

AMENDED IN SENATE JUNE 3, 2010

AMENDED IN ASSEMBLY JULY 1, 2009

CALIFORNIA LEGISLATURE—2009–10 REGULAR SESSION

Assembly Joint Resolution

No. 16

Introduced by Assembly Member Evans
(Principal coauthor: Senator Leno)

April 30, 2009

Assembly Joint Resolution No. 16—Relative to journalism shield laws.

LEGISLATIVE COUNSEL'S DIGEST

AJR 16, as amended, Evans. Journalism shield laws.

This measure would urge the Congress and President of the United States to work together to enact a shield law for America's journalists.
Fiscal committee: no.

- 1 WHEREAS, A free press is vital to the publication of important
2 news within our society so that our government is accountable to
3 its citizens; and
4 WHEREAS, A journalist's promise of confidentiality to a source
5 of information is often the only way the public can learn about
6 waste, fraud, and abuse in government and the private sector, and
7 the forced disclosure of confidential sources and information will
8 cause individuals to refuse to talk to journalists, resulting in a
9 chilling effect on the free flow of information and the public's
10 right to know; and
11 WHEREAS, The most famous confidential source in United
12 States history, W. Mark Felt, also known as Deep Throat,

1 voluntarily revealed his identity as a resident of Santa Rosa 33
2 years after the Watergate scandal revealed corruption in the highest
3 levels of the Nixon White House; and

4 WHEREAS, Shield laws promote the free flow of information
5 to the public and prevent government from making journalists its
6 investigative agents because they prohibit courts from holding
7 journalists in contempt for refusing to disclose unpublished news
8 sources or information received from those sources; and

9 WHEREAS, California's shield law was first enacted in 1935
10 and later incorporated as subdivision (b) of Section 2 of Article I
11 of the California Constitution in 1980 to provide that a journalist
12 may not be held in contempt for refusing to disclose a news source
13 or unpublished information gathered for news purposes; and

14 WHEREAS, California's shield law was broadened in 2000 to
15 also provide that no testimony or other evidence given by a
16 journalist under subpoena in a civil or criminal proceeding may
17 be construed as a waiver of immunity rights provided by the
18 California Constitution, that a journalist subpoenaed in any civil
19 or criminal proceeding shall be given at least five days' notice,
20 except in exigent circumstances, and that a judge must set forth
21 findings on the record stating why the testimony of a journalist is
22 essential to guarantee the defendant's constitutionally guaranteed
23 right to a fair trial when presiding over a criminal trial wherein a
24 journalist is asserting protection under the media shield law; and

25 WHEREAS, In *O'Grady v. Superior Court* (2006) 139
26 Cal.App.4th 1423, the application of California's shield law was
27 further broadened to include the gathering and collection of news
28 by journalists publishing information through the Internet; and

29 WHEREAS, ~~Thirty-seven~~ *Thirty-nine* states: Alabama, Alaska,
30 Arizona, Arkansas, California, Colorado, Connecticut, Delaware,
31 Florida, Georgia, Hawaii, Illinois, Indiana, *Kansas*, Kentucky,
32 Louisiana, Maine, Maryland, Michigan, Minnesota, Montana,
33 Nebraska, Nevada, New Jersey, New Mexico, New York, North
34 Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania,
35 Rhode Island, South Carolina, Tennessee, Texas, Utah, ~~and~~
36 ~~Washington~~ *Washington*, and *Wisconsin*, and the District of
37 Columbia, have statutory shield laws giving journalists some form
38 of privilege against compelled production of confidential or
39 unpublished information; and

1 WHEREAS, ~~Twelve~~ *Ten* states: Idaho, Iowa, ~~Kansas,~~
2 Massachusetts, Mississippi, Missouri, New Hampshire, South
3 Dakota, Vermont, Virginia, ~~West Virginia, and Wisconsin and~~
4 *West Virginia* have established varying confidentiality privileges
5 for journalists through their courts; and

6 WHEREAS, ~~In 2009, legislation was introduced in two states,~~
7 ~~Kansas and Massachusetts, to establish a statutory shield law and~~
8 ~~in two states, Maine and New York, to expand their shield laws;~~
9 and

10 WHEREAS, Two companion measures in the 111th Congress,
11 House Resolution 985 and Senate Bill 448, would establish a
12 federal shield law for journalists through the enactment of the Free
13 Flow of Information Act; and

