# REPORTER'S PRIVILEGE: OREGON

**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

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# 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 an d 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 dissented 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 constitutional 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 supporting 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

# OREGON

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## I. Introduction: History & Background

Oregon's reporter's privilege is found in ORS 44.510 to 44.540. With exceptions for information in a defamation action, and in some cases, information required under Criminal Compulsory Process, the privilege is absolute, protecting not just confidential sources but all unpublished information of any sort. There is some lingering confusion over "eye witness" testimony from a reporter concerning events actually perceived by the reporter.

## II. Authority for and source of the right

The primary source for the reporter's privilege in Oregon is ORS 44.510-540.

### A. Shield law statute

*1.ORS 44.510: Definitions for ORS 44.510 to 44.540.*

As used in ORS 44.510 to 44.540, unless the context requires otherwise:

(1) "Information" has its ordinary meaning and includes, but is not limited to, any written, oral, pictoral or electronically recorded news or other data.

(2) "Medium of communication" has its ordinary meaning and includes, but is not limited to, any newspaper, magazine or other periodical, book, pamphlet, news service, wire service, news or feature syndicate, broadcast station or network, or cable television system. Any information which is a portion of a governmental utterance made by an official or employee of government within the scope of the official's or employee's governmental function, or any political publication subject to ORS 260.532, is not included within the meaning of "medium of communication."

(3) "Processing" has its ordinary meaning and includes, but is not limited to, the compiling, storing and editing of information.

(4) "Published information" means any information disseminated to the public.

(5) "Unpublished information" means any information not disseminated to the public, whether or not related information has been disseminated. "Unpublished information" includes, but is not limited to, all notes, outtakes, photographs, tapes or other data of whatever sort not themselves disseminated to the public through a medium of communication, whether or not published information based upon or related to such material has been disseminated.

*2.ORS 44.520: Limitation on compellable testimony from media persons; search of media persons' papers, effects or work premises prohibited; exception.*

(1)No person connected with, employed by or engaged in any medium of communication to the public shall be required by a legislative, executive or judicial officer or body, or any other authority having power to compel testimony or the production of evidence, to disclose, by subpoena or otherwise:

(a)The source of any published or unpublished information obtained by the person in the course of gathering, receiving or processing information for any medium of communication to the public; or

(b)Any unpublished information obtained or prepared by the person in the course of gathering, receiving or processing information for any medium of communication to the public.

(2)No papers, effects or work premises of a person connected with, employed by or engaged in any medium of communication to the public shall be subject to a search by a legislative, executive or judicial officer or body, or any other authority having power to compel the production of evidence, by search warrant or otherwise. The provisions of this subsection, however, shall not apply where probable cause exists to believe that the person has committed, is committing or is about to commit a crime.

*3.ORS 44.530: Application of ORS 44.520*

(1)ORS 44.520 applies regardless of whether a person has disclosed elsewhere any of the information or source thereof, or any of the related information.

(2)ORS 44.520 continues to apply in relation to any of the information, or source thereof, or any related information, even in the event of subsequent termination of a person's connection with, employment by or engagement in any medium of communication to the public.

(3)The provisions of ORS 44.520 (1) do not apply with respect to the content or source of allegedly defamatory information, in civil action for defamation wherein the defendant asserts a defense based on the content or source of such information.

*4.ORS 44.540: Effect of informant as a witness*

If the informant offers the informant as a witness, it is deemed a consent to the examination also of a person described in ORS 44.520 on the same subject.

### B. State constitutional provision

Article I, §8 of the Oregon Constitution states that "no law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever . . ."

Prior to the enactment of the media shield law, the Oregon Supreme Court held that reporters have no state constitutional right to refuse to testify as to the identity of a confidential source before grand juries. *State v. Buchanan*, 250 Or. 244, 436 P2d 729 (1968). The Court of Appeals has dismissed a state constitutional basis for privilege where criminal defendants sought unpublished photographs from a newspaper. *State v. Pelham*, 136 Or. App. 336, 901 P.2d 972 (1995).

## III. Scope of protection

### A. Generally

The reporter's privilege in Oregon has an exceptionally strong statutory basis.

### B. Absolute or qualified privilege

The reporter's privilege in Oregon is absolute except: a) with respect to the content or source of allegedly defamatory information in a civil action in which the defendant asserts a defense based on the content or source of such information; and b) in cases where criminal defendants have the right under Article 1, Section 11 of the Oregon Constitution to evidence that is material and favorable.

