

The background of the cover is a photograph of a hand holding a large, circular, metallic shield. The shield has a weathered, greyish-brown surface and is reinforced with a dark brown leather strap that crosses it diagonally. The strap is secured with several round metal rivets. Sharp, dark spikes are attached to the leather strap at various points. The hand holding the shield is fair-skinned and appears to be wearing a light-colored garment.

The News Media AND THE LAW

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FALL 2013

Shields,
Searches,
Subpoenas
& Surveillance

The News Media & The Law

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Sources & Citations

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Reining in the NSA

Let's assume we should give the Obama Administration and the National Security Administration the benefit of the doubt. Assume that the communications data they collect will only be used when there's an actual threat to the national security by a foreign national, and that even then they'll still get the permission of a court — even if it's the secretive and unanswerable-to-anyone Foreign Intelligence Surveillance Court — before sifting through that database and collecting names of more people to watch.

Even in that case, do they not see how this affects citizens' free speech and association rights? Can they not tell how the ability of journalists to serve as a watchdog on government activities is compromised?

As Obama has sought to assuage fears over the scope of the spying programs, he has promised reforms. He has also tasked a special panel — The Review Group on Intelligence and Communications Technologies — with the job of determining what reforms can be made quickly. None of this is being done, of course, with the idea of curtailing surveillance, but with the hope of tweaking the far-reaching programs to make them more palatable to the American people.

And the media is participating in those efforts, somewhat grudgingly, because it's better to air concerns in a situation in which major reform is not expected than to sit quietly and do nothing.

Our comments to the review group, filed on behalf of 37 organizations, addressed not just surveillance issues, but on the broader questions of how the government harms the public interest by overclassifying information and then punishing those who try to bring abuses to light. (Our comments are available on our web site at rcfp.org/x?C7dS)

But even beyond those issues, it is clear that the federal government must still undertake a fundamental re-examination of how it handles important information and keeps it from the public.

We saw a start to this process over the summer, as the Department of Justice acknowledged it had overreached in how it investigated two reporters who had covered national security issues. Attorney General Eric Holder prepared a report for the president on how he would protect free press interests better in the future, promising that notice to the news media before service of a subpoena for their records would be the norm, and setting a higher bar for prosecutors in making those demands.

But in the meantime, the actual regulations implementing those reforms have yet

to be issued, although Justice promises they are coming. (The shutdown of the government certainly didn't help with the timetable.) And in September, the department revealed that its confiscation of Associated Press phone logs led to the conviction of an FBI contractor for those leaks.

Then, after seeing a reporter's shield bill pass the Senate Judiciary Committee in September, not much has happened since. Plus, it's clear that the shield bill, if enacted, would have no meaning to the NSA, which isn't bound by the same constitutional restrictions — at least when investigating foreign nationals, as it is supposed to do.

This leads many to wonder if the Administration's push for reform and accountability is sincere. But the important thing now is that journalists don't let their guard down and keep demanding the protections that we know the press needs in a viable democracy.

Big Brother, George Orwell's infamous stand-in for a surveillance state, would not have been acceptable just by having a secret court watch over its shoulder. Surveillance of the scope we've learned about — and Administration apologists can certainly make the case that we have not reached the truly Orwellian depths — could only be tolerable when it is clearly accountable to the people it is supposed to serve and is rendered unable to trample their rights without consequence.

A shield advances

How would the federal shield bill that passed the Judiciary Committee affect journalists?

By Cindy Gierhart

Since the Senate Judiciary Committee passed an amended version of a federal shield bill in September, commentators have largely focused on who qualifies as a journalist under the bill. While it is an important question, it is not the only question journalists should be asking.

The proposed federal shield bill, known as the Free Flow of Information Act of 2013, is a lengthy bill with a number of provisions. Even if an individual qualifies as a journalist initially, he or she might lose protection due to any one of the bill's exceptions.

