

# HOUSE BILL REPORT

## HB 2452

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### As Reported by House Committee On: Judiciary

**Title:** An act relating to a privilege from compelled testimony for members of the news media.

**Brief Description:** Protecting the news media from being compelled to testify in legal proceedings.

**Sponsors:** Representatives Kessler, Armstrong, Clibborn, Priest, Nixon, Blake, Hunt, Morrell, Grant, Newhouse, Dickerson, Kagi, Ericksen, Ericks, Wood, Upthegrove, Ormsby, Roberts and O'Brien; by request of Attorney General.

#### **Brief History:**

##### **Committee Activity:**

Judiciary: 1/27/06, 2/2/06 [DPS].

#### **Brief Summary of Substitute Bill**

- Establishes a privilege from compelled testimony and disclosure of information for members of the news media.

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### HOUSE COMMITTEE ON JUDICIARY

**Majority Report:** The substitute bill be substituted therefor and the substitute bill do pass. Signed by 9 members: Representatives Lantz, Chair; Williams, Vice Chair; Priest, Ranking Minority Member; Rodne, Assistant Ranking Minority Member; Campbell, Kirby, Serben, Springer and Wood.

**Minority Report:** Without recommendation. Signed by 1 member: Representative Flannigan, Vice Chair.

**Staff:** Edie Adams (786-7180).

#### **Background:**

The judiciary has inherent power to compel witnesses to appear and testify in judicial proceedings so that the court will receive all relevant evidence. However, the common law and statutory law recognize exceptions to compelled testimony in some circumstances, including testimonial or evidentiary privileges. Privileges are generally disfavored in the common law because they impede the court's truth-finding function.

Privileges are recognized when certain classes of relationships or communications within those relationships are deemed of such importance that they should be protected. Four criteria must be satisfied to find a privilege under the common law: (1) the communication must be made in confidence; (2) the element of confidentiality must be essential to the relationship; (3) the relationship is one that should be sedulously fostered; and (4) the injury of disclosing the communication must be greater than the benefit of disclosure.

Washington has not enacted a statutory reporter privilege, but the Washington Supreme Court has recognized a common law qualified privilege for reporters against compelled disclosure of confidential source information in both civil and criminal cases. To overcome the privilege, a party must show that: (1) the claim is meritorious; (2) the information sought is necessary or critical to the cause of action or defense pleaded; and (3) the party made a reasonable effort to obtain the information by other means.

Thirty one states and the District of Columbia have enacted statutory reporter shield laws. There is wide variation among these laws: some states provide protection only with respect to confidential sources, either by providing a qualified or absolute privilege; some provide qualified protection for both confidential sources and the reporter's work product; and some provide an absolute privilege for both sources and work product. In addition, state laws vary with respect to whether and how they apply the privilege in different types of proceedings (e. g., civil versus criminal) and the showing that must be made to overcome the privilege where it is qualified.

At the federal level, Congress has not adopted a reporter privilege law, although a number of bills have been introduced on the subject. Most federal circuit courts, including the Ninth Circuit, have recognized some form of qualified reporter privilege, either deriving from the common law or the First Amendment.

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### **Summary of Substitute Bill:**

A privilege from compelled testimony or disclosure of information is established for members of the news media. In addition, a privilege from compelled disclosure of certain information is established for a non-news media party under certain circumstances.

The news media has an absolute privilege from being compelled to testify, produce, or disclose the identity of a source of news or information, or any information that would tend to identify the source, if the source has a reasonable expectation of confidentiality.

The news media has a qualified privilege from being compelled to testify, produce, or disclose any news or information obtained or prepared in the course of gathering, receiving, or processing news or information for potential communication to the public. This qualified privilege does not apply to physical evidence of a crime. The qualified privilege may be overcome if the court finds the following factors are present:

- In the case of a criminal proceeding, there are reasonable grounds to believe a crime occurred, and in the case of a civil proceeding, there is a prima facie case.
- The news or information is highly material and relevant.
- The news or information is critical or necessary to maintenance of a claim, defense, or proof of a material issue.
- The party seeking the news or information has exhausted all reasonable and available means of obtaining the information from another source.
- There is a compelling public interest in the disclosure. In evaluating public interest, the court may consider whether the information came from a confidential source.

A non-news media party is protected from compelled disclosure of records, information, or other communications relating to business transactions with the news media, where the purpose of seeking the records is to discover the identity of a source or information protected from disclosure under the news media privilege. The news media must be given prior notice and an opportunity to be heard when records relating to a non-news media party's business transactions with the news media are sought. Prior notice is not required where the news media is the target of a criminal investigation and prior notice would pose a clear and substantial threat to the investigation.

The news media privilege is not waived by the publication or dissemination by the news media of the news or information or any portion of the news or information. The fact and content of a publication may be established by judicial notice.

"News media" is defined to mean any of the following persons or entities:

- newspaper; magazine or periodical; book publisher; news agency; wire service; radio, television, cable, or satellite station or network; or audio or audiovisual production company;
- any person or entity in the regular business of disseminating news or information to the public by any means;
- a journalist, higher education researcher or scholar, or other individual who is either: earning or about to earn a substantial amount of his or her livelihood by obtaining or preparing information for any of the above; or acting as an agent, assistant, employee, or supervisor of any of the above; and
- a parent, subsidiary, or affiliate of the entities listed above.

