

REPORTER'S PRIVILEGE: WYOMING

The Reporters Committee for Freedom of the Press

*A chapter from our comprehensive compendium of information
on the reporter's privilege —the right not to be compelled
to testify or disclose sources and information in court —
in each state and federal circuit.*

The complete project can be viewed at
www.rcfp.org/privilege

Credits & Copyright

This project was initially made possible by a generous grant from the Phillip L. Graham Fund.

Published by The Reporters Committee for Freedom of the Press.

Executive Director: Lucy A. Dalglish

Editors: Gregg P. Leslie, Elizabeth Soja, Wendy Tannenbaum, Monica Dias, Dan Bischof

Copyright 2002-2010 by The Reporters Committee for Freedom of the Press, 1101 Wilson Blvd., Suite 1100, Arlington, VA 22209. Phone: (703) 807-2100 Email: rcfp@rcfp.org. All rights reserved.

Reproduction rights in individual state and federal circuit outlines are held jointly by the author of the outline and The Reporters Committee for Freedom of the Press. Rights for the collective work and other explanatory and introductory material are held by the Reporters Committee.

Educational uses. Those wishing to reproduce parts of this work for educational and nonprofit uses can do so freely if they meet the following conditions. *Educational institutions:* No charge is passed on to students, other than the direct cost of reproducing pages. *Nonprofit groups:* No fee is charged for the seminar or other meeting where this will be distributed, other than to cover direct expenses of the seminar. *Distribution:* This license is meant to cover distribution of printed copies of parts of this work. It should not be reproduced in another publication or posted to a Web site. Those needing to provide Web access can post links directly to the project on the Reporters Committee's site: <http://www.rcfp.org/privilege>

All other uses. Those wishing to reproduce materials from this work should contact the Reporters Committee to negotiate a reprint fee based on the amount of information and number of copies distributed.

Reprints. This document will be available in various printed forms soon. Please check back for updates, or contact the Reporters Committee for more information.

The Reporter's Privilege Compendium: An Introduction

Since the first edition of this guide was published in 2002, it would be difficult to say that things have gotten better for reporters faced with subpoenas. Judith Miller spent 85 days in jail in 2005 for refusing to disclose her sources in the controversy over the outing of CIA operative Valerie Plame. Freelance videographer Josh Wolf was released after 226 days in jail for refusing to testify about what he saw at a political protest. And at the time of this writing, former *USA Today* reporter Toni Locy is appealing her contempt conviction, which was set to cost her as much as \$5,000 a day, for not revealing her sources for a story on the anthrax investigations.

This recent round of controversies underscores a problem that journalists have faced for decades: give up your source or pay the price: either jail or heavy fines. Most states and federal circuits have some sort of reporter's privilege—the right to refuse to testify—that allows journalists to keep their sources confidential. But in every jurisdiction, the parameters of that right are different. Sometimes, the privilege is based on a statute enacted by the legislature—a shield law. In others, courts have found the privilege based on a constitutional right. Some privileges cover non-confidential information, some don't. Freelancers are covered in some states, but not others.

In addition, many reporters don't work with attorneys who are familiar with this topic. Even attorneys who handle a newspaper's libel suits may not be familiar with the law on the reporter's privilege in the state. Because of these difficulties, reporters and their lawyers often don't have access to the best information on how to fight a subpoena. The Reporters Committee for Freedom of the Press decided that something could be done about this, and thus this project was born. Compiled by lawyers who have handled these cases and helped shape the law in their states and federal circuits, this guide is meant to help both journalists who want to know more about the reporter's privilege and lawyers who need to know the ins and outs of getting a subpoena quashed.

Journalists should note that reading this guide is not meant as a substitute for working with a licensed attorney in your state when you try to have a subpoena quashed. You should always consult an attorney before trying to negotiate with a party who wants to obtain your testimony or when appearing in court to get a subpoena quashed or testifying. If your news organization does not have an attorney, or if you are not affiliated with an established organization, the Reporters Committee can help you try to find an attorney in your area.

Above the law?

Outside of journalism circles, the reporter's privilege suffers from an image problem. Critics often look at reporter's shield laws and think that journalists are declaring that they are "above the law," violating the understood standard that a court is entitled to "every man's evidence," as courts themselves often say.

But courts have always recognized the concept of "privileges," allowing certain individuals to refuse to testify, out of an acknowledgment that there are societal interests that can trump the demand for all evidence. Journalists need to emphasize to both the courts and the public that they are not above the law, but that instead they must be able to remain independent, so that they can maintain their traditional role as neutral watchdogs and objective observers. When reporters are called into court to testify for or against a party, their credibility is harmed. Potential sources come to see them as agents

of the state, or supporters of criminal defendants, or as advocates for one side or the other in civil disputes.

Critics also contend that exempting journalists from the duty to testify will be detrimental to the administration of justice, and will result in criminals going free for a lack of evidence. But 35 states and the District of Columbia have shield laws, and the Department of Justice imposes restrictions on federal agents and prosecutors who wish to subpoena journalists, and yet there has been no indication that the courts have stopped working or that justice has suffered.