At its core, the bill protects journalists from having to disclose confidential sources or material in court. It is similar to a spousal privilege or attorney-client privilege, in that the law recognizes there are certain instances when the public interest in not testifying outweighs the parties' interest in having a person testify.

The public interest in not forcing journalists to reveal their sources is found in the need for journalists to be able to freely gather and disseminate information to the public. If individuals fear they will later be identified in court for disclosing information to journalists, they will stop coming forward.

Even if individuals do not qualify for protection under the bill, if faced with a subpoena to appear in court or hand over information, they are in no worse position than they are in now. The bill would add privileges for some but take nothing away from those who do not qualify.

Coverage under the bill comes down to several key questions.

Are you a “covered journalist”?



AP Photo by Mark Lennihan

Editorial employees walk through the headquarters of The Associated Press in New York. The Justice Department secretly obtained the wire service's telephone record, prompting the recent battle for a federal shield law for journalists.

Much of the volley surrounding the shield bill has been on the issue of who qualifies as a journalist under the bill. Sen. Ted Cruz (R-Tex.) thought those covered by the bill should be defined by their actions and not by their job title. Therefore, a person who had the primary intent at the start of the process to investigate events and disseminate information to the public would qualify for protection.

Sens. Dianne Feinstein (D-Calif.) and Dick Durbin (D-Ill.), on the other hand, thought there should be some limits as to who could qualify. Feinstein, for example, said at the Senate Judiciary Committee meeting that her press secretary and the “occasional blogger” should not be given a privilege under the bill. Sen. Cruz thought “citizen bloggers” should be covered and voted against the amendment to the bill for that reason.



AP Photo by Manuel Balce

Sen. Ted Cruz, R-Texas, said that those covered by the bill should be defined by their actions and not by their job title.

Feinstein and Durbin’s amendment prevailed in the end. But it does not necessarily exclude bloggers, as Cruz indicated. The version of the bill that passed the committee and is now before the full Senate defines a “covered journalist” in three ways, any of which will qualify the person for protection under the bill.

First, a person is covered by the bill if he or she is “an employee, independent contractor, or agent of an entity or service that disseminates news or information . . .”; gathers information with the primary intent to investigate events and disseminate information to the public; and engages in regular newsgathering.

Significantly, the word “salaried” was deleted from an earlier version, so a person need not be paid to qualify for protection. The reporting medium can take many shapes, from the traditional newspaper or broadcast to a nonfiction book, news website, mobile application, or other news or information service.

Sen. Cruz criticized this language at the Senate Judiciary Committee meeting, noting, “Essentially as I understand this amendment, it protects what I would characterize as the corporate media.”

While the definition certainly covers a reporter for *The New York Times*, it also covers a sole proprietor and writer of a news website who works from her living room and receives no pay. A freelance photographer who photographs a house fire hoping to publish it with a news medium and who regularly photographs newsworthy events for publication would qualify under the bill. In contrast, a neighbor who photographs the same house fire to show his friends would not be covered by the bill.

A second avenue through which a person may be covered is when a person formerly worked as a journalist and is now working independently. Specifically, a person is covered if he or she worked for a news entity for 1 year within the past 20 years or for 3 months within the past 5 years — and gathered news or information on matters of public interest with the intent to disseminate it to the public.

The third avenue is through a catchall provision, which states that a judge may decide that anyone who does not fit the other two definitions can still qualify for protection if doing so “would be in the interest of justice and necessary to protect lawful and legitimate news-gathering activities.” This provision allows a judge the discretion to decide anyone, especially non-traditional journalists, could be covered.

That answers the question of who qualifies for protection, but that is only the beginning of the inquiry.

Are you in federal or state court?

It is somewhat obvious but worth reminding that the *federal* shield bill applies in *federal* court. Presently, 39 states and the District of Columbia have state shield laws, and another 10 states offer some protection developed through case law. That leaves only Wyoming with no statutory or case law protection, but that is likely only because the issue has not arisen there (there is no known case of a reporter being jailed or fined for not testifying in Wyoming).