### C. Type of case

#### 1. Civil

The privilege under ORS 44.520 is essentially absolute, except regarding information which forms the basis of a defense to a defamation claim. *McNabb v. Oregonian Publishing Co.*, 69 Or. App. 136, 685 P.2d 458 (1984).

#### 2. Criminal

The privilege may be overcome by a criminal defendant with a showing that the evidence withheld is both material and favorable to the criminal defendant. *State ex rel Meyers v. Howell*, 86 Or. App. 570, 740 P.2d 792 (1987); *State v. Pelham*, 136 Or. App. 336, 901 P.2d 972 (1995).

#### 3. Grand jury

ORS 44.520 prohibits any judicial body (or any authority having the ability to compel testimony) from compelling the testimony of a reporter. An earlier state Supreme Court decision, in which both state and federal constitutional claims of privilege were rejected, invited this legislative response. *State v. Buchanan*, 250 Or. 244 436 P.2d 729 (1968).

#### D. Information and/or identity of source

ORS 44.520 specifically protects a reporter's source for either published or unpublished information, including that which could implicitly identify a source.

#### E. Confidential and/or non-confidential information

ORS 44.520 makes no distinction in the protection of confidential or non-confidential information.

#### F. Published and/or non-published material

The privilege in Oregon specifically protects all unpublished information and additionally the sources of any information, whether or not published. ORS 44.520(1)(1)(2).

#### G. Reporter's personal observations

"Information obtained" in course of news gathering does not include a cameraman's personal observations to the extent that the observations were of events taking place in public, were made with naked eye, and did not relate to work product, informants or confidential sources. *State v. Pelham*, 136 Or. App. 336, 344, 901 P.2d 972 (1995),

#### H. Media as a party

The scope of the privilege does not depend on whether the media is a party to the litigation, except that it does not apply in a civil action for defamation in which a defendant asserts a defense based on the content or source of otherwise privileged information. This exception to the shield law applies in any defamation action in which any defendant – not only a media defendant – asserts a defense based on the content or source of such information. *Brown v. Gatti*, 195 Or. App. 695, 99 P.3d 199 (2004), *aff'd in part and rev'd in part on other grounds*, 341 Or. 452, 145 P.3d 130 (2006). In *Brown*, the Oregon Court of Appeals expressly rejected the argument the exception is limited to instances in which a *media* defendant asserts a defense based on the content or source of otherwise privileged information. *Id.* at 712-13.

#### I. Defamation actions

As noted above, the privilege does not apply in a civil action for defamation in which any defendant, whether media or otherwise, asserts a defense based on the content or source of otherwise privileged information.

## IV. Who is covered

Oregon's reporter's privilege extends to every person engaged in any medium of newsgathering.

### A. Statutory and case law definitions

#### 1. Traditional news gatherers

##### a. Reporter

ORS 44.520 protects any person "connected with, employed by or engaged in any medium of communication to the public."

##### b. Editor

ORS 44.520 protects any person "connected with, employed by, or engaged in any medium of communication to the public."

##### c. News

ORS 44.510 defines the scope of the privilege as protecting a "medium of communication." "Medium of communication" "has its ordinary meaning and includes, but is not limited to, any newspaper, magazine or other periodical, book, pamphlet, news service, wire service, new or feature syndicate, broadcast station or network, or cable television system. Any information which is a portion of a governmental utterance made by an official or employee of government within the scope of his or her governmental function, or any political publication, is not included within the meaning of 'medium of communication.'"

#### d. Photo journalist

ORS 44.510 expressly includes "pictorial or electronically recorded news or other data," and therefore the product of photojournalists is protected. *State ex rel Meyer v. Howell*, 86 Or. App. 570, 740 P.2d 792 (1987). A television cameraman was required to testify as to his personal observations, however. *State v. Pelham*, 136 Or. App. 336, 901 P.2d 972 (1995).

#### e. News organization / medium

ORS 44.620 protects anyone "connected with, employed by or engaged in any medium of communication to the public." ORS 44.510 gives "medium of communication" its ordinary meaning.

### 2. Others, including non-traditional news gatherers

There is no case law on this topic. Note that "medium of communication" is expansive enough that it includes "pamphlet."

## B. Whose privilege is it?

The privilege under ORS 44.520 belongs to the reporter. The statute on its face does not provide protection to the source of the reporter's information. There is no statutory or case law addressing this issue.

