



Committee: Committee on Judiciary
Hearing Date/Time: Friday, February 20, 2015, 4:00 p.m.
Place: Conference Room 325
Re: Testimony of the ACLU of Hawaii **in Support of H.B. 295**, Relating to Evidence

Dear Chair Rhoads, Vice Chair San Buenaventura, and Members of the Committee on Judiciary:

The American Civil Liberties Union of Hawaii (“ACLU of Hawaii”) writes in **support** of H.B. 295, which seeks to establish news media privilege against the compelled disclosure of sources and unpublished sources.

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.

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 detention. In retaliation, the government has used subpoenas to intimidate journalists into revealing sources and jailed them if they declined to name names.

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 will allow the press to continue to inform the public about substantial risks to our health and safety without fear of government persecution. The experiences of the states, most federal courts, and our closest allies around the world demonstrate 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.

Thank you for this opportunity to testify.

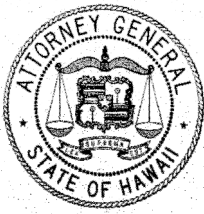
Daniel M. Gluck
Legal Director
ACLU of Hawaii

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Chair Rhoads and Judiciary Committee Members
February 20, 2015
Page 2 of 2

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 50 years.

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**TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-EIGHTH LEGISLATURE, 2015**

ON THE FOLLOWING MEASURE:
H.B. NO. 295, RELATING TO EVIDENCE.

BEFORE THE:
HOUSE COMMITTEE ON JUDICIARY

DATE: Friday, February 20, 2015 **TIME:** 4:00 p.m.

LOCATION: State Capitol, Room 325

TESTIFIER(S): Russell A. Suzuki, Attorney General, or
Deirdre Marie-Iha, Deputy Attorney General

Chair Rhoads and Members of the Committee:

This bill restores the journalists' shield law, which was originally enacted by Act 210 in 2008 and repealed via a sunset provision in 2013. A journalists' shield law allows professional journalists to keep their sources confidential, and thus promotes public access to more information. The existence and scope of a journalists' shield law is a question of policy. To the extent the journalists' shield applies to professional journalists and their sources, the Department of the Attorney General does not object to this bill. Beyond that, however, the Department has some significant concerns about the wording of this bill, including provisions that make the shield law unduly expansive.

We therefore respectfully urge this Committee to amend this bill. We suggest four substantive 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 not reasonably likely to lead to the identification of the source, and (4) add definitions for some of the critical terms in the statute. These amendments would address 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. We also suggest one drafting change.

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 state-law 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

As noted above, however, we understand the scope of the journalists' shield to be a question of policy. If this Committee wants to provide bloggers with protection under the shield law, we suggest the provision be made more narrow. There is one amendment that could accomplish this objective. One of the criteria to qualify under subsection (b) is that the individual has "regularly and materially participated in the reporting or publishing of news[.]" Page 3, line 19-20. This could be narrowed, and made more precise, by adding in a frequency-of-circulation requirement, and a requirement that the individual have done so for a year. This could be accomplished by adding in the phrase "and has done so at least once a month for an entire year," at the end of subsection (b)(1). This would ensure that only individuals who regularly participate in the gathering and publishing of news qualify. This would keep the bulk of the bloggers' provision intact, but narrow it in a very precise manner. The Department's preference remains to remove the bloggers' provision in its entirety. But if the Committee wants to include the provision, this narrowing wording offers a method to make the provision less problematic in our view.

Second, the existing wording 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

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

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

Fourth, the proposed wording should be made more precise by adding definitions for the critical terms. Adding definitions will give the statute more precision, which will help our courts apply it more consistently. Many of the words used in the operative part of the statute are sufficiently precise with their ordinary English meaning. There are other phrases, however, that would benefit from additional definitions. We specifically suggest that definitions be added for "news agency," "press association," and "wire service." For example, "news agency" could be defined as "a commercial organization that collects and supplies news to subscribing newspapers, magazines, and radio or television broadcasters."² "Press association" could be defined as "an association of newspapers or magazines formed to gather and distribute news to its members." "Wire service" could be defined as "a news agency that sends out syndicated news copy by wire to subscribing newspapers, magazines, or radio or television broadcasters." Additional definitions could be added (for "journalist," "newscaster," "newspaper," and "magazine") if desired.³

² Our suggested definitions are based in part on New York's journalist shield law, found at N.Y. Cons. Law § 79-h.