There has never been a federal shield law, though Congress has introduced—and ultimately rejected—numerous bills since the Supreme Court first held in 1972 that journalists have no special privilege under the First Amendment beyond the average citizen.

Yet there is not a void for journalists at the federal level, either. Rather, some federal circuits recognize a non-statutory reporter’s privilege, but the circuits vary widely as to whether they recognize a privilege at all and, if so, who is covered and under what circumstances. A federal shield law would offer consistent and, in many cases, stronger protection across the circuits.

Is the case criminal or civil?

Because individuals charged with a crime have a constitutional right to confront their accusers, it is generally more difficult for journalists to keep their sources confidential in criminal cases than in civil cases.

According to the current Senate version of the shield bill, for a court to force journalists to reveal their sources in both civil and criminal cases, the party asking for the information must have “exhausted all reasonable alternative sources” (i.e., tried and failed to find the information elsewhere), and the information sought must be “essential” to the case.

But in a criminal case, the journalist has the burden of additionally showing that disclosure would be “contrary to the public interest.” In contrast, in a civil case, the

party asking for the information — not the journalist — has the burden of showing that the interest in disclosure “clearly outweighs” the public interest in gathering and disseminating news.

So, in a civil case, if the party seeking the information cannot prove its burden, the journalist automatically wins. In a criminal case, if the journalist cannot prove his or her burden (assuming the other elements are met), the other party automatically wins.

Is your source confidential?

The proposed federal shield bill only protects confidential communications — that is, information that would identify a person who was promised confidentiality or documents or other material that were obtained in exchange for a promise of confidentiality. Therefore, if a court seeks information regarding a source who was named in the publication or documents that were given to the journalist without promise of confidentiality, then the journalist cannot seek protection under this bill.

That does not necessarily mean that journalists have no federal protection when it comes to non-confidential sources or material. The proposed bill explicitly states that it will not interfere with any law or court decision that protects non-confidential communications. Any federal circuit that currently protects non-confidential information — and some do — may continue to do so after the shield law is enacted.

While the circuits vary in how much protection they offer non-confidential communication — if any — it is generally true across all circuits that non-confidential has fewer protections than confidential information. In the Second Circuit, for example, a party seeking non-confidential information need only show that the information is likely relevant to a significant issue in the case and that the same information could not reasonably be obtained from other available sources.

Despite this low bar, the Second Circuit ruled recently in *In re McCray* that “Central Park Five” documentary filmmakers did not have to turn over outtakes, even though the information was not confidential. On the other hand, the D.C. Circuit ruled just days before in *Klieman v. Palestinian Authority* that the BBC had to turn over documentary outtakes, largely because the information was not confidential — though the D.C. Circuit does protect non-confidential information in some instances.

As a word of caution, revealing the identity of a source to others outside your news organization, even to a friend or neighbor, could cause your information to lose its confidential status. Even under New Jersey’s strong shield statute, the court in *In re Venezia* ruled in 2007 that a reporter “waived” his privilege by disclosing the information to a prosecutor and city attorney in a separate but related criminal matter, so he could not keep that same information private when requested for a civil matter.

Other states have come to similar conclusions (e.g., *Pinkard v. Johnson* in Alabama, *Wheeler v. Goulart* in the District of Columbia, and *In re Dan* in New York). Therefore, it is best not to disclose confidential information to anyone beyond an editor or collaborator; otherwise, you may have to disclose it to the court, as well.

Could the information you hold prevent acts of terrorism or acts that could cause “significant and articulable harm to national security”?

In a criminal investigation or prosecution by the federal government for the disclosure of classified information, under the proposed shield bill, a court may order a journalist to disclose information if that information would help the government in “preventing or mitigating” an act of terrorism or other acts likely to cause “significant and articulable harm to national security.”

