



Subpoenas and Newsroom Searches

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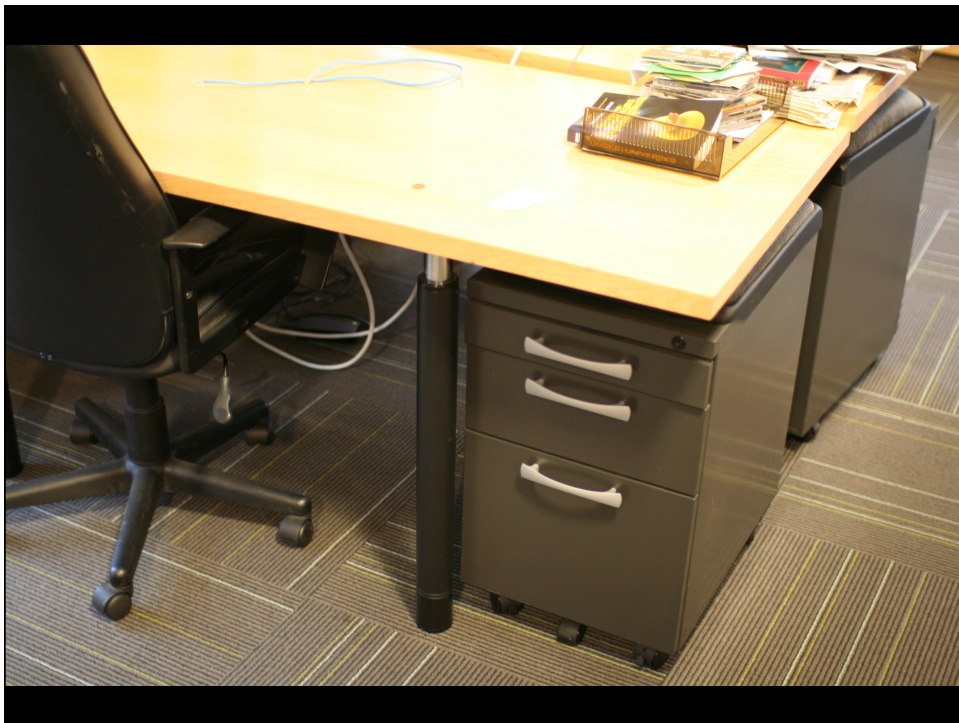
Law that protects journalists from investigation and discovery

- Reporters privilege (per se; evidence doctrine)
- **Privacy Protection Act**
- **Additional sources of protection (generally applicable procedural law, etc.)**

Zurcher v. Stanford Daily

436 U.S. 547
Supreme Court of the United States May 31,
1978





Privacy Protection Act

Aftermath of *Zurcher*

- SCOTUS refused to find constitutional violation for newsroom search in *Zurcher v. Stanford Daily* (1978)
- In 1980, Congress responded with the Privacy Protection Act, creating statutory protection in such circumstances
- 42 U.S.C. § 2000aa

Privacy Protection Act

Privacy Protection Act

- “Notwithstanding any other law, it shall be unlawful for a government officer or employee, in connection with the investigation or prosecution of a criminal offense, to search for or seize [materials] possessed by a person [with] a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication, in or affecting interstate or foreign commerce”

Exception 1

- “there is probable cause to believe that the person possessing such materials has committed or is committing the criminal offense to which the materials relate”
 - Unless crime is possession or receipt
 - Unless national security, child sexual exploitation ...

Exception 2

- “there is reason to believe that the immediate seizure of such materials is necessary to prevent the death of, or serious bodily injury to, a human being”

Exception 3

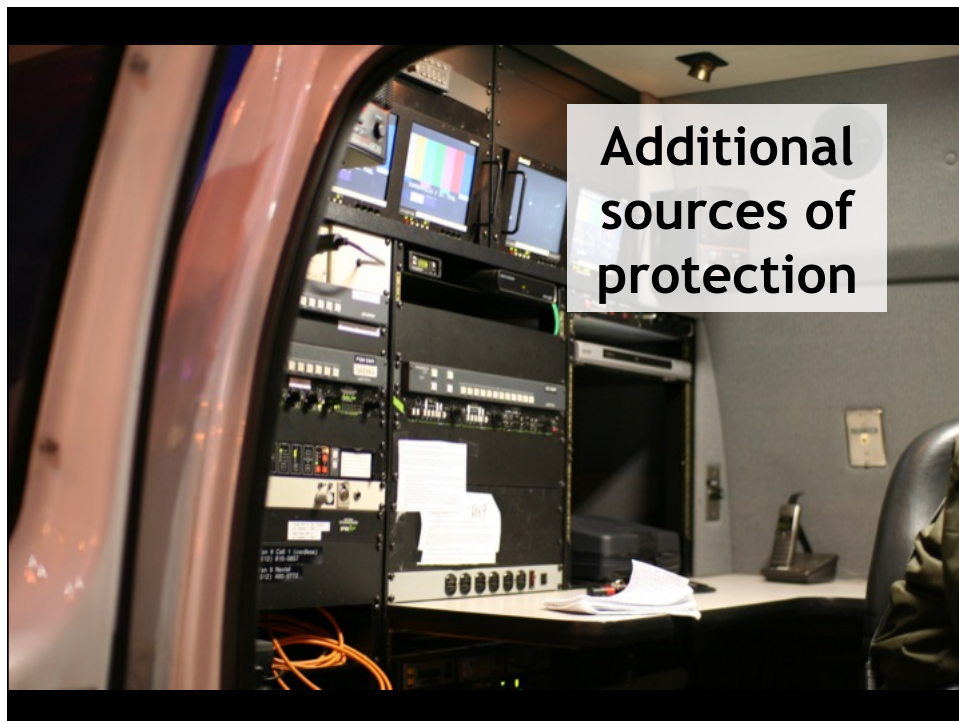
- Applying to “documentary materials, *other than work product materials*”
- “there is reason to believe that the giving of notice pursuant to a subpoena duces tecum would result in the destruction, alteration, or concealment of such materials”

Exception 4

- Applying to “documentary materials, *other than work product materials*”
- “such materials have not been produced in response to a court order directing compliance with a subpoena duces tecum, and—
 - (A) all appellate remedies have been exhausted; or
 - (B) there is reason to believe that the delay in an investigation or trial occasioned by further proceedings relating to the subpoena would threaten the interests of justice.”

Remedies

- Civil cause of action for damages.
- Minimum of \$1,000 liquidated damages.
- Attorneys fees and costs, in court's discretion, for prevailing plaintiff



Additional Sources

Additional sources of protection

- Fifth Amendment
- Sixth Amendment
- Federal Rule of Criminal Procedure 17(c)
- U.S. Attorney General's Guidelines
- Federal Rule of Civil Procedure 26

Additional Sources

Fifth Amendment

- If the reporter is implicated in a crime through communication with the source, the reporter can “plead the Fifth” (really “invoke” the Fifth Amendment against self-incrimination) and refuse to identify the source or otherwise testify or answer investigators' questions

Sixth Amendment

- If the information is sought by a criminal defendant based on the Sixth Amendment guarantee of a fair trial, the information must be both:
 - Material
 - Favorable to the defense
- If not, the reporter can move quash the subpoena under Sixth-Amendment law.

Federal Rule of Criminal Procedure 17(c)

- All subpoenas seeking “documents and objects” directed toward anyone (including the press) in a federal criminal matter can seek only materials that are “admissible as evidence” at trial.
 - This is much more limited than in civil discovery
- Even if admissible as evidence, the party must show:
 - Materials must be not otherwise reasonably procurable
 - Party cannot adequately prepare for trial without it
 - Failure to obtain the material may unreasonably delay trial
 - Not a “fishing expedition”

Additional Sources

U.S. Attorney General Guidelines

- Guidelines issued in 1970.
- Require U.S. Attorneys to balance First Amendment interests with the need for effective law enforcement before issuing a subpoena.
- Require all reasonable attempts to obtain the information from alternative sources.
- Require that the information sought from the press is essential.
- Generally require approval of the Attorney General.
- Generally require negotiations with the press before issuing a subpoena to the press or for press's telephone records.

Additional Sources

Federal Rule of Civil Procedure 26

- Courts “issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense,”
- Courts can quash or limit subpoenas if the discovery is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive
- Where alternative sources have not been exhausted, it may be an abuse of discretion to not quash a subpoena directed to the press
- Courts can control the order of discovery to prevent interference with the press