THE STATE ATTORNEY GENERAL
TWENTY-FOURTH LEGISLATURE, 2008**

ON THE FOLLOWING MEASURE:

H.B. NO. 2557, RELATING TO EVIDENCE.

BEFORE THE:

HOUSE COMMITTEE ON JUDICIARY

DATE: Tuesday, February 5, 2008 **TIME:** 2:00 PM

LOCATION: State Capitol Room 325
Deliver to: Committee Clerk, Room 302, 5 copies

TESTIFIER(S): Mark J. Bennett, Attorney General
or Lance M. Goto, Deputy Attorney General

Chair Waters and Members of the Committee:

The Department of the Attorney General appreciates the intent of this measure, but has concerns.

The Attorney General supports in general the concept of a reporter's privilege because it maximizes the public's access to important information, by making it more likely that a person will disclose significant information to a reporter. This increase in the free flow of information also promotes government accountability.

However, the Attorney General has concerns about the broad and virtually unlimited scope of the privilege provided in this bill. No exception, for example, is provided even where law enforcement investigation of serious crimes, or the safety and security of the public, would be severely impaired. An exception should be provided to ensure that law enforcement and public safety are not compromised. The Attorney General also has concerns that the bill's protection of "any unpublished information" is too broad and unnecessary.

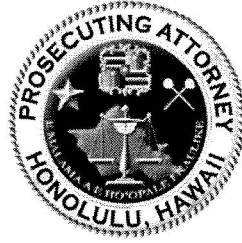
In addition, there may be limited circumstances under which a criminal defendant, for example, may have a constitutional right to disclosure of the privileged information. Because the precise details and scope of any such right are unclear, another exception

should be added to subsection (c) that reads: "a party to a legal case has a constitutional right to the disclosure of the information."

DEPARTMENT OF THE PROSECUTING ATTORNEY
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PETER B. CARLISLE
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DOUGLAS S. CHIN
FIRST DEPUTY PROSECUTING ATTORNEY

**THE HONORABLE TOMMY WATERS, CHAIR
HOUSE COMMITTEE ON JUDICIARY
Twenty-Fourth State Legislature
Regular Session of 2008
State of Hawai'i**

February 5, 2008

RE: H.B. 2557; RELATING TO EVIDENCE.

Chair Waters and members of the House Committee on Judiciary, the Department of the Prosecuting Attorney submits the following comments in opposition to H.B. 2557.

The purpose of this bill is to add a new section to Hawaii Revised Statutes ("HRS") chapter 621 which relates to evidence and witnesses. The section that is added provides that a journalist or newscaster who has met applicable standards of journalism ethics, shall not be required by a legislative, executive or judicial officer to disclose by subpoena or otherwise, the source of information or information obtained in the course of gathering, receiving, or processing of information for communication to the public. The bill also exempts instances where there is probable cause to believe that the journalist or newscaster has committed, is committing or is about to commit a crime or that the journalist or newscaster is a percipient witness to the commission of a crime.

We oppose this bill since it fails to recognize a legitimate and significant public interest in the investigation and prosecution of crime. The proposed shield could deny crime victims and their families, their right for a judicial resolution of the crime and would hamper the search for the truth in criminal cases. And what if the information withheld under this shield was helpful to a criminal defendant because it implicated somebody else?

We are also troubled by the provision that the protection may be claimed by anyone who can establish they have complied with and met applicable (but unspecified) standards of journalism ethics. We wonder whether it will be possible to determine if someone has complied with an ethical standard without being able to inquire as to what they know and how they got the information. Furthermore, it is our understanding that there are some variations in standards promulgated by organizations; given this uncertainty, we are concerned that this provision may be overbroad and ambiguous.

For these reasons, we oppose House Bill 2557 and thank you for this opportunity to testify.

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Disappeared News



News you may not find in the local media. Learn why it was disappeared.

