



**TESTIMONY OF  
THE DEPARTMENT OF THE ATTORNEY GENERAL  
TWENTY-SIXTH LEGISLATURE, 2012**

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**ON THE FOLLOWING MEASURE:**  
H.B. NO. 2016, RELATING TO EVIDENCE.

**BEFORE THE:**  
HOUSE COMMITTEE ON JUDICIARY

**DATE:** Thursday, February 2, 2012 **TIME:** 2:00 p.m.

**LOCATION:** State Capitol, Room 325

**TESTIFIER(S):** David M. Louie, Attorney General, or  
Deirdre Marie-Iha, Deputy Attorney General

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Chair Keith-Agaran and Members of the Committee:

This bill clarifies that the journalists' shield applies to newscasters, editors, and bona fide owners, as well as journalists. The Department of the Attorney General (the "Department") interprets this to be a clarification of the spirit and intent of the original bill, and we see no legal bar to the proposed amendments to the journalists shield law included within this measure.

The Department does, however, have some significant concerns about existing wording in Act 210, Session Laws of Hawaii 2008. We therefore respectfully urge the Committee to amend Act 210, Session Laws of Hawaii 2008, to: (1) add an exception for parties in criminal cases who have a constitutional right to the information, and (2) restrict the protection of unpublished information (and unbroadcast information, under this measure) to that obtained under an express expectation of confidentiality. Both of these amendments would remove potentially problematic aspects of the journalists' shield law, and better tie the provision to the protection of confidential *sources*, which is the primary aim of journalists' shield laws.

First, the Department suggests that the new section being added to the Hawaii Revised Statutes by section 1 of Act 210 be amended to add an exception for parties in criminal cases that have a constitutional right to the disclosure of the information. Without this exception, a criminal defendant who is denied access to potentially exculpatory information might seek to have an otherwise proper prosecution dismissed on that ground. This result is undesirable as a matter of public policy. This change could be accomplished by adding a new paragraph (6) to the existing list of exceptions in subsection (c), reading: " (c) This section shall not apply if . . . .

(6) A party in a criminal prosecution has a constitutional right to the disclosure of the information.”

Second, subsection (a)(2) of the shield law is overly broad and should be either eliminated or restricted with other wording. As presently written, subsection (a)(2) protects “[a]ny unpublished information” from compelled disclosure by a journalist. This measure would apply the same protection to “unbroadcasted” information. See page 2, line 14 of the bill. Because the journalist’s privilege should be concerned about protecting the *identity* of the source, not the information given by the source, this language is too broad. The identity of the source is already protected under subsection (a)(1). In addition, subsection (a)(2) unreasonably protects *all* unpublished information in a journalist’s possession. This is so even if the information was not obtained under any express expectation that it would be kept confidential, and even if it cannot be reasonably assumed the information will lead to the disclosure of the identity of the source (as is already protected under subsection (a)(1)).

As presently written, subsection (a)(2) lacks any requirement that the information was given with an express expectation of confidentiality. The Department suggests that this paragraph (2) be deleted entirely. Barring that, the paragraph could be significantly improved by limiting it to unpublished (or unbroadcasted) information given with an express expectation of confidentiality. With this alteration, subsection (a)(2) would read: “(2) Any unpublished information obtained or prepared by the person while so employed or professionally associated in the course of gathering, receiving, or processing information for communication to the public, provided that the unpublished information was given by the source with an express expectation of confidentiality.”

We respectfully ask this Committee to amend this bill with the recommend changes listed above.



*The Judiciary, State of Hawaii*

**Testimony to the House Committee on Judiciary**  
Representative Gilbert S.C. Keith-Agaran, Chair  
Representative Karl Rhoads, Vice Chair

Thursday, February 2, 2012 at 2:00 p.m.  
State Capitol, Conference Room 325

by  
Judge Glenn Kim, Chair  
Supreme Court Standing Committee on the Rules of Evidence (Evidence Committee)

