SENATE BILL REPORT
SB 6216

As Reported By Senate Committee On:
Judiciary, February 1, 2006

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: Senators Kline, Johnson, Keiser, Schmidt, Rasmussen, Fairley, Kohl-Welles, Esser and Doumit; by request of Attorney General.

Brief History:
Committee Activity: Judiciary: 1/25/06, 2/1/06 [DPS, w/oRec].

SENATE COMMITTEE ON JUDICIARY

Majority Report: That Substitute Senate Bill No. 6216 be substituted therefor, and the substitute bill do pass.

Signed by Senators Kline, Chair; Weinstein, Vice Chair; Johnson, Ranking Minority Member; Esser, Hargrove, McCaslin, Rasmussen and Thibaudeau.

Minority Report: That it be referred without recommendation.

Signed by Senator Carrell.

Staff: Lidia Mori (786-7755)

Background: Washington has no statute that protects a reporter or journalist from being compelled to disclose confidential sources and information he or she has obtained during the process of gathering news. Washington courts have ruled in favor of a qualified protection, based on the First Amendment and common law. In the case of *Senear v. Daily Journal American*, the Washington Supreme Court set forth four conditions that must be met before the common law qualified privilege for news reporters in a civil or criminal proceeding can be defeated. The party seeking discovery must show (1) the claim is meritorious; (2) the information sought is necessary or critical to the cause of action or the defense pleaded; (3) a reasonable effort has been made to acquire the information by other means; and (4) the interest of the reporter in nondisclosure is supported by a need to preserve confidentiality.

Thirty-one states and the District of Columbia have laws that shield the media from compelled disclosure. Federal shield legislation is being considered in Congress. There is concern that compelled disclosure of confidential information by the media has a chilling effect on information availability and that it inhibits whistleblowers from communicating about important issues.

Summary of Substitute Bill: No judicial, legislative, administrative, or other body with subpoena power may compel the news media to testify, produce, or in any way disclose the

identity of a source of any news or information where such source has a reasonable expectation of confidentiality. In addition, news or information, other than physical evidence of a crime, obtained or prepared by the news media in its capacity in gathering, receiving, or processing news or information for potential communication to the public may not be compelled to be disclosed or produced, except in the following circumstances. A court may compel disclosure of such news or information if the party seeking the news or information can establish by clear and convincing evidence that (1) in a criminal investigation or prosecution, based on information other than that sought, there are reasonable grounds to believe a crime has occurred; or (2) in a civil proceeding, based on information other than that sought, there is a prima facie cause of action. In both instances, whether criminal or civil, the party must establish that (1) the news or information is highly material and relevant; (2) it is critical or necessary to the maintenance of a party's claim, defense, or proof of a material issue; (3) the party seeking the news or information has exhausted all reasonable and available means to obtain it from alternative sources; and (4) there is a compelling public interest in the disclosure. Publication or dissemination by the news media of the identity of a source or of news or information obtained or prepared by the news media does not constitute waiver of the protection from compelled disclosure. If the fact of publication must be proved in any proceeding, that fact and the contents of the publication may be established by judicial notice.

"News media" is defined as, among other things, any newspaper, magazine, book publisher, news agency, radio or television station or network, or any person who is in the regular business of disseminating news or information to the public by any means. It also includes any person who is or has been a journalist, scholar, or researcher employed by an institution of higher education, or other individual who, either at the time he or she obtained or prepared the information sought by compulsory disclosure, was earning or on a professional track to earn a significant portion of his or her livelihood by obtaining or preparing information for dissemination by a news media entity or person. New media also includes any person who obtained or prepared the information that is sought while serving as an agent, assistant, employee, or supervisor of any news media person or entity.

A non-news media party is protected from compelled disclosure when the subpoena or compulsory process seeks records, information, or other communications relating to business transactions between the non-news media party and the new media for the purpose of discovering the identity of a source. When a subpoena or other compulsory process is initiated against a non-news media party seeking information or communications on business transactions with the news media, the affected news media must be given reasonable and timely notice of the compulsory process before it is initiated and be given an opportunity to be heard. If the compulsory process against the non-news media is in connection with a criminal investigation in which the news media is the target, and advance notice would pose a clear and substantial threat to the integrity of an investigation, the governmental authority must certify so in court. In such a case, notification of the compulsory process will be given to the affected news media as soon as it is determined that the notice will not pose a clear and substantial threat to the integrity of the investigation.

Substitute Bill Compared to Original Bill: The bill as referred to committee was not considered.

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Appropriation: None.

Fiscal Note: Not requested.

Committee/Commission/Task Force Created: No.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Testimony For: This bill provides two shields, one completely protects the identity of a source and one is a qualified protection for work product. One test that must be met before a work product can be compelled to be disclosed is that disclosure must be a compelling public interest. As the tests indicate, compelling disclosure should be a last resort. It was important to provide some definition of journalist, the bill was not meant to cover a person who writes the occasional op-ed piece. This is a moderate approach, consistent with other states. The role of the press as the guardian of the public interest is undervalued. A qualified immunity for identity of a source would not work, it has to be 100% or not at all. The work product protection should be qualified. It is expensive to fight a subpoena. Small newspapers have to make the decision to either turn over the desired material or fight the subpoena. Often, the critical factor is the cost involved. Hopefully, this bill will deter unnecessary and burdensome challenges of subpoenas. The source deserves a much broader protection than work product. It should cut down substantially on "fishing expeditions."

Testimony Against: The core idea is to protect the first amendment freedom of speech and press. The Society of Professional Journalists is in favor of a shield law but believe it should be stronger than what this bill provides. Confidential sources are a small part of a journalist's work. The income based test in this bill puts free lance journalists in jeopardy of disclosure. The Oregon statute is better in the area of work product. The public has a right to every man's evidence. There should not be a total privilege for identity of a source, it should be up to a judge. One drawback to an absolute protection of a source is that there is no way to find the source to see if he or she would waive the privilege.

Who Testified: PRO: Rob McKenna, Attorney General; Norm Maleng, King County Prosecutor; Bruce Johnson, Davis, Wright, Tremaine law firm; Bill Will, Washington Newspapers Publishers Assn. CON: Kirsten Kendrick, Society of Professional Journalists; Marcus Donner, Society of Professional Journalists; Stacey Walters, Society of Professional Journalists, Dave McEachran, Whatcom County Prosecuting Attorney; William McCartney, USAA.

Signed in, Unable to Testify & Submitted Written Testimony: No one