14 WHEREAS, House Resolution 985 passed the House of
15 Representatives on March 31, 2009, by a voice vote, demonstrating
16 the broad bipartisan support for the bill, and Senate Bill 448 is
17 expected to be considered by the Senate Judiciary Committee soon;
18 and

19 WHEREAS, President Barack Obama cosponsored media shield
20 legislation when he was a Senator in the 110th Congress; and

21 WHEREAS, Attorney General Eric Holder, during his Senate
22 confirmation hearing in January 2009, expressed support for media
23 shield legislation; and

24 WHEREAS, The pending Free Flow of Information Act in the
25 111th Congress establishes that a federal entity may not compel a
26 journalist to divulge confidential sources unless a court determines
27 by a preponderance of the evidence that: (1) all reasonable
28 alternative sources of information have been exhausted, (2)
29 information is needed to prevent an act of terrorism or other
30 significant harm to national security, to prevent death or substantial
31 bodily harm, to investigate a leak of properly classified information
32 or private trade secret, health or financial information, and to
33 furnish eyewitness observations of a crime, and (3) taking into
34 account the public interest in, disclosure of a confidential source
35 and the public interest in gathering and disseminating news and
36 information; and

37 WHEREAS, The pending Free Flow of Information Act in the
38 111th Congress stipulates that the testimony or documents sought
39 by a federal entity from a journalist should be narrowly and
40 appropriately tailored in scope and time period; and

1 WHEREAS, A 2008 University of Arizona survey found that
2 there were 335 federal subpoenas in 2006 seeking information
3 obtained by a reporter following a promise of confidentiality and,
4 of these, 21 sought the names of confidential sources and 13 sought
5 other information obtained under a promise of confidentiality; and

6 WHEREAS, Over the last seven years, four federal courts of
7 appeals, the First Circuit, the Fifth Circuit, the Ninth Circuit, and
8 the Circuit for the District of Columbia, have affirmed contempt
9 citations issued to reporters who declined to reveal confidential
10 sources; and

11 WHEREAS, Federal courts are imposing prison sentences that
12 are increasingly severe on journalists for nondisclosure of
13 confidential sources, most recently demonstrated in 2008 by the
14 United States District Court for the District of Columbia in *Hatfill*
15 *v. Mukasey* (D.C. Cir. Mar. 7, 2008, No. 031793), in which the
16 court ordered fines of up to \$5,000 a day on a journalist and
17 expressly prohibited the journalist from seeking assistance from
18 her employer in paying the fines, even though the fine related to
19 activities occurring within the course and scope of her employment;
20 and

21 WHEREAS, In relation to *Miller v. United States* (2005) 125
22 S.Ct. 2977, and *Cooper v. United States* (2005) 125 S.Ct. 2977,
23 the Attorneys General of 34 states: Arizona, California, Colorado,
24 Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Iowa,
25 Kentucky, Louisiana, Maine, Maryland, Massachusetts,
26 Mississippi, Montana, Nebraska, New Mexico, North Carolina,
27 North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South
28 Carolina, South Dakota, Tennessee, Texas, Utah, Vermont,
29 Washington, West Virginia, and Wisconsin, and the District of
30 Columbia, stated in an amicus brief submitted to the United States
31 Supreme Court, “A federal policy that allows journalists to be
32 imprisoned for engaging in the same conduct that these State
33 privileges encourage and protect buck[s] that clear policy of
34 virtually all states, and undermines both the purpose of the shield
35 laws, and the policy determinations of state courts and legislatures
36 that adopted them”; and

37 WHEREAS, Confidentiality of certain communications has
38 long been protected in order to further important interests, both
39 public and private, including communications between doctor and
40 patient, lawyer and client, and priest and penitent; and

1 WHEREAS, A May 2005 poll conducted by the First
2 Amendment Center and American Journalism Review found that
3 69 percent of Americans agree with the statement: “Journalists
4 should be allowed to keep a news source confidential”; now,
5 therefore, be it

6 *Resolved by the Assembly and the Senate of the State of*
7 *California, jointly*, That the Legislature of the State of California
8 respectfully urges the Congress and President of the United States
9 to work together to enact a shield law for America’s journalists;
10 and be it further

11 *Resolved*, That the Chief Clerk of the Assembly transmit copies
12 of this resolution to the President and the Vice President of the
13 United States, to the Senate Majority Leader, to the Speaker of the
14 House of Representatives, and to each Senator and Representative
15 from California in the Congress of the United States.