³ When the Legislature considered this issue in 2013, the S.D. 1 and the C.D. 1 of H.B. No. 622 contained definitions of "journalist," "newscaster," "newspaper" and "magazine." All four of these definitions contained a financial component (i.e., a paid subscription for a magazine, or a

Finally, we make one minor drafting suggestion. Subsection (d), regarding when the protections of the privilege apply, is vague because it implies that a person "claiming" the privilege is protected from fines or imprisonment, even if the privilege plainly did not apply. For this reason we suggest replacing this wording with something more precise, such as: "No fine or imprisonment shall be imposed against a person validly claiming a privilege pursuant to this section." This change is not substantive.

We respectfully ask this Committee to amend the journalists' shield law with the recommend changes listed above.

requirement that a journalist be acting for the journalist's livelihood or financial gain) in the S.D. 1. Those components were later removed in the C.D. 1. The Department takes no position on whether a financial component should be included in any definitions for these four terms. The Department's concern about a lack of definitions is due to the lack of precision. If the Committee chose to add definitions for these four terms using the prior wording from H.B. No. 622, either set of definitions would be sufficient to address the Department's concern about a lack of precision. The difference between them is a policy choice.

LATE



House Judiciary Committee
Chair Karl Rhoads, Vice Chair Joy San Buenaventura

Friday 02/20/2015 at 4:00 PM in Room 325
HB 295 Relating to Evidence

TESTIMONY OF SUPPORT
Carmille Lim, Executive Director, Common Cause Hawaii

Dear Chair Rhoads, Vice Chair San Buenaventura, and members of the House Judiciary Committee:

Common Cause Hawaii supports HB295, would essentially restore the “Media Shield Law”-- Act 210, Session Laws of Hawaii 2008.

HB295 protects journalists from revealing their confidential sources. The “Media Shield Law” is a critical tool for protecting and promoting a robust news media.

A strong democracy depends on information and knowledge, so that citizens and leaders have the information necessary to make decisions and hold government and other institutions accountable. The news media must have the freedom and protections to ensure they can fulfill their role in collecting and disseminating that information, and especially in investigating controversial issues. By protecting sources who reveal critical information, the shield law is essential to making this work possible.

Thank you for the opportunity to testify on HB295.

LATE



P.O. Box 3141
Honolulu, HI 96802
Feb. 20, 2015

House Judiciary Committee
State Capitol
Honolulu, HI 96813

Re: House Bill 295

Chairman Rhoads and Committee Members:

The Hawaii Chapter of the Society of Professional Journalists supports HB 295 to reinstate Act 210, Session Laws of Hawaii 2008.

It was an important law helping to provide a free flow of information by providing a limited privilege to journalists and nontraditional journalists against disclosure of confidential sources and unpublished information.

We ask you to pass House Bill 295, restoring this law.

The law worked and caused no problems. It was one of the best in the country in terms of depth of coverage. For that reason, we support bringing back the law without any major changes.

Forty-nine states and the District of Columbia currently have some form of Shield Law protections. The Student Press Law Center once described Hawaii's law as "the best in the country in terms of the clarity and breadth of its coverage." It had been cited as a model for a national shield law.

Shield laws have been around since 1896, when a Baltimore Sun reporter went to jail after refusing to divulge his source to a grand jury on his report about some elected officials and police officers on the payrolls of illegal gambling establishments.

Shield laws protect not just journalists, but all citizens by making possible the free flow of information in a democratic society as envisioned by the First Amendment to the U.S. Constitution.