Larry Geller
Disappeared News
disappearednews.com

HB2557
JUD
Tuesday February 5, 2008
2:00 p.m.
Room 325
5 copies

COMMITTEE ON JUDICIARY

Rep. Tommy Waters, Chair
Rep. Blake K. Oshiro, Vice Chair

February 4, 2008

Re: HB2557—Protects the disclosure of sources for journalists and newscasters

In Support

A shield law for journalists in Hawaii would echo the protections now being sought on the federal level where the San Francisco Chronicle observed, "Journalists are under siege from federal prosecutors and civil litigants seeking to unmask their sources. In the end, 176 Republicans joined virtually all Democrats to support the [federal] bill." I reported on this in Disappeared News, which is an Internet blog, on October 17, 2007.

A welcome addition to this bill would be to include protection for the blogs that supplement the more traditional print and television news media. More and more readers are abandoning newsprint in favor of reading their news online, particularly the younger people, who demand both news and opinion that the commercial media are unlikely to provide.

Disappeared News is but one example. There are several online bloggers in Hawaii who post daily, very much in the same way that newspaper reporters file their stories. Instead of delivery to your door, this news is deposited in your email inbox.

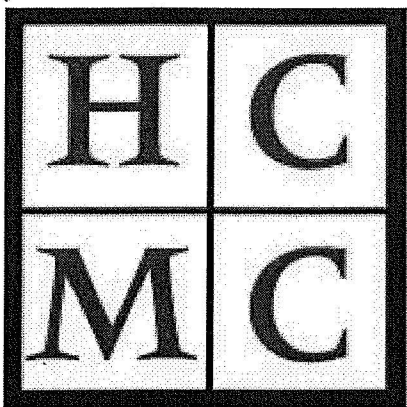
I would like to suggest an alternative approach that could avoid most of the issues of credentialing who is entitled to protection. Follow the example of whistleblower protection laws which protect people no matter what they do for a living.

No matter what your profession, whether you're a secretary or an engineer, you can seek protection as a whistleblower. Shield law protections can be similarly based on the kind of information to be protected rather than the professional status of the person involved.

I recommend to the Chair and to the Committee that this bill should be passed.


Larry Geller

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Honolulu Community Media Council

Since 1970

P. O. Box 22415
Honolulu, Hawaii 96823-2415

Representative Tommy Waters, Chair
Representative Blake K. Oshiro, Vice-chair
Committee on Judiciary
Tuesday, February 5, 2008

Support of HB 2557 RELATING TO EVIDENCE

The Honolulu Community Media Council (HCMC) is composed of individuals from the community and the news media and is a non-partisan, non-profit, non-governmental independent group. It seeks to promote accurate and fair journalism in Hawaii, broaden public understanding of the role of the media, foster discussion of media issues, strengthen public support for First Amendment rights and freedoms, and improve public access to information. We strongly support HB 2557, Relating to Evidence, which would provide journalist-source protection similar to that available in 36 states and the District of Columbia.

The Media Council believes that strong and effective protection of journalist-source privilege through what is known as a "Shield Law" is essential to an independent press in our free society. Without such protection, journalists face the constant threat of subpoenas for testimony and documentary information they have gathered from confidential sources. Sometimes, promising confidentiality is the only means of obtaining important information in the public interest. As a practical matter, sources sometimes fear retaliation or loss of privacy so the only means of obtaining disclosure of information is keeping confidential the source of that information.

The Media Council believes that enacting a Shield Law is the best means of assuring the continued free flow of information that is vital to the public interest.

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There already are many privileges created to promote open communication in society, including the attorney-client privilege, the doctor-patient privilege, and the priest-penitent privilege. Indeed, members of the state Legislature have a privilege to freely and openly debate the issues of the day because such open communication is important to our society. A journalist-source privilege serves the same important public policy goals.

The Honolulu Community-Media Council supports the broad coverage of the privilege as provided in HB 2557 as the best means of extending such protection .

The Honolulu Community Media Council encourages the committee to pass HB 2557. Thank you for this opportunity to testify on this matter of great importance to the First Amendment and a free and open society.

Gerald Kato
Honolulu Community Media Council
Board of Directors

C80075

Richard S. Miller
Member, Board of Directors, Honolulu Community-Media Council
E-mail: rmiller@aya.yale.edu

TESTIMONY IN SUPPORT OF HB 2557, RELATING TO EVIDENCE

For hearing to be held on Tuesday, February 5, 2008 at 2:00PM in Conference Room 325.