Courts in Maryland, in fact, have managed to function with a reporter's shield law for more than a century. In 1896, after a reporter was jailed for refusing to disclose a source, a Baltimore journalists' club persuaded the General Assembly to enact legislation that would protect them from having to reveal sources' identities in court. The statute has been amended a few times—mainly to cover more types of information and include broadcast journalists once that medium was created. But the state has never had the need to rescind the protection.

And the privilege made news internationally in December 2002 when the appeals court of the United Nations International Criminal Tribunal decided that a qualified reporter's privilege should be applied to protect war correspondents from being forced to provide evidence in prosecutions before the tribunal.

The hows & whys of the reporter's privilege

In the course of gathering news, journalists frequently rely on confidential sources. Many sources claim that they will be subject to retribution for exposing matters of public importance to the press unless their identity remains confidential.

Doctor-patient, lawyer-client and priest-penitent relationships have long been privileged, allowing recipients to withhold confidential information learned in their professional capacity. However, the reporter's privilege is much less developed, and journalists are frequently asked to reveal confidential sources and information they have obtained during newsgathering to attorneys, the government and courts. These "requests" usually come from attorneys for the government or private litigants as demands called subpoenas.

In the most recent phase of a five-year study on the incidence of subpoenas served on the news media, *Agents of Discovery*, The Reporters Committee for Freedom of the Press reported that 1,326 subpoenas were served on 440 news organizations in 1999. Forty-six percent of all news media responding said they received at least one subpoena during 1999.

In criminal cases, prosecutors argue that reporters, like other citizens, are obligated to provide relevant evidence concerning the commission of a crime. Criminal defendants argue that a journalist has information that is essential to their defense, and that the Sixth Amendment right to a fair trial outweighs any First Amendment right that the reporter may have. Civil litigants may have no constitutional interest to assert, but will argue that nevertheless they are entitled to all evidence relevant to their case.

When reporters challenge subpoenas, they argue that they must be able to promise confidentiality in order to obtain information on matters of public importance. Forced disclosure of confidential or unpublished sources and information will cause individuals to re-

fuse to talk to reporters, resulting in a "chilling effect" on the free flow of information and the public's right to know.

When asked to produce their notes, documents, or other unpublished material obtained during news gathering, journalists argue that these subpoenas intrude on the editorial process, and thus violate their First Amendment right to speak without fear of state interference. Some litigants who request information from the media are simply lazy. Rather than investigating to find appropriate witnesses, these litigants find it simpler and cheaper to compel journalists to reveal their sources or to hand over information.

But journalists also have legitimate reasons to oppose subpoenas over published, non-confidential information. Responding to such subpoenas consumes staff time and resources that should be used for reporting and editing.

If a court challenge to a subpoena is not resolved in the reporter's favor, he or she is caught between betraying a source or risking a contempt of court citation, which most likely will include a fine or jail time.

Most journalists feel an obligation to protect their confidential sources even if threatened with jail time. When appeals have been exhausted, the decision to reveal a source is a difficult question of journalism ethics, further complicated by the possibility that a confidential source whose identity is revealed may try to sue the reporter and his or her news organization under a theory of promissory estoppel, similar to breach of contract. The U.S. Supreme Court has held that such suits do not violate the First Amendment rights of the media. (*Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991))

The sources of the reporter's privilege

First Amendment protection. The U.S. Supreme Court last considered a constitutionally based reporter's privilege in 1972 in *Branzburg v. Hayes*, 408 U.S. 665 (1972). Justice Byron White, joined by three other justices, wrote the opinion for the Court, holding that the First Amendment does not protect a journalist who has actually witnessed criminal activity from revealing his or her information to a grand jury. However a concurring opinion by Justice Lewis Powell and a dissenting opinion by Justice Potter Stewart recognized a qualified privilege for reporters. The privilege as described by Stewart weighs the First Amendment rights of reporters against the subpoenaing party's need for disclosure. When balancing these interests, courts should consider whether the information is relevant and material to the party's case, whether there is a compelling and overriding interest in obtaining the information, and whether the information could be obtained from any source other than the media. In some cases, courts require that a journalist show that he or she promised a source confidentiality.

Two other justices joined Justice Stewart's dissent. These four justices together with Justice William O. Douglas, who also dis-

sent from the Court's opinion and said that the First Amendment provided journalists with almost complete immunity from being compelled to testify before grand juries, gave the qualified privilege issue a majority. Although the high court has not revisited the issue, almost all the federal circuits and many state courts have acknowledged at least some form of a qualified constitutional privilege.

However, some courts, including the federal appeals court in New Orleans (5th Cir.), have recently interpreted *Branzburg* as holding that the First Amendment protects the media from subpoenas only when the subpoenas are being used to harass the press. (*United States v. Smith*, 135 F.3d 963 (5th Cir. 1998)).