When gathering news, journalists frequently run across sources who are willing to give information but ask that their names be kept secret. Many of them fear they will be subject to retribution for exposing matters of public importance to the media. If a reporter divulges that information, he or she will find the supply of sources drying up.

In 2011 at the Legislature's behest, the Judiciary Evidence Committee recommended that the law's "sunset provision be eliminated and that Act 210 be integrated into HRS Ch. 621."

The report also mentioned the Legislature could "were it so inclined" consider adding to the section on exceptions "potential felony, or serious crime involving unlawful injury to persons or animals" and "all civil litigation."

If this suggestion were to be incorporated in the bill, we ask you to hold the bill. The resulting measure would not offer any source protections because almost every type of case would be exempted.

In what cases would the name of a confidential news source be protected under that possible revision? Traffic cases?

Also, the "potential felony" wording would open the door for investigators and prosecutors to fish for information from newsrooms in investigations where there are no cases but news articles about the subject they are interested in. This would be a major step backward.

Two years ago, a proponent of this suggestion did not come up with actual problems caused by the law or facts supporting her stance.

Part of the compromise in creating Act 210 was making the statute not apply in felony criminal cases or civil defamation cases if the information sought is not otherwise available; the information is noncumulative; and the information is necessary and relevant.

Also, the law was progressive and took notice of the changing media in the 21st century, providing protection for both traditional and nontraditional journalists. We also ask you to keep this part of the law.

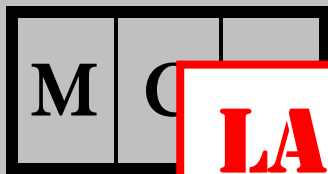
These protections would not be available to any blogger as some would try to make you believe. It would cover those whose work is materially similar or identical to that of traditional journalists.

This law was the product of long negotiations seven years ago between representatives of the news media and the former attorney general. Compromises were made, and the resulting bill that became Act 210 recognized the need to protect the free flow of information in a democratic society while balancing the need for information in the pursuit of justice.

Thank you. Sincerely,

A handwritten signature in black ink, appearing to read "Stirling Morita". The signature is fluid and cursive, with a large initial "S" and "M".

Stirling Morita
President, Hawaii Chapter SPJ



LATE

Media Council Hawai'i

1970

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Chris Conybeare

Vice-President:

Beth-Ann Kozlovich

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Board Members at Large:

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To: House Committee on Judiciary
Hearing: Friday, February 20, 2015
Conference Room 325

TESTIMONY IN SUPPORT OF HB 295 RELATING TO EVIDENCE

Chair Rhoads and Members of the Judiciary Committee:

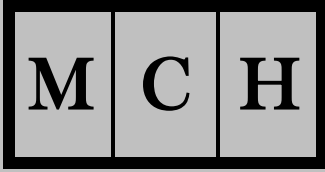
Media Council Hawaii supports HB 295 Relating to Evidence, which would restore Act 210, Session Laws of Hawaii 2008. Act 210, commonly known as the "Shield Law," provides a limited privilege to journalists, and those acting in similar capacity, against compulsory disclosure of confidential sources and unpublished information.

We believe the shield law as it was enacted in 2008 should become a permanent part of Hawaii statutes. During the five years it was in effect, there were no reported problems with the law. In 2011, the Judiciary's Evidence Committee reviewed the law as requested by the Legislature and it recommended that "the sunset provision be eliminated and that Act 210 be integrated in HRS Ch. 621." Due to an unfortunate set of circumstances, the shield law fell victim to the sunset provision two years ago. HB 295 would fully restore what was widely considered one of the best shield laws in the country.

Shield laws exist in 40 states. They protect the free flow of information and the public interest in guaranteeing anonymity to whistleblowers and others who possess and provide information about government misconduct.

This law is the product of long and detailed negotiations in 2008 between representatives of the news media and the then Attorney General. With the able assistance of former Rep. Blake Oshiro, compromises were made on both sides. The bill that ultimately became Act 210 is a tribute to all parties recognizing the need to protect the free flow of information in a democratic society while balancing the need for information in the pursuit of justice.