**WRITTEN TESTIMONY ONLY**

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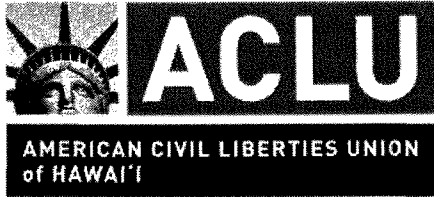
**Bill No. and Title:** House Bill No. 2016, Relating to Evidence

**Purpose:** Amends the title of Act 210, Session Laws of Hawaii 2008, to read news and broadcast media privilege. Expands the application of the Act to expressly include bona fide owners or editors of news or broadcast media entities. Clarifies that, where applicable, the news and broadcast media privilege will shield a journalist, newscaster, owner, or editor of a news or broadcast media entity from being compelled to testify or produce the source of information whether or not it has been published or broadcasted, or any unpublished or unbroadcasted information.

**Judiciary's Position:**

The Judiciary supports making the news media privilege permanent by repealing the scheduled sunset date of Act 210, Session Laws of Hawaii 2008, as amended by Act 113, Session Laws of Hawaii, as proposed in House Bill No. 2763, which is currently pending hearing by this committee. However, we take no position on the substantive issues in House Bill No. 2016, which contains new material that has just come to the attention of the Evidence Committee. We, therefore, respectfully request deferral of House Bill No. 2016 for review and discussion by the Evidence Committee.

Thank you for the opportunity to comment on this measure.



Committee: Committee on Judiciary  
Hearing Date/Time: Thursday, February 2, 2012, 2:00 p.m.  
Place: Conference Room 325  
Re: Testimony of the ACLU of Hawaii in Opposition to H.B. 2016, Relating to Evidence

Dear Chair Keith-Agaran, Vice Chair Rhoads, and Members of the Committee on Judiciary:

The ACLU of Hawaii opposes H.B. 2016, insofar as it restricts the journalists' privilege to those who are paid for their work. Free speech and freedom of the press principles, however, have no relationship whatsoever to compensation, and there is simply no basis whatsoever to condition the media shield privilege on the receipt of money.

Under the plain language of H.B. 2016, a student journalist at the University of Hawaii who wrote an exposé on the Board of Regents would not be covered by the media shield unless s/he were paid for the piece (or, more strangely, unless s/he had ever been paid for any journalism work at any point in her/his life). A law student who writes a piece on housing discrimination while interning, unpaid, at a non-profit organization would be ineligible as well. A young reporter who contributes pieces to the newspaper for free, in the hopes of eventually getting a job with that paper, would not be protected. From *Street Beat* to the myriad school newspapers across the state, there are many publications for which many (if not all) contributors are not paid in any way.

Similarly, there are innumerable bloggers today, some of whom receive compensation (either in the form of a salary or in the form of advertising revenues) and some of whom do not (either because they choose to reject advertising altogether or because their audience is not wide enough to attract advertisers). The nature of the work, however, has absolutely nothing to do with their desire or ability to attract advertisers. A blogger's ability to claim the journalists' privilege should not depend on either her decision to accept advertisements or her past employment.

Freedom of the press promotes speech and self-governance for all Americans. Journalists provide information needed for voters to evaluate candidates. They uncover unlawful acts by elected representatives and expose government abuses of power. Investigative reporting helps ensure that our government is open to public scrutiny. Liberty is lost without a free and independent press.

American Civil Liberties Union of Hawaii  
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Journalists cannot maintain their independence without access to information from confidential sources. The Watergate scandal and the Pentagon Papers became public only after informants were assured anonymity. More recently, confidential sources broke stories about illegal government programs including torture, warrantless wiretapping, kidnapping, and illegal detention. In retaliation, the government has used subpoenas to intimidate journalists into revealing sources and jailed them if they declined to name names.

The government's efforts to silence dissent are facilitated by the lack of a journalist's privilege from identifying confidential sources. Forty-nine states and D.C. recognize some form of reporters' privilege. A vibrant and meaningful state reporters' shield will ensure that journalists continue to have the tools they need to hold the government accountable to the people. It also will allow the press to continue to inform the public about substantial risks to our health and safety without fear of government persecution.

The experience of the states, most federal courts, and our closest allies around the world demonstrates that we can have freedom of the press without harming our collective security. A state media shield law that safeguards free speech and other important interests strikes the right balance. We urge this Committee to make the state media shield law permanent and to reject the language in H.B. 2016.

