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Editorial| Our View

Shield law for media should be reinstated

By Star-Advertiser staff

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Several bills introduced in the Legislature this session would restore to Hawaii journalists special legal protections that expired in 2013. It's reasonable to ask why.

The bills would re-establish a news media privilege against the compelled disclosure of sources and unpublished information. The privilege would limit the ability of the judicial system, through law enforcement or private action, to use the subpoena power to threaten journalists by seizing their notes or forcing them to turn over the names of those who give them information.

The purpose of this limited privilege — a shield law — is twofold. First, to allow journalists to report on issues of public concern without fear of government coercion or restraint. Second, and more important, to protect individuals who want to make sensitive information public, but who lack the authority, resources or fortitude to openly challenge the powers that be. They need the information to be vetted and released by a credible, independent source — namely, a news media that adheres to common journalistic standards and ethics.

These protections are not only necessary, they are commonplace. Nearly every state and the District of Columbia provide some version of a journalist's privilege, either through a shield law or other legal means.

In fact, Hawaii had one of the most progressive shield laws in the country from 2008 until 2013, when the Legislature failed to lift a sunset provision and allowed the law to expire. The law, known as Act 210, died, predictably, at the hands of self-interested government — the state attorney general's office and then-state Sen. Clayton Hee,

whose attempts to rewrite the law at the AG's behest effectively rendered Act 210 useless.

The destruction of Hawaii's shield law was both unfortunate and a waste of time. No one was denied justice because of Act 210. The journalist's privilege was a qualified one, carefully crafted to apply only to those legitimately in the news business — not to random bloggers or fraudsters. In the five years of its existence, the law was invoked only once, by a young documentary filmmaker on Kauai who successfully protected his unpublished materials from subpoena in a civil lawsuit.

Two bills, House Bill 295 and Senate Bill 496, propose to restore Act 210 in its original form. This is the best and only option. It follows the position of the state Judiciary's Standing Committee on the Rules of Evidence, which recommended in a 2011 report that the sunset provision be lifted on Act 210.

Two other bills, House Bill 17 and Senate Bill 570, proposes a weaker version of Act 210 that incorporates some comments in the standing committee's report and recommendations from the attorney general.

HB 17 and SB 570 would restrict the privilege not only for material evidence for felonies, but for "potential felonies, or serious crime involving unlawful injury to persons or animals."

It also would allow subpoenas against journalists in all civil actions, rather than only those involving defamation.

These exemptions are so broad that a journalist could be vulnerable to subpoena in just about any type of judicial proceeding, civil or criminal — a chilling effect that would negate the very purpose of a shield law. Even worse, SB 570 would eliminate protections for non-traditional journalism, such as online media. Such weak protection is worse than no protection at all, because it enshrines in statute a meaningless privilege.

If the Legislature is serious about protecting freedom of the press and public discourse, it should do so with HB 295 or SB 496 — legislation already proven to work.