State constitutions, common law and court rules. Many states have recognized a reporter's privilege based on state law. For example, New York's highest court recognized a qualified reporter's privilege under its own state constitution, protecting both confidential and non-confidential materials. (*O'Neill v. Oakgrove Construction Inc.*, 71 N.Y.S.2d 521 (1988)). Others states base a reporter's privilege on common law. Before the state enacted a shield law in 2007, the Supreme Court in Washington state recognized a qualified reporter's privilege in civil cases, later extending it to criminal trials. (*Senear v. Daily Journal-American*, 97 Wash.2d 148, 641 P.2d 1180 (1982), *on remand*, 8 Media L. Rep. 2489 (Wash. Super. Ct. 1982)). And in a third option, courts can create their own rules of procedure. The Utah Supreme Court adopted a reporter's privilege in its court rules in 2008, as did the New Mexico high court years before.

Even in the absence of an applicable shield law or court-recognized privilege, journalists occasionally have been successful in persuading courts to quash subpoenas based on generally-applicable protections such as state and federal rules of evidence, which allow the quashing of subpoenas for information that is not relevant or where the effort to produce it would be too cumbersome.

Statutory protection. In addition to case law, 35 states and the District of Columbia have enacted statutes —shield laws —that give journalists some form of privilege against compelled production of confidential or unpublished information. The laws vary in detail and scope from state to state, but generally give greater protection to journalists than the state or federal constitution, according to many courts.

However, shield laws usually have specific limits that exclude some journalists or certain material from coverage. For instance, many of the statutes define "journalist" in a way that only protects those who work full-time for a newspaper or broadcast station. Freelance writers, book authors, Internet journalists, and many others are left in the cold, and have to rely on the First Amendment for protection. Broad exceptions for eyewitness testimony or for libel defendants also can remove protection from journalists, even though these situations often show the greatest need for a reporter's privilege.

The Reporter's Privilege Compendium: Questions and Answers

What is a subpoena?

A subpoena is a notice that you have been called to appear at a trial, deposition or other court proceeding to answer questions or to supply specified documents. A court may later order you to do so and impose a sanction if you fail to comply.

Do I have to respond to a subpoena?

In a word, yes.

Ignoring a subpoena is a bad idea. Failure to respond can lead to charges of contempt of court, fines, and in some cases, jail time. Even a court in another state may, under some circumstances, have authority to order you to comply with a subpoena.

What are my options?

Your first response to a subpoena should be to discuss it with an attorney if at all possible. Under no circumstances should you comply with a subpoena without first consulting a lawyer. It is imperative that your editor or your news organization's legal counsel be advised as soon as you have been served.

Sometimes the person who subpoenaed you can be persuaded to withdraw it. Some attorneys use subpoenas to conduct "fishing expeditions," broad nets cast out just to see if anything comes back. When they learn that they will have to fight a motion to quash their subpoenas, lawyers sometimes drop their demands altogether or agree to settle for less than what they originally asked for, such as an affidavit attesting to the accuracy of a story rather than in-court testimony.

Some news organizations, particularly broadcasters whose aired videotape is subpoenaed, have deflected burdensome demands by agreeing to comply, but charging the subpoenaing party an appropriate fee for research time, tape duplication and the like.

If the person who subpoenaed you won't withdraw it, you may have to fight the subpoena in court. Your lawyer will file a motion to quash, which asks the judge to rule that you don't have to comply with the subpoena.

If the court grants your motion, you're off the hook —unless that order is itself appealed. If your motion isn't granted, the court will usually order you to comply, or at the very least to disclose the demanded materials to the court so the judge may inspect them and determine whether any of the materials must be disclosed to the party seeking them. That order can itself be appealed to a higher court. If all appeals are unsuccessful, you could face sanctions if you continue to defy the court's order. Sanctions may include fines imposed on your station or newspaper or on you personally, or imprisonment.

In many cases a party may subpoena you only to intimidate you, or gamble that you will not exercise your rights. By consulting a lawyer and your editors, you can decide whether to seek to quash the subpoena or to comply with it. This decision should be made with full knowledge of your rights under the First Amendment, common law, state constitution or statute.

They won't drop it. I want to fight it. Do I have a chance?

This is a complicated question.

If your state has a shield law, your lawyer must determine whether it will apply to you, to the information sought and to the type of proceeding involved. Even if your state does not have a shield law, or if your situation seems to fall outside its scope, the state's courts may have recognized some common law or constitu-

tional privilege that will protect you. Each state is different, and many courts do not recognize the privilege in certain situations.

Whether or not a statutory or other privilege protects you in a particular situation may depend on a number of factors. For example, some shield laws provide absolute protection in some circumstances, but most offer only a qualified privilege. A qualified privilege generally creates a presumption that you will not have to comply with a subpoena, but it can be overcome if the subpoenaing party can show that information in your possession is essential to the case, goes to the heart of the matter before the court, and cannot be obtained from an alternative, non-journalist source.

Some shield laws protect only journalists who work full-time for a newspaper, news magazine, broadcaster or cablecaster. Freelancers, book authors, scholarly researchers and other "non-professional" journalists may not be covered by some statutes.