In criminal investigations and prosecutions not involving the disclosure of classified information, the same rule applies, although the government additionally may force a journalist to disclose information if it could help the government in “identifying the perpetrator of” terrorist acts or other dangers to national security.

This means that, under the proposed bill, the federal government cannot force a journalist to identify the person who disclosed classified documents just for the sake of identifying the leaker. (But the government can force a journalist to testify for the sole purpose of identifying the perpetrator of any other type of crime.)

Were this provision currently law, it could potentially help *New York Times* reporter James Risen, whom the Justice Department has subpoenaed in the leaks prosecution of former CIA officer Jeffrey Sterling.

The government would not be able to force Risen to testify for the sole purpose of identifying who disclosed classified documents to him. However, if the government could show that his testimony could prevent future harm to national security, then Risen would have to testify. Importantly, the proposed bill explicitly states that the potential for the leaker to disclose more information in the future is not in itself, without further proof, sufficient to prove future harm to national security.

Could the information you hold prevent death, kidnapping, substantial bodily harm, a crime against a minor, or destruction of critical infrastructure?

A journalist will have to disclose information if it is “reasonably necessary to stop, prevent, or mitigate” death, kidnapping, substantial bodily harm, specified crimes against minors, or the incapacitation or destruction of critical infrastructure.

This exception largely speaks for itself. If you interviewed someone who confessed to kidnapping a child and keeping her in his house, the court could order you to disclose the identity of the person, so that the police could find the child.

Are you publishing unauthorized documents without analyzing them?

This is the so-called “Wikileaks exception.” To qualify for a journalist’s privilege, you have to engage in traditionally journalistic activities. That means explanation, analysis, description, and original photography or videography. It does not mean uploading leaked documents without further analysis.

The proposed bill does not shield anyone whose “principal function . . . is to publish primary source documents that have been disclosed . . . without authorization.” Therefore, Wikileaks founder Julian Assange would not be able to claim privilege under the proposed bill. However, a journalist reporting on Wikileaks and the material posted on Wikileaks could claim a privilege.

Is the information relating to your own criminal charge?

The proposed shield bill does not protect journalists who themselves are charged with a crime. If a journalist has a recording of himself offering a bribe or robbing a bank, he cannot claim privilege under the proposed shield bill in his own criminal prosecution.

This exception does not apply if the journalist’s only “crime” was communicating the documents or information. This clarification seemed necessary given the surprising revelation in the summer of 2013 that the government labeled Fox News reporter James Rosen a “co-conspirator” simply because he reported on national security secrets disclosed to him by a former State Department contractor. Under the proposed bill, if Rosen ever were charged with a crime for communicating leaked documents — which would be exceptionally unlikely — he could still claim a privilege under the proposed bill.

What is different now from 2010, the last time the bill failed?

Many are optimistic that the shield bill will finally pass this time around. The reason: the climate has changed significantly in the past three years. The failure of the 2009 bill (carried over into 2010) is largely attributed to the Wikileaks saga that began to unfold in the spring of 2010. Members of Congress lost their enthusiasm for protecting confidential sources in the face of one of the largest breaches of national security.

In 2013, legislators have no less concern over protecting national security, but they have crafted the language of the bill so as to exclude Wikileaks-type disclosures and other harms to national security. Some, like Sen. Jeff Sessions (R-Ala.), still think the bill doesn’t go far enough to protect national security, but others, such as Sens. Feinstein and Durbin, who initially had hesitations about the bill, are satisfied with the amended version.

Also, the bill was revived in large part as a reaction to the revelation in the summer of 2013 that the Department of Justice had secretly obtained Associated Press (AP) phone records and seized a Fox News reporter’s Gmail account. The

news stunned free-speech advocates, and the reintroduction of the shield bill into Congress acted as an olive branch to media.