Representative Tommy Waters, Chair; Representative Blake K. Oshiro, Vice-chair and distinguished members of the House Committee on Judiciary:

I am currently a member of the Board of the Honolulu Community-Media Council. I have been a member of the Media Council since 1983 and have served as chair (president).

I strongly support HB 2557, which creates a "shield law." I urge you to pass it for the reasons so very well-stated by Professor Gerald Kato, U.H. School of Communications, in his testimony to this committee on this day. I will not burden you by repeating his testimony.

Please note that I am very strongly in favor of including section (b) of this bill, which would extend the privilege to those, other than professional journalists, who are exercising a journalistic function in conformity with journalistic ethics:

- (b) The limitation on compellable testimony established by this section may be claimed by and afforded any individual who can properly establish that the individuals has complied with and met applicable standards of journalism ethics.

I regret that I am not able to testify in person today.

Mahalo for considering my testimony.

Respectfully,



Richard S. Miller
Professor of Law, Emeritus and former dean, The Wm. S. Richardson School of Law.
(The views expressed here are my own and not necessarily those of the University of Hawaii.)

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JUDtestimony

From: hunter [hunterbishop@hawaii.rr.com]
Sent: Monday, February 04, 2008 7:09 PM
To: JUDtestimony
Subject: HB 2557 testimony

Hunter Bishop
Hilo Unit Representative, Hawaii Newspaper Guild
808-969-3088
Publisher, www.hunterbishop.com
hunterbishop@hawaii.rr.com
808-965-1009/808-987-5186

Rep. Tommy Waters, Chair
Committee on Judiciary
Hawaii State House of Representatives
415 South Beretania St.
Honolulu, Hawaii

RE: Hearing on HB2557, Tuesday, Feb. 5, 2 p.m.
Conference Room 325, State Capitol Building

Honorable Chairman Waters and members of Committee on Judiciary,

I wish to testify on HB2557.

I have been a journalist working for various newspapers and magazines on the Mainland and Hawaii since I started my career in 1976. I worked as a reporter and editor for the Hawaii Tribune-Herald in Hilo for 17 years until October 2005, when I began working for the Hawaii Newspaper Guild.

Since July 2006 I have written a blog under my own name, on my own time and with minimal compensation, focusing on government and politics of the District of Puna and the Island of Hawaii. Although a blog provides a different format and requires different style for my work, I still consider it journalism in that I am providing news and commentary on a regular basis about matters of general public interest to my community.

When necessary on occasion I use unnamed sources for the work that I do and I ask that the Legislature provide the protections in HB 2557 to all those practicing journalism whether in the traditional media or in the newer, emerging forms of electronic journalism.

By my reading of HB 2557, it seems that I may have protection as a journalist formerly employed by a newspaper. But apparently that would not protect another blogger, who has not previously worked with a newspaper, TV station or other media outlet as described in the bill, from receiving protection when doing the same work.

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I have reviewed SB2473, a bill with similar intent, and prefer the language in that bill as it applies to the definition of journalism and the work that journalists do.

I am also troubled by the term “complied with and met applicable standards of journalism ethics” in Section 1(b) of HB 2557, which must be met to claim the limitations established by the proposed legislation. Standards of journalism ethics are not always clearly defined and neither is the test of compliance with standards of journalism ethics.

Thank you for this opportunity to testify on HB2557. I am available to answer questions or to clarify my remarks. Please contact me at the numbers and addresses provided above.

Sincerely,

Hunter Bishop

Click hunterbishop.com, online daily from Pahoia, Hawaii.

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JUDtestimony

From: Andy Parx [redacted]
Sent: Monday, February 04, 2008 7:12 PM
To: JUDtestimony
Subject: Testimony on bill 2557- Reporters' shield

Testimony on Bill HB 2557 The Reporters' shield Law
Andy Parx, Kaua'i

Aloha Committee memebrs

A reporters' shield bill is, by definition, based on protecting the information in a report from inquest..

The protection for this privilege is for the reporter, as distinguished from those not engaged in reporting. Those who report news need protection from revealing the information in question.. That is the reason for this bill.