Other factors that may determine the scope of the privilege include whether the underlying proceeding is criminal or civil, whether the identity of a confidential source or other confidential information is involved, and whether you or your employer is already a party to the underlying case, such as a defendant in a libel suit.

The decision to fight may not be yours alone. The lawyer may have to consider your news organization's policy for complying with subpoenas and for revealing unpublished information or source names. If a subpoena requests only published or broadcast material, your newspaper or station may elect to turn over copies of these materials without dispute. If the materials sought are unpublished, such as notes or outtakes, or concern confidential sources, it is unlikely that your employer has a policy to turn over these materials —at least without first contesting the subpoena.

Every journalist should be familiar with his or her news organization's policy on retaining notes, tapes and drafts of articles. You should follow the rules and do so consistently. If your news organization has no formal policy, talk to your editors about establishing one. Never destroy notes, tapes, drafts or other documents once you have been served with a subpoena.

In some situations, your news organization may not agree that sources or materials should be withheld, and may try to persuade you to reveal the information. If the interests of the organization differ from yours, it may be appropriate for you to seek separate counsel.

Can a judge examine the information before ordering me to comply with a subpoena?

Some states require or at least allow judges to order journalists to disclose subpoenaed information to them before revealing it to the subpoenaing party. This process, called *in camera* review, allows a judge to examine all the material requested and determine whether it is sufficiently important to the case to justify compelled production. The state outlines will discuss what is required or allowed in your state.

Does federal or state law apply to my case?

A majority of the subpoenas served on reporters arise in state cases, with only eight percent coming in federal cases, according to the Reporters Committee's 1999 subpoena survey, *Agents of Discovery*.

State trial courts follow the interpretation of state constitutional, statutory or common law from the state's highest court to address the issue. When applying a First Amendment privilege, state courts may rely on the rulings of the United States Supreme Court as well as the state's highest court.

Subpoenas in cases brought in federal courts present more complicated questions. Each state has at least one federal court. When a federal district court is asked to quash a subpoena, it may apply federal law, the law of the state in which the federal court sits, or even the law of another state. For example, if a journalist from one state is subpoenaed to testify in a court in another state, the enforcing court will apply the state's "choice of law" rules to decide which law applies.

Federal precedent includes First Amendment or federal common law protection as interpreted by the United States Supreme Court, rulings of the federal circuit court of appeals for the district court's circuit, or earlier decisions by that same district court. There is no federal shield law, although as of May 2008 a bill had passed the House and was moving to the Senate floor.

The federal district court will apply the state courts' interpretation of state law in most circumstances. In the absence of precedent from the state's courts, the federal district court will follow prior federal court interpretations of the state's law. In actions involving both federal and state law, courts differ on whether federal or state law will apply.

Twelve federal circuits cover the United States. Each circuit has one circuit (appellate) court, and a number of district (trial) courts. The circuit courts must follow precedent established by the U.S. Supreme Court, but are not bound by other circuits' decisions.

Are there any limits on subpoenas from federal agents or prosecutors?

Ever since 1973, the Attorney General of the United States has followed a set of guidelines limiting the circumstances in which any agents or employees of the Department of Justice, including federal prosecutors and FBI agents, may issue subpoenas to members of the news media or subpoena journalists' telephone records from third parties. (28 C.F.R. 50.10)

Under the guidelines, prosecutors and agents must obtain permission from the Attorney General before subpoenaing a member of the news media. Generally, they must exhaust alternative sources for information before doing so. The guidelines encourage negotiation with the news media to avoid unnecessary conflicts, and specify that subpoenas should not be used to obtain "peripheral, nonessential or speculative" information.

In addition, journalists should not be questioned or arrested by Justice employees without the prior approval of the Attorney General (unless "exigent circumstances preclude prior approval") and agents are not allowed to seek an arrest warrant against a journalist or present evidence to a grand jury against a journalist without the same approval.

Employees who violate these guidelines may receive an administrative reprimand, but violation does not automatically render the subpoena invalid or give a journalist the right to sue the Justice Department.

The guidelines do not apply to government agencies that are not part of the federal Department of Justice. Thus agencies like the National Labor Relations Board are not required to obtain the Attorney General's permission before serving a subpoena upon a member of the news media.

Do the news media have any protection against search warrants?

Subpoenas are not the only tool used to obtain information from the news media. Sometimes police and prosecutors use search warrants, allowing investigators to enter newsrooms and search for evidence directly rather than merely demanding that journalists release it.

The U.S. Supreme Court held that such searches do not violate the First Amendment. *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978). Congress responded by passing the federal Privacy Protection Act in 1980. (42 U.S.C. 2000aa)

In general, the Act prohibits both federal and state officers and employees from searching or seizing journalists' "work product" or "documentary materials" in their possession. The Act provides limited exceptions that allow the government to search for certain types of national security information, child pornography, evidence that the journalists themselves have committed a crime, or materials that must be immediately seized to prevent death or serious bodily injury. "Documentary materials" may also be seized if there is reason to believe that they would be destroyed in the time it took to obtain them using a subpoena, or if a court has ordered disclosure, the news organization has refused and all other remedies have been exhausted.