The climate continues to remain tense, however, in light of the continuing insistence from the Justice Department that Risen testify in the prosecution of Sterling. This continued targeting of journalists' information only strengthens the conviction that a federal shield law is necessary now more than ever.

Who's who

A quick rundown of key players in recent leak cases

By Latara Appleby

Jana Winter: The *Fox News* reporter has been subpoenaed to testify in Colorado about her confidential sources in her coverage of James Holmes, the man accused of the 2012 Aurora theater shooting.

Days after the killing spree that left 12 dead, Winter reported that the accused gunman mailed his psychiatrist a notebook containing violent images. She cited two anonymous law enforcement members. Officials sought to identify the sources who they said violated a blanket gag order.

Winter's attorney argued that she should not have to comply with the Colorado court because she is based in New York, which applies an absolute reporter's privilege for confidential sources. The court rejected this argument.

Winter is appealing the New York decision. The Colorado court granted her motion to delay her hearing until January, giving her time to finish her New York appeal.

Joe Hosey: The Patch.com reporter was found in contempt of court for not revealing his anonymous sources for a story he wrote about a double murder in Joliet, Ill.

In September, the court gave Hosey 21 days to hand over his notes and documents relating to his source. If these documents did not reveal the source's identity, Hosey would have had to write an affidavit detailing how he came to acquire the information.

Defense attorneys argued that the information in Hosey's news report could influence a jury.

Hosey's attorney, Kenneth Schmetterer, told the judge his client did not intend to comply with the order and requested that the judge rule on the contempt charge so that they could file an appeal.



AP Photo

Jana Winter

Hosey was fined \$1,000 and has to pay court fees. He is also being fined \$300 a day until he reveals his sources, though the fines have been stayed pending the appeal.

Donald John Sachtleben: In September, the former FBI agent pleaded guilty to disclosing information to the Associated Press in May 2012 regarding a thwarted Yemen-based plan to bomb a U.S.-bound airplane.

After the AP reported the story, the Justice Department secretly subpoenaed the phone records of more than 20 of their telephone lines.

Sachtleben had worked as a bomb technician for the FBI from 1983 to 2008. In 2009, he started working for a defense contractor where he maintained his top secret security clearance.

Sachtleben first developed the relationship with the AP reporter in May 2009. Then, from Jan. 2010 to May 2012, he communicated with the journalist about “explosives used in terrorist plots or attacks and the FBI’s analysis of such explosives,” according to court documents.

Sachtleben faces a 43-month sentence for the leak. He also pleaded guilty to charges involving child pornography.

James Rosen: The Justice Department labeled the Washington correspondent for *Fox News* a “co-conspirator” to a violation of the Espionage Act following his 2009 news report on North Korea.

The label allowed the Justice Department to obtain a warrant for Rosen’s email account using an exception in the Privacy Protection Act. An affidavit claimed Rosen, in his newsgathering, was violating federal statutes that prohibit “unauthorized disclosure of national defense information.”

Prosecutors believe that Stephen Jin-Woo Kim, a State Department official, leaked the information to Rosen and have charged him in relation to the disclosure. He has pleaded not guilty.

James Risen: *The New York Times* reporter James Risen was subpoenaed in 2008 to testify to the identity of his confidential source in his 2006 book on the Central Intelligence Agency. In his book he wrote about an operation aimed at Iran’s nuclear program with information allegedly provided to him by a former CIA operations officer. Risen and his attorney have been fighting the subpoena.

Risen’s attorney argued in a July letter that the Justice Department’s effort to make him testify is “utterly inconsistent” with the new guidelines for journalist subpoenas.

The U.S. Court of Appeals for the Fourth Circuit declined a request for a rehearing in October. He is expected to ask the Supreme Court to review the case.

Jeffrey Sterling, a former CIA operations officer, is accused of providing classified information to James Risen. The information he allegedly disclosed was about a botched operation intended to injure Iran’s nuclear program.

