

# HOUSE BILL REPORT

## HB 1366

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### As Passed House:

February 16, 2007

**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:** By Representatives Kessler, DeBolt, Grant, Ericksen, Lantz, Rodne, Williams, Priest, Morrell, Hunt, Appleton, Blake, Chase, Anderson, Darneille, Dickerson, Linville, Springer, Hurst and Wood.

### Brief History:

#### Committee Activity:

Judiciary: 1/26/07, 2/2/07 [DP].

#### Floor Activity:

Passed House: 2/16/07, 96-0.

### Brief Summary of 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:** Do pass. Signed by 10 members: Representatives Lantz, Chair; Goodman, Vice Chair; Rodne, Ranking Minority Member; Warnick, Assistant Ranking Minority Member; Flannigan, Kirby, Moeller, Pedersen, Ross and Williams.

**Minority Report:** Do not pass. Signed by 1 member: Representative Ahern.

**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,

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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.

More than 30 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 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 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 information is highly material and relevant;
- the information is critical or necessary to maintenance of a claim or defense, or proof of a material issue;
- the party seeking the information has exhausted all reasonable and available means of obtaining the information from another source; and
- 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 or information relating to business transactions with the news media where the purpose of seeking the records is to discover the identity of a source or other information protected from disclosure. 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.

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**Appropriation:** None.

**Fiscal Note:** Not requested.

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

**Staff Summary of Public Testimony:**

(In support) Freedom of the press is the strength of our democracy. When we lose the freedom of the press we lose the ability to know what is going on in our society. The real issue and purpose of this bill is to encourage people to be good citizens and come forward with information on wrongdoers so they may be brought to justice. The absolute privilege is needed for the free flow of information. There are some stories that simply wouldn't get out without the protection for sources of information. Use of confidential sources is rare, but necessary when very serious matters are involved and the source fears reprisals for coming forward.

Investigative journalism is expensive. It takes substantial resources, time, and legal fees. Reporters are constantly finding subpoenas arriving for their raw notes. Sometimes we win, sometimes we lose, but it is always expensive and creates a real economic burden, especially for small newspapers. This has a chilling effect on journalism. This bill would help lower costs and expand what we are able to do.

The problem with the privilege created in case law is that it is judge-made and applied differently in different cases. We need a law that makes it clear what the test is and what journalists and sources can expect. We are talking about the making and upholding of a promise. Without an absolute privilege, we are not certain that we can keep our promises without having to go to jail. Washington shouldn't be a state where journalists are thrown in jail, nor a state where journalists are too afraid to cover the important stories for fear of being subpoenaed. The bill strikes a good balance and provides clarity that will benefit judges, parties, and journalists.

At least 12 states have established an absolute privilege for sources and we have never heard of any abuses in those states. If a court is confronted with a conflict between a defendant's Sixth Amendment right to a fair trial and the privilege, the court would find that the Constitution trumps the privilege. The definition of news media in the bill is well crafted. It covers most people in the business of disseminating information to the public and it has an economic test since journalism is a business.

(Opposed) The absolute privilege is not fairly balanced and not good public policy. The bill impedes the factfinding process of the judiciary. It expands the current case law, which allows the judge to consider whether the privilege is justified. The bill entirely bars the courts from making inquiry into matters relating to source. The media shouldn't be the sole determiner of whether source information will be available to the court for determining the facts and the outcome of justice. A qualified source is appropriate so that the court can make an in-camera review to make sure fairness and justice prevails on both sides.

The definition of news media in the bill is incredibly broad and sweeping and does not properly define the profession. The bill includes bloggers, political association executives, and business or trade association staff. Just about anybody is now provided with an absolute privilege with respect to source information.

The bill is fine to the extent it confirms and gives standards to the qualified privilege, but the absolute privilege should not be included. A major concern with the absolute privilege arises in those rare case where the only access to information that may exonerate an innocent person

is through a source. There is no reason to send an innocent person to prison just to protect a source. The court can fairly apply the qualified privilege. The courts are completely respectful of the media's concerns if they truly have a privilege.

**Persons Testifying:** (In support) Mark Allen, Washington Association of Broadcasters; Chris Halsne, Investigative Reporter, KIRO-TV; Bill Will, Washington Newspaper Publishers Association; Michele Earl-Hubbard, Davis Wright Tremaine; Ken Bunting, Associate Publisher, Seattle Post-Intelligencer; James Anderson, Retired Legislator, and Supreme Court Justice; and Rowland Thompson, Allied Daily Newspapers.

(Opposed) Mark Rising, King County Bar Association; Tim Maybrown, Washington Criminal Defense Lawyers; Mel Sorensen, Washington Defense Trial Lawyers; and Cliff Webster, Washington Construction Industry Council.

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