"News media" does not include a governmental entity, or its officers or employees while engaged in official duties.

### **Substitute Bill Compared to Original Bill:**

The original bill did not exclude physical evidence of a crime from the privilege and did not contain the provision allowing a court to take judicial notice of the fact and content of a publication. The original bill's definition of "news media" did not specifically reference the Internet, did not include persons who *are about to earn* a substantial portion of their livelihood in the news media, and did not specifically exclude governmental entities and their officers

and employees. In addition, the original bill contained a provision stating that information protected by the privilege is inadmissible in a proceeding.

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**Appropriation:** None.

**Fiscal Note:** Not requested.

**Effective Date of Substitute Bill:** The bill takes effect 90 days after adjournment of session in which bill is passed.

**Testimony For:** This is a timely and necessary bill to extend clear rights and protections to the news media. The free flow of information and the functions of investigative journalism are critical to our democracy and critical to the role that the press plays in keeping the government and corporate power honest. This important role is deserving of the privilege created in this bill.

The bill advances our case law by providing an absolute privilege for confidential sources. We don't want to create a chilling effect on the ability of the press to obtain information for the public through a fear of having to divulge confidential source information. A qualified privilege creates an insufficient relationship to promote the free flow of information. The news media are cautious right now in how they use confidential sources. We don't want the lack of an absolute privilege to prevent people from coming forward with information that is vital for the public to have.

This bill also protects a journalist's work product with a qualified privilege that may only be overcome by a strict four-part test. The privilege for work product is important in preserving the public's trust of the news media. The news media should not be in the position of being perceived by the public as either a tool for private civil litigants or as an investigatory arm of the police. That can happen if reporters are called in to testify in civil or criminal proceedings. In addition, codifying a qualified work product privilege will enable the news media, attorneys, and judges to more expeditiously deal with news media subpoenas without the current time-consuming and expensive process of briefing the court.

This bill provides greater protections for the rights of the press and journalists than what they have today. However, some sections of the bill are of concern and could be strengthened. The work product protections in the bill are more ephemeral than real. The basic protection the work product provision seeks to create is undone by the highly subjective test that applies to it. Journalists need to have the ability to talk with and interact with individuals and groups of people who need confidentiality without the fear that the journalist will be turned into a government spy. Although the bill protects the identity of a source, notes might be seized and the identity of the source penetrated. The parties aren't going to know whether the work product will include highly relevant material until the court takes a look at them.

**Testimony Against:** There should not be an absolute privilege for confidential sources as created in this bill. The privilege should be qualified so that the court can be the arbiter of the

necessary balancing of the interests involved. Privileges are not favored in the law because they limit the information that gets to the fact finder and this impedes the search for truth and the ability to get to justice. None of the federal courts, or the United States Supreme Court, or the Washington Supreme Court has granted an absolute privilege. An absolute privilege substitutes the journalist's opinion for that of the judge as to whether the information is critical. The courts are entrusted to make these kinds of decisions all the time.

The work that journalists do is very important, but the privilege needs to be qualified so that there is judicial oversight. There are two interests at stake: the interest of the public to know what is going on; and the interest of protecting an innocent person from a wrongful conviction. If the press has information that could exculpate a defendant, the accused has the right to that information.

The bill should not create an absolute shield for matters involving the private sector. There might be policy reasons for having an absolute privilege for sources in issues relating to the public sector. There have been egregious violations involving disclosure of proprietary personal and financial information from private companies, and this absolute privilege would protect the persons who engaged in that behavior.

This bill doesn't meet the real needs of journalists. Journalists need legislation that provides for the free flow of information. This bill isn't about protecting journalists, it is about keeping the information to the public free and open. The bill's definition of "news media" contains an income-based test that could put freelancers and part-time journalists at risk of not being protected. Under this bill, journalists will still have to face substantial subpoena risks and will still be drawn into court to defend themselves and their work product. Confidential source issues are a small percentage of what journalists deal with on a daily basis. The real concern is with a journalist's work product. Almost all of the requests for information are for work product and in almost every case what the parties are seeking is contained in the information that was published. Work product requests are just an attempt to draw the news media into private litigation. A neutral press is vital to society and being drawn into the legal disputes of others can seriously harm that neutrality.

**Persons Testifying:** (In support) Representative Kessler, prime sponsor; Mark Allen, Washington State Association of Broadcasters; Bryan Johnson, KOMO Radio - TV; Don Satterberg, King County Prosecuting Attorney; Rowland Thompson, Allied Daily Newspaper; and Greg Overstreet, Office of the Attorney General.

(Opposed) Kirsten Kendrick, Marcus Donner, and Stacey Walters, Western Washington Chapter of the Society of Professional Journalists; Amy Muth, Washington Association of Criminal Defense Lawyers, Washington Defenders Association; William McCartney, United States Automobile Association and Dave McEachran, Whatcom County Prosecuting Attorney.

**Persons Signed In To Testify But Not Testifying:** None.