Even though the Privacy Protection Act applies to state law enforcement officers as well as federal authorities, many states, including California, Connecticut, Illinois, Nebraska, New Jersey, Oregon, Texas and Washington, have their own statutes providing similar or even greater protection. (*See section IX.A. in the state outlines.*) Other states, such as Wisconsin, require that search warrants for documents be directed only at parties suspected of being "concerned in the commission" of a crime, which generally exempts journalists.

If law enforcement officers appear with a warrant and threaten to search your newsroom unless you hand over specific materials to them, contact your organization's attorney *immediately*. Ask the officers to delay the search until you have had an opportunity to confer with your lawyer. If the search proceeds, staff photographers or a camera crew should record it.

Although the news organization staff may not impede the search, they are not required to assist with it. But keep in mind that the warrant will probably list specific items to be seized, and you may decide it is preferable to turn over a particular item rather than to allow police to ransack desks and file cabinets or seize computers.

After the search is over, immediately consult your attorney about filing a suit in either federal or state court. It is important to move quickly, because you may be able to obtain emergency review by a judge in a matter of hours. This could result in your seized materials being taken from the law enforcement officials and kept under seal until the dispute is resolved.

Another option allows you to assert your claim in an administrative proceeding, which may eventually lead to sanctions against the official who violated the act. You would not receive damages, however. Your attorney can help you decide which forum will offer the best remedy in your situation.

Whichever option you choose, a full hearing will vindicate your rights in nearly every case, and you will be entitled to get your materials back, and in some cases, monetary damages including your attorney's fees.

The Reporter's Privilege Compendium: A User's Guide

This project is the most detailed examination available of the reporter's privilege in every state and federal circuit. It is presented primarily as an Internet document (found at www.rcfp.org/privilege) for greater flexibility in how it can be used. Printouts of individual state and circuit chapters are made available for readers' convenience.

Every state and federal section is based on the same standard outline. The outline starts with the basics of the privilege, then the procedure and law for quashing a subpoena, and concludes with appeals and a handful of other issues.

There will be some variations on the standard outline from state to state. Some contributors added items within the outline, or omitted subpoints found in the complete outline which were not relevant to that state's law. Each change was made to fit the needs of a particular state's laws and practices.

For our many readers who are not lawyers. This project is primarily here to allow lawyers to fight subpoenas issued to journalists, but it is also designed to help journalists understand the reporter's privilege. (Journalists should *not* assume that use of this book will take the place of consulting an attorney before dealing with a subpoena. You should contact a lawyer if you have been served with a subpoena.) Although the guides were written by lawyers, we hope they are useful to and readable by nonlawyers as well. However, some of the elements of legal writing may be unfamiliar to lay readers. A quick overview of some of these customs should suffice to help you over any hurdles.

Lawyers are trained to give a legal citation for most statements of law. The name of a court case or number of a statute may therefore be tacked on to the end of a sentence. This may look like a sentence fragment, or may leave you wondering if some information about that case was omitted. Nothing was left out; inclusion of a legal citation provides a reference to the case or statute sup-

porting the statement and provides a shorthand method of identifying that authority, should you need to locate it.

Legal citation form also indicates where the law can be found in official reporters or other legal digests. Typically, a cite to a court case will be followed by the volume and page numbers of a legal reporter. Most state cases will be found in the state reporter, a larger regional reporter, or both. A case cite reading 123 F.2d 456 means the case could be found in the Federal Reports, second series, volume 123, starting at page 456. In most states, the cites will be to the official reporter of state court decisions or to the West Publishers regional reporter that covers that state.

Note that the complete citation for a case is often given only once, and subsequent cites look like this: "*Jackson* at 321." This means that the author is referring you to page 321 of a case cited earlier that includes the name Jackson. Because this outlines were written for each state, yet searches and comparisons result in various states and sections being taken out of the sequence in which they were written, it may not always be clear what these second references refer to. Authors may also use the words *supra* or *infra* to refer to a discussion of a case appearing earlier or later in the outline, respectively. You may have to work backwards through that state's outline to find the first reference in some cases.

We have encouraged the authors to avoid "legalese" to make this guide more accessible to everyone. But many of the issues are necessarily technical and procedural, and removing all the legalese would make the guides less useful to lawyers who are trying to get subpoenas quashed.

Updates. This project was first posted to the Web in December 2002. The last major update of all chapters was completed in September 2007. As the outlines are updated, the copyright notice on the bottom of the page will reflect the date of the update. All outlines will not be updated on the same schedule.

