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# A BILL FOR AN ACT

RELATING TO EVIDENCE.

**BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:**

1           SECTION 1. The legislature finds that the United States  
2 Supreme Court held in *Branzburg v. Hayes*, 408 U.S. 665 (1972),  
3 that the First Amendment of the United States Constitution does  
4 not provide members of the press with the right to withhold from  
5 a grand jury the names of confidential sources. Specifically,  
6 the First Amendment does not relieve a newspaper reporter of the  
7 obligation that all citizens respond to a grand jury subpoena  
8 and answer questions relevant to a criminal investigation of a  
9 crime. Although the federal appellate circuit courts have  
10 applied a qualified privilege for journalists in some cases as a  
11 matter of common law, Congress has not established a federal  
12 shield law that would supersede the holding of *Branzburg*.

13           The legislature finds that Act 210, Session Laws of Hawaii  
14 2008, temporarily established a news media privilege against the  
15 compelled disclosure of sources and unpublished information to a  
16 legislative, executive, or judicial officer or body, or to any  
17 other person who may compel testimony. Subsequently, Act 113,  
18 Session Laws of Hawaii 2011, extended the repeal date of Act



1 210, Session Laws of Hawaii 2008, from June 30, 2011, to  
2 June 30, 2013, and required the judiciary, through its standing  
3 committee on the rules of evidence, to report to the legislature  
4 and recommend whether to:

- 5 (1) Codify Act 210, Session Laws of Hawaii 2008, under  
6 chapter 621, Hawaii Revised Statutes, relating to  
7 evidence and witnesses, generally;
- 8 (2) Codify Act 210, Session Laws of Hawaii 2008, under  
9 chapter 626, Hawaii Revised Statutes, the Hawaii rules  
10 of evidence; or
- 11 (3) Allow Act 210, Session Laws of Hawaii 2008, to be  
12 repealed.

13 In December 2011, the supreme court standing committee on  
14 the rules of evidence submitted a report to the legislature  
15 recommending that the sunset provision under Act 210, Session  
16 Laws of Hawaii 2008, be repealed and the news media privilege be  
17 codified under chapter 621, Hawaii Revised Statutes, with  
18 suggestions for amendments.

19 The purpose of this Act is to:

- 20 (1) Enact the recommendation made by the supreme court  
21 standing committee on the rules of evidence by  
22 repealing the sunset date of Act 210, Session Laws of



1 Hawaii 2008, as amended by Act 113, Session Laws of  
2 Hawaii 2011, which makes permanent the news media  
3 privilege; and

4 (2) Clarify and define the applicability of Act 210,  
5 Session Laws of Hawaii 2008, as amended by Act 113,  
6 Session Laws of Hawaii 2011.

7 SECTION 2. Act 210, Session Laws of Hawaii 2008, as  
8 amended by Act 113, Session Laws of Hawaii 2011, is amended as  
9 follows:

10 1. By amending section 1 to read:

11 "SECTION 1. Chapter 621, Hawaii Revised Statutes, is  
12 amended by adding a new section to be appropriately designated  
13 and to read as follows:

14 "**§621- Limitation on compellable testimony from**  
15 **journalists and newscasters; exceptions.** (a) A journalist or  
16 newscaster presently or previously employed by or otherwise  
17 professionally associated with any newspaper or magazine or any  
18 digital version thereof operated by the same organization, or  
19 any news agency, press association, wire service, or radio or  
20 television transmission station or network, shall not be  
21 required by a legislative, executive, or judicial officer or  
22 body, or any other authority having the power to compel



1 testimony or the production of evidence, to disclose, by  
2 subpoena or otherwise[+]

3 ~~(1) The]~~ The source, or information that could reasonably  
4 be expected to lead to the discovery of the identity  
5 of the source, of any published or unpublished  
6 information obtained by the person while so employed  
7 or professionally associated in the course of  
8 gathering, receiving, or processing information for  
9 communication to the public; ~~[ex]~~ provided that the  
10 assertion of the privilege based on previous  
11 employment as a journalist or newscaster shall extend  
12 only to the information obtained during the previous  
13 period of employment.

14 ~~[(2) Any unpublished information obtained or prepared by~~  
15 ~~the person while so employed or professionally~~  
16 ~~associated in the course of gathering, receiving, or~~  
17 ~~processing information for communication to the~~  
18 ~~public.~~

19 ~~(b) The limitation on compellable testimony established by~~  
20 ~~this section may also be claimed by and afforded to any~~  
21 ~~individual who can demonstrate by clear and convincing evidence~~  
22 ~~that:~~