The gainful employment in commercial dissemination methods of a reporter's product is of no factor whatsoever in determining if the person in question is gathering and disseminating information. Non-commercial reports are ubiquitous on the internet and many are more detailed reports than any brick and mortar press can produce, yet their reporters are no doubt engaged in reporting.

A more simple yet applicable standard for determining eligibility would be to protect "reporters" who are defined as "any person(s) engaged news gathering and dissemination", perhaps using a "reasonable man" standard, rather than definitions using professional status or ethics as a guide, as some current drafts of the bill suggest

Please recognize and protect the public-interest reporters, especially those who employ the technological future of media for their reporting.

I thank you for considering this alternate proposal

Full disclosure: I have been a journalist for 40 year with 30 of them on Kaua'i with newspaper television and on-line experience. I am currently and Editor and Publisher of the Parx News Net (PNN), a Kaua'i news service with almost 1000 subscribers.

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HOUSE OF REPRESENTATIVES
TWENTY-FOURTH LEGISLATURE REGULAR SESSION OF 2008
COMMITTEE ON JUDICIARY

TO: Representative Tommy Waters, Chair
Representative Blake K.Oshiro, Vice Chair
Members of the Committee

FR: Glenn Cannon, President, Screen Actors Guild Hawaii Branch
Brenda Ching, Executive Director, Screen Actors Guild Hawaii Branch
Michael Largenticha, President, American Federation of Musicians, Local 677
Brien Matson, Vice President, American Federation of Musicians, Local 677

RE: Testimony in Support of House Bill 2557
Relating to Evidence

Dear Chair, Vice-Chair and Members of the Committee:

We are submitting testimony on behalf of the Screen Actors Guild (SAG) and the American Federation of Musicians (AFM), Local 677. Collectively we represent 1,000 union members who work in the film and music industry.

We support the intent of House Bill 2557 which would protect the disclosure of sources for journalists and newscasters.

Thank you for giving us the opportunity to submit testimony on House Bill 2557.

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P.O. Box 3141
Honolulu, HI 96802
Feb . 5, 2008

House Judiciary Committee
State Capitol
Honolulu, HI 96813

Re: House Bill 2577

Committee Members:

We want to thank you for taking up the issue of protecting journalists' sources. This is an important step toward a free flow of information and reporting of information crucial to the public and democracy.

Utah's Supreme Court just recently handed down a rule that protects journalists' sources, making a total of 36 states and the District of Columbia that offer some form of protection for confidential sources.

We think it is time Hawaii joined their ranks.

The national Society of Professional Journalists also endorses strong shield laws.

Every day reporters face the possibility of subpoenas to get information, sources or unused details – whether they be outtakes or reporter's notes – because conventional sources of information won't or can't give out basic information needed for news reports. Media attorney Jeff Portnoy estimates that he has handled 40-50 such subpoenas.

There are times reporters have to use confidential sources to root out corruption, find out whether government is doing its job – the list is endless. That bond between source and reporter is sacred. Any reporter who gives up a source will discover he or she no longer has sources. Oftentimes, sources want their identities hidden because they fear retribution, whether it is loss of a job or threats to him and his family.

A reporter will go to jail rather than give up that name of a source. We have been lucky because attorneys like Portnoy have been able to persuade judges to take other courses of action.

But that may not always be the case

May we suggest some changes to the bill? We see little reason to distinguish between a journalist and a newscaster. We believe "otherwise associated with" makes or previously employed unnecessary. We use the word connected because that is in the California shield law. We also want to make sure that such privilege extends to digital media as that is the frontier for the news media.

- (a) [A journalist or newscaster] A publisher, editor, reporter, or other person presently [or previously] employed or otherwise [associated] connected with any newspaper, magazine, news agency, press

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association, wire service, or radio or television transmission station or network, or digital media operated by those organizations, or any person who has been so connected or employed, shall not be required by a legislative, executive, or judicial officer or body, or any other authority having the power to compel testimony or the production of evidence, to disclose, by subpoena or otherwise:

The issue has been around since the turn of the century. This is not an easy issue to resolve, but 36 other states have chosen this route.

Thank you for the opportunity to express our opinions on this extremely important issue.