REPORTER'S PRIVILEGE COMPENDIUM

WYOMING

Prepared by:

Bruce T. Moats
 Law Office of Bruce T. Moats
 2515 Pioneer Avenue
 Cheyenne, Wyoming 82001

I. Introduction: History & Background.....	2	V. Procedures for issuing and contesting subpoenas.....	4
II. Authority for and source of the right.....	2	A. What subpoena server must do	4
A. Shield law statute	2	B. How to Quash	4
B. State constitutional provision	2	VI. Substantive law on contesting subpoenas	5
C. Federal constitutional provision	2	A. Burden, standard of proof.....	Error! Bookmark not defined.
D. Other sources.....	2	B. Elements	Error! Bookmark not defined.
III. Scope of protection	3	C. Waiver or limits to testimony.....	Error! Bookmark not defined.
A. Generally	3	VII. What constitutes compliance?.....	6
B. Absolute or qualified privilege	3	A. Newspaper articles.....	6
C. Type of case	3	B. Broadcast materials	6
D. Information and/or identity of source	3	C. Testimony vs. affidavits.....	6
E. Confidential and/or non-confidential information	3	D. Non-compliance remedies	6
F. Published and/or non-published material	3	VIII. Appealing	6
G. Reporter's personal observations	3	A. Timing	6
H. Media as a party	3	B. Procedure	6
I. Defamation actions	3	IX. Other issues	7
IV. Who is covered.....	3	A. Newsroom searches	7
A. Statutory and case law definitions Error! Bookmark not defined.		B. Separation orders	7
B. Whose privilege is it? Error! Bookmark not defined.		C. Third-party subpoenas	7
		D. The source's rights and interests	7

I. Introduction: History & Background

Anecdotal evidence indicates that few subpoenas are issued to news organizations in Wyoming. The subpoenas that have been issued usually ask the reporter to testify that his or her story is accurate. The infrequent use of subpoenas on news organizations may explain why the state has never enacted a shield law, or why there is no case law from the Wyoming Supreme Court, the state's only appellate court, regarding the service of subpoenas on news organizations. The only known case in Wyoming where a news organization moved to quash a subpoena took place in U.S. District Court for the District of Wyoming. The court denied the motion to quash and the decision was not appealed to the 10th Circuit Court of Appeals. *Order on Appeal from Magistrate's Order, Wilson v. Amoco*, U.S. District Court for District of Wyoming, Docket No. 96-CV-0124-B (filed April 8, 1998). A state court is likely to look to federal law in any motion to quash a subpoena served on the news media because Wyoming does not have a shield law and has little case law regarding the state constitutional declaration of the right to freedom of speech and of the press.

No Wyoming journalist is known to have been fined or jailed for failing to comply with a subpoena.

II. Authority for and source of the right

A. Shield law statute

Wyoming does not have a shield law. The Wyoming Press Association has discussed seeking the enactment of such a law, but no bill has ever been filed in the state legislature.

B. State constitutional provision

Article 1, Section 20 of the Wyoming Constitution states: "Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right." The provision has not been interpreted by the courts in regard to its effect on any reporter's privilege. A federal district court has found that the state constitutional provision is broader than that found in the First Amendment to the U.S. Constitution as it also guarantees the right to publish. *Tate v. Akers*, 409 F.Supp. 978 (D. Wyo. 1976) *aff'd* 565 F.2d 1166 (10th Cir. 1977). No state court has confirmed this interpretation by the federal court, and exactly how this broader right might affect the reporter's privilege in Wyoming is yet to be tested.

The Wyoming Supreme Court has ruled that any recourse to the Wyoming Constitution as an independent source for recognizing or protecting an individual right, such as freedom of speech or the press, "must spring from a process that is articulable, reasonable, and reasoned." *Saldana v. State*, 846 P.2d 604, 621 (Wyo. 1993). In other words, a party must articulate specifically why the state constitutional provision should be held to provide a more comprehensive or broader right than does the federal constitution. That process in regard to freedom of the press has not yet been undertaken in Wyoming.

In the context of public access to governmental information, the Wyoming Supreme Court has cited federal precedents for the proposition that news gathering is not without First Amendment Protections and that "without some protection for seeking out the news, freedom of the press could be eviscerated." *Sheridan Newspapers v. City of Sheridan*, 660 P.2d 785, 794 (Wyo. 1983). The scope of that protection in regard to subpoenas of news organization awaits further development.

C. Federal constitutional provision

No reported state court decision has applied or rejected a reporter's privilege based on the First Amendment to the U.S. Constitution. As mentioned above, a U.S. District Court has applied the reporter's privilege in a motion to quash a subpoena and found that the subpoena of a news photographer's unpublished photographs should be provided to a party in a civil case pursuant to the test set forth by the 10th Circuit Court of Appeals. *Tate v. Akers*, 565 F.2d 1166 (10th Cir. 1977).

D. Other sources

There are no other sources of a reporter's privilege in Wyoming, such as court rules, state bar guidelines or administrative procedures.

III. Scope of protection

A. Generally

Obviously, the lack of a reported decision finding a reporter's privilege under state law does not place Wyoming in an enviable position in comparison to other states.

B. Absolute or qualified privilege

Wyoming has no state shield law or reported case decisions establishing a reporter's privilege under the state constitution or statutory law. Under federal law, as established by the 10th Circuit, a news person has a qualified privilege for confidential information in a civil case. *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433 (10th Cir. 1997). The privilege in regard to non-confidential information in a civil case is unclear.