House Judiciary Committee



Media Council Hawai'i

Since 1970

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Lucy Witeck

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We agree with the January 31, 2015 Honolulu Star-Advertiser editorial which said: "If the Legislature is serious about protecting freedom of the press and public discourse, it should do so with HB 295...legislation already proven to work."

Hawaii has long prided itself on being at the forefront of progressive legislation. This law should be counted as one of the state's major achievements in protecting dissemination of news and information in the public interest and protecting a free and independent press. We urge your support of this bill.

Thank you for your consideration. We're prepared to respond to any questions you may have.

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LATE

February 19, 2015

To: Rep. Karl Rhoads and the House Committee on Judiciary

Re: HB 295 Hearing, February 20, 2015, 4 p.m.

The Hawaii Publishers Association supports HB 295, which would restore protections to journalists that were removed when the Hawaii Shield Law expired on June 31, 2013.

It is imperative that legislation be passed to fully restore the Hawaii Shield Law to protect the free exercise of the press as intended by the First Amendment to the U.S. Constitution.

The Hawaii Publishers Association represents over 40 companies statewide who hold themselves accountable for what they publish. It is not the responsibility of the State of Hawaii to interfere with sources of information and affect how it is disseminated.

Thus, protecting public interest and its right to information should not have been challenged by allowing the Hawaii Shield Law to sunset two years ago. We ask that you support HB 295 to restore the previous shield law.

Respectfully,

A handwritten signature in black ink, appearing to read 'Craig Furuya', written over a white background.

Craig Furuya
President
Hawaii Publishers Association

LATE

Rhoads and Committee Members:

communications, publisher of many local magazines, including Hawaii Business, Honolulu, Mana and Hawaii, supports HB 295 to reinstate Act 210, Session Laws of Hawaii 2008.

An effective “Shield Law” is vital to a democracy because encourages a free flow of information to citizens by providing a limited privilege to journalists and nontraditional journalists against disclosure of confidential sources and unpublished information.

Pacific Basin Communications asks you to restore this important law by passing House Bill 295.

For the five years it was in effect, the Shield Law worked well and caused no problems. It was one of the best in the country and that’s why we support its restoration without any major changes. Other proposed legislation in this session would add exemptions to the Shield Law such as “potential felony, or serious crime involving unlawful injury to persons or animals” and “all civil litigation.” Such changes would render the law worse than no law at all.

The “potential felony” wording is especially egregious because it would allow prosecutors and others to fish for information from newsrooms when they have no case. The Student Press Law Center described Hawaii’s 2008 Shield Law as “the best in the country in terms of the clarity and breadth of its coverage.” Many experts called it a model for a national shield law.

When gathering news, journalists frequently run across sources who are willing to give information important to the public interest, but they ask that their names be kept secret. They fear retaliation against their businesses, themselves or their families. If reporters cannot guarantee anonymity, important sources will not speak out and the public will be kept in the dark about important information. A Shield Law is needed to ensure that free flow of information.

Part of the compromise in creating Act 210 was ensuring the statute did not apply in felony criminal cases or civil defamation cases if the information sought is not otherwise available; the information is noncumulative; and the information is necessary and relevant.

Another valuable part of Act 210 was that it acknowledged the changing media in the 21st century, providing protection for both traditional and nontraditional journalists. We also ask you to keep this part of the law.

These protections would not be available to any blogger. These protections would only cover those whose work is materially similar or identical to that of traditional journalists.

The 2008 law was the product of long negotiations seven years ago between representatives of the news media and the former attorney general. Compromises were made, and the resulting bill that became Act 210 recognized the need to protect the free flow of information in a democratic society while balancing the need for information in the pursuit of justice. It was a good law and should be restored.

Thank you.

Scott Schumaker
President
Pacific Basin Communications

Steven Petranik
Editor
Hawaii Business magazine

LATE

Submitted By	Organization	Testifier Position	Present at Hearing
marjorie erway	Individual	Oppose	No

Comments: