

Reporters Privilege

and other protections for media from
investigation and discovery

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Konomark - Most rights sharable.

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.)



Sources of Reporters Privilege

- First Amendment to the U.S. Constitution
- State constitutions
- State common law
- State statutes
- *Note:* no federal statute, despite calls for one

First Amendment Privilege

- *Branzburg v. Hayes* declined to find a reporters privilege under the First Amendment.
 - Opinion used limiting language
 - Powell concurrence (5th vote) emphasized narrowness of holding
- Lower courts interpreted *Branzburg* as not precluding a reporters privilege
- The contours of the First Amendment privilege (when recognized) differs greatly from circuit to circuit, state to state

State Law Privilege

- Before *Branzburg*, 17 states (a minority) had shield laws.
- In the wake of *Branzburg v. Hayes* many more states passed shield laws.
- Today, 39 states, plus D.C., have shield laws.
- Additionally, some states recognize a reporters privilege under common law or under the state constitution.
- The contours of these laws vary greatly from state to state.

Reporters Privilege Constants

- The privilege does not belong to the source.
 - The source cannot invoke.
 - The source cannot waive.
- The privilege belongs to the reporter.
 - But in many jurisdictions, the privilege can be invoked by the publisher / news organization
- Applies to information gathered in the course of newsgathering duties.
- Professional journalists employed by newspapers or broadcast networks or stations are covered by the privilege.

Reporters Privilege Variables

- Confidential vs. nonconfidential materials
- Third-party records regarding the media
- Who qualifies? (e.g., freelancers, scholars, authors, bloggers, non-legacy media)

Confidential vs. Nonconfidential

- Some jurisdictions limit privilege to confidential information.
- In some jurisdictions, the privilege expands to include nonconfidential information
 - E.g., outtakes, unused footage

Arguments for protecting nonconfidential information

- “subtle and lurking threat” to First Amendment interests if production of nonconfidential information by press “becomes routine and casually ... compelled.”
- Confidentiality of information “has little, if anything, to do with the burdens on the time and resources of the press that would inevitably result from discovery without special restrictions.”



Third-party records concerning media

- Hotel and phone records can be used to identify confidential sources, even without gathering information directly from press
- Some courts have analyzed motions to quash in such cases under the same First Amendment standards as those applied directly to subpoenas of the press

Who counts as a reporter?

- Employee-journalists for newspapers or broadcast news operations always do.
- Freelancers may not.
- Scholars and book authors may not.
- Bloggers may not.
- It all depends on the wording of the statute and how courts apply the law.

New York Civil Rights Law § 79-h

no professional journalist or newscaster presently or having previously been employed or otherwise associated with any newspaper, magazine, news agency, press association, wire service, radio or television transmission station or network or other professional medium of communicating news or information to the public shall be adjudged in contempt by any court in connection with any civil or criminal proceeding, or by the legislature or other body having contempt powers, nor shall a grand jury seek to have a journalist or newscaster held in contempt by any court, legislature or other body having contempt powers for refusing or failing to disclose news obtained or received in confidence or the identity of the source of such news coming into such person's possession in the course of gathering or obtaining news for publication or to be published in a newspaper, magazine, or for broadcast by a radio or television transmission station or network or for public dissemination by any other professional medium or agency which has as one of its main functions the dissemination of news to the public, by which such person is professionally employed or otherwise associated in a news gathering capacity

Hale v. Too Much Media LLC (N.J. 2011)

N.J. shield law expressly extends the privilege to a person engaged in, connected with, or employed by “news media,” which is defined as “newspapers, magazines, press associations, news agencies, wire services, radio, television or other similar printed, photographic, mechanical or electronic means of disseminating news to the general public.”

The court implied that this might include blogs authored by non-professionals. But it did not include Hale, who was posting to an online message board, which was a virtual public forum, not the functional equivalent of newspapers and the like.



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

- “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 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

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”

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.

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