# V. Procedures for issuing and contesting subpoenas

Oregon State Courts are bound by the Oregon Rules of Civil Procedure ("ORCP"). In addition, individual counties may have supplemental "Local Rules" that contain procedural requirements. These rules should be consulted.

## A. What subpoena server must do

### 1. Service of subpoena, time

Service of a subpoena must be made within reasonable time to allow for preparation and travel. ORCP 55D(1). If a subpoena commands production of books, papers or tangible things and it is not accompanied by a demand to appear at trial, or hearing or at a deposition, a copy of the subpoena must be served on each party to the litigation at least seven days before it is served on the person required to produce the documents. Additionally, the subpoena shall not require production less than 14 days from date of service. ORCP 55D(1)

### 2. Deposit of security

None required under the ORCP.

### 3. Filing of affidavit

None required under the ORCP.

### 4. Judicial approval

None required under the ORCP, except for any requested shortening of the time in which to respond.

### 5. Service of police or other administrative subpoenas

No statutory or case law addressing this issue.

## B. How to Quash

### 1. Contact other party first

ORCP does not require that the other party be contacted, and at this time there is no trial court rule requiring a conference before making a motion to quash. Such a conference is usually a good idea, however, because some parties will withdraw their subpoenas once they understand the shield law.

### 2. Filing an objection or a notice of intent

ORCP does not require a party to file an objection or notice of intent to object.

### 3. File a motion to quash

#### a. Which court?

The motion to quash should be filed in the same court as the court hearing the case at issue.

#### b. Motion to compel

The party subpoenaed should move to quash before the appearance date and not await a motion to compel.

#### c. Timing

There is no statutory time for filing a motion to quash. As a practical matter, a motion should be filed as soon as possible and an attempt made to schedule a hearing on that motion.

#### d. Language

Motions to quash are made pursuant to ORS 44.510 et. seq., the shield law. Motions must state whether oral argument is requested — and it should be —- and whether argument is requested by telephone, which may be permitted if counsel for the person subpoenaed has his or her office located more than 25 miles from the courthouse. The motion shall then state the name and telephone numbers of the attorneys for all parties, whether court reporting services are requested, and the length of the requested hearing. The motion must be accompanied by a statement of points and authorities or a memorandum of law.

#### e. Additional material

No additional material is required.

### 4. In camera review

#### a. Necessity

No law or case law directs a court to conduct an in camera review of materials or interview with the reporter before deciding on a motion to quash.

#### b. Consequences of consent

No case law or statute on this subject.

#### c. Consequences of refusing

No Oregon statute or case specifically addresses this, but it would probably result in a finding of contempt.

### 5. Briefing schedule

In the ordinary course, a party opposing a motion has 14 days from service in which to file an opposition, and reply memorandum may be filed within 7 days thereafter. Unless the filing is personally served on the opposing party's counsel, three days are added to these times to account for service. As a practical matter, a motion to quash is usually handled on an expedited basis. Oregon's various trial courts may have specific procedures for requesting expedited treatment of the motion, set forth in their local rules.

### 6. Amicus briefs

Amicus briefs are not typically filed in Oregon trial courts, but may be in Oregon's appellate courts, pursuant to Oregon Rule of Appellate Procedure 8.15. Statewide interested parties include the Oregon Newspaper Publisher Association, 7150 SW Hampton, Suite 111, Portland, Oregon 97233, (503) 624-6397, fax (503) 624-9811, and the Oregon Association of Broadcasters, 7150 SW Hampton, Suite 214, Portland, Oregon 97223, (503) 443-2299, Fax (503) 443-2488.

## VI. Substantive law on contesting subpoenas

### A. Burden, standard of proof

There are no statutory or case law rules regarding standard of proof, except that in arguing that compulsory process entitles a criminal defendant to overcome the privilege, the defendant must establish that the information sought is both material and favorable. *State ex rel Meyer v. Howell*, 86 Or. App. 570, 579, 740 P.2d 792, 797 (1987).

### B. Elements

#### 1. Relevance of material to case at bar

In a criminal matter, the defendant must show that the information will be both material and favorable. In a civil defamation matter, the information sought must be the basis of a defense asserted.