Regards,

Stirling Morita
FOI Committee Chairman
Hawaii Chapter SPJ

000082

JUDtestimony

From: Joan Conrow [REDACTED]
Sent: Monday, February 04, 2008 10:32 AM
To: JUDtestimony
Subject: HB 2557 Testimony 2-5-08 hearing

Testimony for JUDICIARY HEARING, 2 p.m., Tuesday, Feb. 5, 2008 on Bill 2557.

Feb. 4, 2008

Dear Chairman Waters and Judiciary Committee Members:

I am writing to thank you for taking up the issue of a journalism shield law, HB 2557.

I appreciate your efforts to protect the ability and long-standing privilege of journalists to provide their sources with a guarantee of confidentiality.

It would be wonderful if every source was willing to be named, but many people fear — quite legitimately — losing their jobs, reputation, influence, insider status or what have you by sharing their information on the record.

As journalists, we need to have access to this information to fully evaluate and report the news, and I am grateful that this bill seeks to protect us from revealing confidential sources.

However, I am a bit concerned about the bill's language limiting protection to individuals who have "complied with and met applicable standards of journalism ethics." In this era of "advertorials" and "infotainment" — concepts that have become commonplace in mainstream media — the definition of journalistic ethics has become increasingly vague.

I think it would be difficult for even media representatives, much less lawmakers, to reach consensus on such a definition, and I believe reporters would have very different responses than their editors, publishers and producers, who often are more concerned with pleasing advertisers and increasing profits than reporting the news.

I'm also concerned that bloggers, independent journalists and others who are disseminating information over the Internet might not be protected under the bill's current language. I urge you to consider their needs, as well, because they generally lack the resources available to corporate media in fighting off spurious attempts to force disclosure of information or halt its distribution.

Thank you for considering my testimony and for your careful deliberation in this important issue.

Sincerely,
Joan Conrow
Journalist and Blogger
Kauai

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2/4/2008

Testimony of Douglas White
Regarding House Bill 2557
Offered to the House Committee on Judiciary.

DATE: February 5, 2008

TIME: 2:00 pm

LOCATION: State Capitol, Room 325

Chair Waters, Vice-Chair Oshiro, and members of the Committee,

I support the intent of House Bill 2557 and suggest amendments to simplify its applicability and to incorporate bloggers under the proposed immunity.

For several years I have been writing a blog about Hawaii politics at Poinography dot com. Some of you are more familiar with it than your colleagues; indeed, I may have offended some of you in the past on my blog and today I find myself at your mercy. Your opinions of my blog are not the point, of course. With the benefit of my ten sessions of experience working among the House staff, I try to provide another perspective to my readers.

Moving to the contents of the bill, my work at the blog has generated no revenue, and I have never been employed by "any newspaper, magazine, news agency, press association, wire service, or radio or television transmission station or network." On rare occasions I engage in original research via sunshine law requests and personal contacts throughout the political community, however, my blog (as is typical of many blogs) more often only provides additional context or insight on the work of paid media professionals. Thus, I am concerned that bloggers would have trouble asserting the protection afforded by this bill.

I respectfully request that you carefully reconsider the "public good" provided by shielding journalists from being forced to reveal confidential sources, and then ponder whether this public good would be better served by shielding anyone performing that public service. In its current form HB 2557 unnecessarily restricts the protection to "journalist[s] or newscaster[s] presently or currently employed by ..." [as above]. It also provides protection to "any individual who can properly establish that the individuals [sic] has complied with and met applicable standards of journalism ethics." While "journalism ethics" is high-sounding, no guidance is provided in the bill as to how a person (like myself) would go about "establishing" compliance with such a nebulous concept. Furthermore, one can envision circumstances (both actual and hypothetical) where an individual deserving of protection may have a bit of trouble "establishing" his or her compliance. The act of performing the public good, regardless of credentials or the ethical history of the actor, should be the focus of the bill.

To that end, I urge the Committee to consider the language of Senate Bill 2473. That bill is less exclusive in its application, and has more of a focus on the gathering and dissemination "of matters of local, national, or worldwide events or other events of public concern or public interest or affecting the public welfare." I take no position on the specific limits placed on the shield privilege, but I do acknowledge that the privilege should not be absolute.

Mahalo for providing this opportunity to testify.

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