The mission of the ACLU of Hawaii is to protect the fundamental freedoms enshrined in the U.S. and State Constitutions. The ACLU of Hawaii fulfills this through legislative, litigation, and public education programs statewide. The ACLU of Hawaii is a non-partisan and private non-profit organization that provides its services at no cost to the public and does not accept government funds. The ACLU of Hawaii has been serving Hawaii for over 45 years.

Thank you for this opportunity to testify.

Sincerely,

Daniel M. Gluck  
Senior Staff Attorney  
ACLU of Hawaii

American Civil Liberties Union of Hawaii  
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Feb. 2, 2012

House Judiciary Committee  
Chairman Gilbert S.C. Keith-Agaran  
State Capitol  
Honolulu, HI

Chairman Keith-Agaran and Committee Members:

Re: House Bill 2016 Relating to Evidence

Thank you for the opportunity to give our views in opposition to this bill.

HB 2016 purports to add bonafide owners and editors to people who can protect confidential sources under the Shield Law and also purports to add broadcasted or unbroadcasted information to information covered by the law.

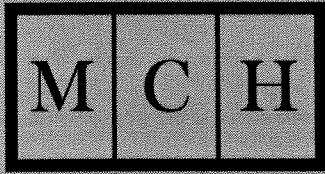
While this bill might seem laudable at first blush, it really doesn't do much of anything. Editors and owners are considered journalists and allowed the opportunity to protect confidential sources. The same coverage exists for broadcasted and unbroadcasted information because the current law covers published and unpublished information, which is widely interpreted to include information published on television and radio – or broadcasted.

These people and information are already covered by the Shield Law. Passage of this bill is not needed and would only serve to muddle an excellent, model law.

We ask that you shelve this bill.

Thank you for your time and attention.

Stirling Morita  
President



# Media Council Hawai'i

*Since 1970*

*President:*

**Chris Conybeare**

*Vice-President:*

**Beth-Ann Kozlovich**

*Treasurer:*

**Teresita Bernales**

*Secretary:*

**Marya Grambs**

*Board Members at Large:*

**Brenda Ching**

**Josh Frost**

**Ikaika Hussey**

**Jeanne Ishikawa**

**Gerald Kato**

**Jean King**

**Bobby Lambrix**

**Nikki Love**

**Brien Matson**

**Richard Miller**

**Liam Skilling**

**Lucy Witeck**

*Honorary Member:*

**U Win Tin**

The following measure(s) were previously heard on **January 26, 2012**. **No public testimony will be accepted.**

HB 1695

Status

RELATING TO TAXATION.

Prohibits penalties for substantial understatements or misstatements and for erroneous claims for refund or credit from being added to tax underpayments on which certain other penalties are already imposed.

J1

Gerald Kato: 808.223.3844

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To: House Committee on Judiciary  
Hearing: Thursday, February 2, 2012  
2:00 pm, Conference Room 325

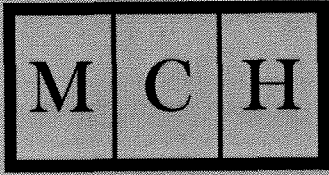
## **TESTIMONY IN OPPOSITION TO HB 2016 RELATING TO EVIDENCE**

Chair Keith-Agaran and Members of the Judiciary Committee:

Media Council of Hawaii (MCH) opposes HB 2016 Relating to Evidence, which proposes to amend Act 210, Session Laws of Hawaii 2008, by expressly including "bona fide owners and editors of news and broadcast media" to what is commonly known as the Shield Law.

The Media Council believes that owners and editors are protected within the scope of the existing law and changes to the law would be unnecessarily redundant. Hawaii's law is widely regarded as one of the best among the shield laws in the 40 states and the District of Columbia. It has served the public interest effectively as it exists now.

Media Council of Hawaii recommends that the committee defer action on this bill.



# Media Council Hawai'i

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**Lucy Witeck**

*Honorary Member:*

**U Win Tin**

Thank you for the opportunity to express our views.

Gerald Kato  
Media Council of Hawaii