- 1       ~~(1) The individual has regularly and materially~~  
2           ~~participated in the reporting or publishing of news or~~  
3           ~~information of substantial public interest for the~~  
4           ~~purpose of dissemination to the general public by~~  
5           ~~means of tangible or electronic media;~~
- 6       ~~(2) The position of the individual is materially similar~~  
7           ~~or identical to that of a journalist or newscaster,~~  
8           ~~taking into account the method of dissemination;~~
- 9       ~~(3) The interest of the individual in protecting the~~  
10           ~~sources and unpublished information under subsection~~  
11           ~~(a) is materially similar to the interest of the~~  
12           ~~individuals referenced under subsection (a); and~~
- 13       ~~(4) The public interest is served by affording the~~  
14           ~~protections of this section in a specific circumstance~~  
15           ~~under consideration.~~
- 16       ~~(e)]~~ (b) This section shall not apply if:
- 17           (1) Probable cause exists to believe that the person  
18           claiming the privilege has committed, is committing,  
19           or is about to commit a crime;
- 20           (2) The person claiming the privilege has observed the  
21           alleged commission of a crime, but if:



1 (A) The interest in maintaining the privilege granted  
2 by this section outweighs the public interest in  
3 disclosure; and

4 (B) The commission of the crime is the act of  
5 communicating or providing the information or  
6 documents at issue,

7 then the privilege granted by this section may be  
8 asserted;

9 (3) There is substantial evidence that the source or  
10 information sought to be disclosed is material to the  
11 investigation, prosecution, or defense of a felony,  
12 potential felony, or serious crime involving unlawful  
13 injury to persons or animals, or to a civil action  
14 [~~for defamation~~], and the source or information sought  
15 is:

16 (A) Unavailable, despite exhaustion of reasonable  
17 alternative sources;

18 (B) Noncumulative; and

19 (C) Necessary and relevant to the charge, claim, or  
20 defense asserted;

21 (4) The information sought to be disclosed is critical to  
22 prevent serious harm to life or public safety; [~~or~~]



1 (5) The source consents to the disclosure of unpublished  
2 documents or other tangible materials provided by the  
3 source ~~[-]~~; or

4 (6) The information is sought by a defendant in a criminal  
5 case who has a constitutional right to the information  
6 sought.

7 ~~[-(d)]~~ (c) No fine or imprisonment shall be imposed against  
8 a person validly claiming ~~[the]~~ a privilege pursuant to this  
9 section ~~[for refusal to disclose information privileged pursuant~~  
10 ~~to this section]~~.

11 (d) For purposes of this section:

12 "Journalist" means an individual who, for financial gain or  
13 livelihood, engages in the gathering, preparing, collecting,  
14 writing, editing, filming, taping, or photographing of news  
15 intended for a newspaper, magazine, news agency, press  
16 association, wire service, or radio or television station or  
17 network.

18 "Magazine" means a publication containing news that is  
19 published and distributed not less than four times a year either  
20 through print or digital means for at least one year with a paid  
21 circulation.



1       "News agency" means a commercial organization that collects  
2 and supplies news to subscribing newspapers, magazines, or radio  
3 and television broadcasters.

4       "Newscaster" means an individual who, for financial gain or  
5 livelihood, engages in the gathering, preparing, collecting,  
6 writing, editing, filming, taping, or photographing of news  
7 intended for a newspaper, magazine, news agency, press  
8 association, wire service, or radio or television station or  
9 network.

10       "Newspaper" means a paper with a paid circulation that is  
11 printed and distributed not less than once a week for at least  
12 one year and contains news, articles of opinion, such as  
13 editorials, features, advertising, or other matters of current  
14 interest.

15       "Press association" means an association of newspapers or  
16 magazines formed to gather and distribute news to its members.

17       "Wire service" means a news agency that distributes  
18 syndicated news copy by wire to subscribing newspapers,  
19 magazines, or radio or television broadcasters."

20       2. By amending section 3 to read:

21       "SECTION 3. This Act shall take effect upon its approval  
22 [~~and shall be repealed on June 30, 2013~~]."





1 SECTION 3. This Act does not affect rights and duties that  
2 matured, penalties that were incurred, and proceedings that were  
3 begun before its effective date.

4 SECTION 4. Statutory material to be repealed is bracketed  
5 and stricken. New statutory material is underscored.

6 SECTION 5. This Act shall take effect on June 29, 2013.



**Report Title:**

Evidence; News Media Privilege; Shield Law

**Description:**

Clarifies that a journalist or newscaster may invoke the privilege based on previous employment only to the extent that the information was obtained during the period of that previous employment; repeals unpublished information from the scope of the privilege; repeals specific conditions that a person may demonstrate by clear and convincing evidence to invoke the privilege; expands the exceptions to claiming the privilege for substantial evidence related to a potential felony or serious crime involving unlawful injury to persons or animals; adds that the privilege does not apply if the information is sought by a defendant in a criminal case who has a constitutional right to the information sought; clarifies that only individuals who validly invoke the privilege will be shielded from fines or imprisonment; and adds definitions. Makes permanent the news media privilege against the compelled disclosure of sources and unpublished sources. Effective 06/29/13. (SD1)

*The summary description of legislation appearing on this page is for informational purposes only and is not legislation or evidence of legislative intent.*

