
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15 compelled disclosure of sources and unpublished information to a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12 repealed.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16 Laws of Hawaii 2008, be repealed and the news media privilege be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, to make 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 source, or information that could reasonably be
4 expected to lead to the discovery of the identity of
5 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; 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; or

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~~
20 ~~by 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.

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

8 (d) For purposes of this section:

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

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

19 "News agency" means a commercial organization that collects
20 and supplies news to subscribing newspapers, magazines, or radio
21 or television broadcasters.



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

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

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

14 "Wire service" means a news agency that distributes
15 syndicated news copy by wire to subscribing newspapers,
16 magazines, or radio or television broadcasters."

17 2. By amending section 3 to read:

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

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



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

3 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 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; 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 June 29, 2013. (HB622 CD1)

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