TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-SEVENTH LEGISLATURE, 2013

ON THE FOLLOWING MEASURE:
H.B. NO. 622, RELATING TO EVIDENCE.

BEFORE THE:
HOUSE COMMITTEE ON JUDICIARY

DATE: Tuesday, January 29, 2013 **TIME:** 2:00 p.m.

LOCATION: State Capitol, Room 325

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

Chair Rhoads and Members of the Committee:

This bill would make the journalists' shield law permanent. The journalists' shield was originally enacted by Act 210 in 2008, with a sunset date of 2011. The sunset date was later extended to 2013. The journalists' shield allows professional journalists to keep their sources confidential, and thus promotes public access to more information. To the extent the journalists' shield applies to professional journalists and their sources, the Department of the Attorney General does not object to making the law permanent. Beyond that, however, the Department has some significant concerns about the existing wording in Act 210, Session Laws of Hawaii 2008, including provisions that make the shield law unduly expansive.

We therefore respectfully urge the Committee to use this bill to amend Act 210, Session Laws of Hawaii 2008. We suggest four specific amendments: (1) omit the provision that extends the protections beyond professional journalists to non-traditional journalists and bloggers, (2) add an exception for defendants in criminal cases who have a constitutional right to the information, (3) omit the provision extending the shield to unpublished information that is <u>not</u> reasonably likely to lead to the identification of the source, and (4) clarify that the privilege would shield a person from contempt of court or other consequences only when the provision is <u>validly</u> invoked. 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 protection for "bloggers" or non-traditional journalists is far too broad, untested, and well beyond any statutory journalists' shield enacted in any State. Our research indicates that no states statutory journalists' shield law has gone this far. The interests in bringing information to the public eye would be just as well served by offering statutory protection for professional journalists only, because a source desiring anonymity could simply go to a professional journalist. The bloggers provision should be therefore removed. Making this amendment will not decrease the protection for professional journalists who publish on the digital version of traditional news sources (for example, a newspaper's website), because that is explicitly protected under subsection (a). Because the bloggers' provision is overbroad and not necessary to accomplish the shield law's central goals, all of subsection (b) should be omitted.[1]

Second, the existing language fails to guarantee the protection of constitutional rights of criminal defendants, who may be entitled to the information as part of their entitlement to a fair trial, or to call or confront witnesses in their defense. In the absence of an exception tailored to address this concern, when this circumstance arises, the statute may be struck down as unconstitutional, or otherwise valid prosecutions may be dismissed because the defendant is unable to present evidence in his or her defense. Neither result is in the public interest. To address this concern, a new paragraph (6) should be added to the exceptions presently found in subsection (c). Such an exception could read, for example: "a defendant in a criminal case has a constitutional right to the information sought to be disclosed."

Third, the statute's extension to all unpublished information in a journalists' possession (or in the possession of a blogger who stands in a similar position, if the blogger provision is left intact) is unnecessary, because it goes beyond unpublished information that is likely to reveal the identity of the source. Because subsection (a)(1) explicitly protects information that "could reasonably be expected" to lead to the identity of the source, further protection for unpublished information not reasonably likely to lead to the identity of the source is unnecessary to serve the central aim of the journalists' shield law. Furthermore, because there is no requirement that the protected unpublished information be given to the journalist by the source with an express demand for confidentiality, there is no reason to believe that the source would not come forward

[1] The following subsections would have to be re-designated.

unless the unpublished information were protected. The protection of all unpublished information is therefore overbroad, and subsection (a)(2) should be omitted.

Fourth, the final paragraph of the shield law intends to protect those who validly invoke it from contempt or other fines imposed by a court. As currently written, however, subsection (d) is ambiguous; it leaves the impression that just invoking the privilege (even if wrongly invoked) shields a person from contempt of court or fines. But of course the person must be legally entitled to the privilege before the shield provision should apply. A short amendment, inserting the word "validly," will correct this potential ambiguity. With this amendment, the last subsection would read "No fine or imprisonment shall be imposed against a person validly claiming the privilege pursuant to this section for refusal to disclose information privileged pursuant to this section."

We respectfully ask this Committee to amend the journalists' shield law with the recommend changes listed above, before making it permanent.