#### 2. Material unavailable from other sources

The existence of evidence not protected by the shield law which can prove the same point is a factor that weighs against a criminal defendant's subpoena. *Meyer*, 86 Or. App. at 579. There are no such considerations in civil matters and the privilege has been upheld even when no other material is available. *McNabb v. Oregonian Publishing Co.*, 69 Or. App. 136, 685 P.2d 458 (1984).

##### a. How exhaustive must search be?

No statutory or case law addressing this issue.

##### b. What proof of search does subpoenaing party need to make?

No statutory or case law addressing this issue.

##### c. Source is an eyewitness to a crime

The Court of Appeals has held that a cameraman must testify to his personal observation of events that took place in public, and which did not relate to work product, informants or confidential sources. *State v. Pelham*, 136 Or. App. 336, 901 P.2d 972 (1995).

#### 3. Balancing of interests

Balancing occurs only in criminal matters in which a defendant asserts a constitutional compulsory process claim.

#### 4. Subpoena not overbroad or unduly burdensome

No statutory or case law addressing this issue.

#### 5. Threat to human life

No statutory or case law addressing this issue.

#### 6. Material is not cumulative

In a criminal case, information is not material if there is other evidence which can prove the same point. *State v. Pelham*, 136 Or. App. 336, 901 P.2d 972 (1995); *State ex rel Meyers v. Howell*, 86 Or. App. 570, 740 P.2d 792 (1987).

#### 7. Civil/criminal rules of procedure

No statutory or case law addressing this issue.

### C. Waiver or limits to testimony

#### 1. Is the privilege waivable at all?

No statutory or case law addressing this issue.

#### 2. Elements of waiver

##### a. Disclosure of confidential source's name

No statutory or case law addressing this issue.

#### b. Disclosure of non-confidential source's name

No statutory or case law addressing this issue.

#### c. Partial disclosure of information

The shield statute protects unpublished information even when published information based upon or related to such materials has been disseminated. ORS 44.510(5).

### 3. Agreement to partially testify act as waiver?

No statutory or case law addressing this issue.

## VII. What constitutes compliance?

### A. Newspaper articles

The testimony of a newsperson is not needed to authenticate articles. Printed materials purporting to be newspapers or periodicals are self-authenticating. Oregon Evidence Code 902(6).

### B. Broadcast materials

Authentication may be made by any witness with knowledge that a matter is what it is claimed to be, i.e., material actually broadcast. Oregon Evidence Code 901(2)(a).

### C. Testimony vs. affidavits

No further statutory or case law addressing this issue.

### D. Non-compliance remedies

#### 1. Civil contempt

#### a. Fines

No statutory or case law addressing this issue.

#### b. Jail

No statutory or case law addressing this issue.

#### 2. Criminal contempt

No statutory or case law addressing this issue.

#### 3. Other remedies

No statutory or case law addressing this issue.

## VIII. Appealing

### A. Timing

#### 1. Interlocutory appeals

No statutory or case law addressing this issue.

#### 2. Expedited appeals

No statutory or case law addressing this issue.

### B. Procedure

#### 1. To whom is the appeal made?

From an Oregon trial court, or an administrative hearing, the Oregon Court of Appeals accepts appeals pursuant to ORS Chapter 19 and the Oregon Rules of Appellate Procedure.

#### 2. Stays pending appeal

ORS 19.330 states that an appeal does not automatically stay a trial court's judgment and allows a party to seek a stay. A party may seek review of a trial court's grant or denial of a stay by filing a motion no later than 14 days after entry of judgment. ORS 19.360.

#### 3. Nature of appeal

No statutory or case law addressing this issue.

#### 4. Standard of review

No statutory or case law addressing this issue.

#### 5. Addressing mootness questions

No statutory or case law addressing this issue.

#### 6. Relief

No statutory or case law addressing this issue.

## IX. Other issues

### A. Newsroom searches

No case law addresses newsroom searches or the applicability of the federal Privacy Protection Act or a similar provision in the state statutory privilege. The statute provides:

> No papers, effects or work premises of a person connected with, employed by or engaged in any medium of communication to the public shall be subject to a search by a legislative, executive or judicial officer or body, or any other authority having power to compel the production of evidence, by search warrant or otherwise. The provisions of this subsection, however, shall not apply where probable cause exists to believe that the person has committed, is committing or is about to commit a crime.

ORS 44.520(2).

### B. Separation orders

No statutory or case law addressing this issue.

### C. Third-party subpoenas

No statutory or case law addressing this issue.

### D. The source's rights and interests

No statutory or case law addressing this issue.