C. Type of case

1. Civil

Wyoming has no statutory or reported case law in this area. A reporter has a qualified privilege for confidential information in a civil case under 10th Circuit Court of Appeals precedent. The privilege in regard to non-confidential information is unclear.

2. Criminal

Wyoming has no statutory or reported case law in this area. The 10th Circuit has not recognized a privilege in regard to information sought in a criminal case.

3. Grand jury

Wyoming has no statutory or reported court decisions involving reporter's privilege in regard to grand jury testimony.

D. Information and/or identity of source

Wyoming has no statutory or reported case law in this area.

E. Confidential and/or non-confidential information

Wyoming has no statutory or reported case law in this area.

F. Published and/or non-published material

Wyoming has no statutory or reported case law in this area.

G. Reporter's personal observations

Wyoming has no statutory or reported case law in this area.

H. Media as a party

Wyoming has no statutory or reported case law regarding a reporter's privilege in this area.

I. Defamation actions

Wyoming has no statutory or reported case law regarding a reporter's privilege in this area.

IV. Who is covered

Wyoming does not have a shield law or any reported case law discussing who is covered by a First Amendment privilege against disclosure of certain information. The 10th Circuit Court of Appeals ruled that the balancing test

outlined in *Silkwood v. Kerr-McGee* should have been applied to a plaintiff, who was not a journalist, who claimed that forced production of certain membership, mailing and attendance lists requested in discovery would violate his First Amendment right of freedom of association. *Grandbouche v. Clancy*, 825 F. 2d 1463 (10th Cir. 1987).

V. Procedures for issuing and contesting subpoenas

A. What subpoena server must do

1. Service of subpoena, time

Wyoming law requires that the subpoena be issued in time to allow the person reasonable time to comply. The courts have found that service less than five days before the person is required to appear is unreasonable. What is reasonable, of course, will depend on the circumstances. Wyoming has no special provisions regarding service of subpoenas on the media.

2. Deposit of security

No deposit is required. However, the issuing party must tender the one-day witness fee and mileage along with the subpoena if a person is commanded to appear. This is often overlooked by issuing parties.

3. Filing of affidavit

No affidavit is required under Wyoming law or court rules.

4. Judicial approval

No judicial approval is necessary.

5. Service of police or other administrative subpoenas

No special rules exist regarding the use or service of administrative subpoenas.

B. How to Quash

1. Contact other party first

Wyoming does not require that a person served with a subpoena contact the issuing party before filing a motion to quash. I would recommend contacting counsel for the issuing party in Wyoming. I have observed that there is a reluctance to subpoena the media and a discussion with counsel for the issuing party may reveal alternatives to the subpoena.

2. Filing an objection or a notice of intent

No notice of intent to quash is required. However, the Rule 45 of the W.R.C.P. provides an alternate method of challenging a subpoena. A party upon which a subpoena is served seeking the inspection or copying of materials may serve upon the issuing party or his/her attorney an objection to the subpoena. This relieves the subpoenaed party of the obligation to respond to the subpoena. The issuing party may move at any time for an order to compel. The objection must be filed within 14 days of the service of the subpoena or before the time specified for compliance if it is less than 14 days.

3. File a motion to quash

a. Which court?

A motion to quash should be filed in the court that issued the subpoena.

b. Motion to compel

A person issued a subpoena must comply or file a motion to quash unless the person files an objection as allowed under the rules for subpoenas that seek the inspection or copying of documents.

c. Timing

A motion to quash must be timely. In other words, it must be before the time specified for compliance. Wyoming courts pride themselves in moving their cases along promptly. If the judges perceive that a person issued a subpoena has filed a motion just before the time specified for compliance without good reason, the judge is likely to be less receptive to quashing the subpoena. Filing the motion to quash as soon as is practical is the best approach.

d. Language

There is no stock language that should be included in the motion. However, the movant ought to cite to the specific provision in Rule 45 of Wyoming Rules of Civil Procedure upon the motion to quash is based, such as privilege or an undue burden.

e. Additional material

Affidavits or other materials that help the judge to understand the potential for a "chilling effect" that the subpoenas on the news media will have on the free flow of information to the public should be attached to the motion to compel. As subpoenas have been infrequently issued in Wyoming, judges may focus on the specific case at hand and not examine the larger picture. A federal district court in Wyoming in applying the balancing test in determining whether to quash a subpoena for a photographers unpublished photographs found "no credible argument that any pernicious effects would result from production of these photographs." The court found that it was "hard-pressed to articulate burden to save the administrative one of actually copying and providing the photographs." Courts must be educated regarding the adverse effect on the news media when government or private parties use reporters as their investigators. That education must start with the motion to quash.

4. In camera review

a. Necessity

The Wyoming Supreme Court has required in camera review of materials sought by a subpoena when the balancing of interests must be undertaken by the court. *Hartston v. Campbell County Memorial Hospital*, 913 P.2d 870 (1996). There are no reported cases involving in camera inspection of materials sought from reporters, but the general requirement of such an inspection would logically apply in such cases.

b. Consequences of consent

A stay pending appeal of the denial of a motion to quash after the materials have been reviewed is not automatic. Though there no are reported cases involving media subpoenas in Wyoming, the courts have issued stays in analogous cases where an appeal has been undertaken of an order requiring the disclosure of information claimed to be privileged or confidential.

c. Consequences of refusing

There are no reported cases in Wyoming in which the subpoenaed party has refused to turn materials over for an in camera inspection. However, the refusing party would likely be held to be in contempt of court, or face the prospect of having its motion to quash denied.

5. Briefing schedule

The briefing schedule for a motion to quash is the same as for other motions in Wyoming. Other parties have 20 days to respond to the motion. The moving party then has 15 days to file a reply. A request can be made for a different briefing schedule to be set by the court.

6. Amicus briefs

Courts in Wyoming do accept amicus briefs. However, we have no known history regarding amicus briefs opposing the subpoenaing reporters.

VI. Substantive law on contesting subpoenas

Wyoming has no substantive state law on contesting subpoenas served upon reporters. Guidance may be found by examining the substantive law in the 10th Circuit Court of Appeals in this area.

VII. What constitutes compliance?

A. Newspaper articles

Newspaper articles are generally not self-authenticating, depending upon the purpose for which they are offered. Reporters have been asked to submit affidavits or testify in court regarding the accuracy of the information in the articles.

B. Broadcast materials

Of the two or three incidents of which I am aware where broadcast materials were subpoenaed, reporters were asked to testify that they made the recordings of a particular person on a particular date.

C. Testimony vs. affidavits

Affidavits have been accepted in the place of in-court testimony in cases where the parties have so stipulated.

D. Non-compliance remedies

1. Civil contempt

a. Fines

There are no known cases in Wyoming where a reporter has been fined for failing to comply with a subpoena.

b. Jail

There are no known cases in Wyoming where reporters went to jail rather than disclose the names of confidential sources or information.

2. Criminal contempt

There are no known cases where a reporter has been charged with criminal contempt in Wyoming.

3. Other remedies

There are no known cases where other remedies, such as default judgments, have been assessed against reporters for failure to comply with a subpoena.

VIII. Appealing

A. Timing

1. Interlocutory appeals

Though there is no Wyoming case directly point, a good argument could be made that an interlocutory appeal of the denial of a motion to quash a subpoena to a third party, such as a reporter should be allowed. The denial would be a final judgment as to the issue of whether the material should be disclosed. Denying the right of appeal would leave the third party without recourse, as an appeal after final resolution of the underlying case would only result in shutting the proverbial barn door after the horse has left.

2. Expedited appeals

There is no right to an expedited appeal of the denial of motion to quash.

B. Procedure

1. To whom is the appeal made?

Appeals of denials of motions to quash by municipal or county courts may be appealed to the state district court. Such denials by district courts are appealed to the Wyoming Supreme Court.

2. Stays pending appeal

Parties must seek stays from the court that issued the order.

3. Nature of appeal

There are no cases which indicate that the nature of an appeal of a denial of a motion to quash a subpoena served upon the media would be any different than any other appeal.

4. Standard of review

In Wyoming, discovery rulings of the trial court are reviewed under an abuse of discretion standard. However, in cases involving the subpoena of a reporter as a third party, an argument could be made that ruling on whether privilege exists is a matter of law and should be reviewed de novo, and that the district court should be given no deference as a fundamental right — freedom of press — is at issue. Again, there are no cases on point in Wyoming.

5. Addressing mootness questions

Courts in Wyoming have not addressed whether an appeal can be undertaken after the material at issue has been disclosed. However, the Wyoming Supreme Court has adopted two exceptions to the mootness doctrine. They are that the issue at hand 1) "is capable of repetition but evading review," or 2) is of "great public importance." Either exception could be used to justify an appeal after the reporter's materials have already been disclosed in the trial court.

6. Relief

The appellate court could order a contempt citation reversed as well as ordering the lower court to either reconsider or reverse its decision denying the motion to quash.

IX. Other issues

A. Newsroom searches

There have been no known searches of newsrooms in Wyoming related to newsgathering. Wyoming has no provisions similar to those in the federal Privacy Protection Act.

B. Separation orders

There are no reported cases in Wyoming dealing with the sequestering of reporters who have been subpoenaed to testify in a trial. Reporters should first attempt to seek a narrowing of any sequestering during a trial they are assigned to cover as a condition to their testimony. If such negotiations fail, the reporter should seek such an order from the court.

C. Third-party subpoenas

There are no reported cases in Wyoming of information being sought from third parties, such as telephone companies, regarding newsgathering efforts by the media.

D. The source's rights and interests

There are no reported cases in Wyoming of sources being allowed to intervene anonymously to halt disclosure of their identities. The use of anonymous sources by the media is rare in Wyoming.