Sterling is charged with 10 counts, including unauthorized disclosure of national defense information and obstruction of justice.

The shadows of the spooks

NSA surveillance efforts affect investigative reporting on a daily basis

By Jamie Schuman

For an investigative reporter like David Barstow of *The New York Times*, the revelation that the National Security Agency collects massive amounts of phone and e-mail data makes once routine job tasks — from finding sources to communicating with editors — much harder.

“It’s been the single most destructive thing that I can remember in my 27 years of being a reporter,” said Barstow, who twice won the Pulitzer Prize for Investigative Reporting. “It creeps in every day into my thought process, into my work, into every phone call I make, into every e-mail I write.”

Since *The Washington Post* and *The Guardian* first broke stories in June based on leaked classified documents from former NSA contractor Edward Snowden, reports about the types of information the government collects have dominated the news. The Obama administration has maintained that it only uses the data to hunt for terrorists, and has started to make available court opinions that describe the legal basis for the surveillance. Still, many journalists and media lawyers worry that details about reporters’ sources — from who they are to when they were interviewed — could get caught in the mix.

“Once you know that the NSA is potentially tapping conversations between journalists and sources, that’s all I need to know to be worried,” said Charles Tobin, a media lawyer at Holland & Knight in Washington, DC. “I’m less concerned about what they’re doing with the information than I am that they are gathering it in the first place.”

This worry, reporters say, affects the strategies they use when arranging



AP photo by J. Scott Applewhite

Demonstrators rally at the Capitol to protest spying on Americans by the National Security Agency, as revealed in leaked information by former NSA contractor Edward Snowden, in Washington, D.C., on Oct. 26.

interviews — and whether or not sources will agree to speak with them at all.

“I have absolutely no doubt whatsoever that stories have not gotten done because of this,” Barstow said of NSA surveillance programs’ impact on journalism.

Background on the programs

The first bombshell came in June when news outlets, relying on Snowden’s documents, reported that the NSA has been collecting telephone “metadata” — including phone numbers, timing and duration of calls but not content — of millions of Americans since the Bush administration. The government has said that it only searches these logs when it has a “reasonable, articulable suspicion” of terrorist activity, according to news reports.

The same month, the public learned that the United States is tapping into the servers of nine communications companies to collect e-mail messages, audio, video and connection logs from foreign users who may pose a national security threat. PRISM, as the program is known, gets data from Microsoft, Yahoo, Google, Facebook, Paltalk, AOL, Skype, YouTube and Apple, although most of these companies have disputed the descriptions of their cooperation.

In August, *The New York Times* reported that the NSA is systematically searching the contents of e-mail messages sent between American and overseas contacts. *The Wall Street Journal*, meanwhile, wrote that the agency can collect the content of 75 percent of U.S. Internet traffic directly from fiber optic networks.

This fall, news outlets reported that the NSA, if it has a foreign intelligence justification, can piece together a variety of U.S. citizens’ records — such as e-mail, phone and GPS logs as well as bank information and Facebook profiles — into diagrams that show a clearer picture of people’s social connections.

The government has emphasized that reviews of e-mail messages are focused on national security, and that telephone surveillance efforts do not track content. Still, call logs and the like can be “very revelatory,” said Laura Handman, a media lawyer at Davis Wright & Tremaine. That’s the type of information investigators used to identify former FBI agent Donald John Sachtleben as the person who, in May, leaked details of a foiled terrorist plot to the Associated Press. When the Justice Department announced in September that Sachtleben had agreed to plead to a 43-



AP Photo by Carolyn Kaster

From left, National Security Agency Director Gen. Keith Alexander, Director of National Intelligence James Clapper, and Deputy Atty. Gen. James Cole are sworn in on Capitol Hill prior to testifying before the Senate Intelligence Committee hearing on the Foreign Intelligence Surveillance Act, and National Security Agency call records.

month sentence for the leak, it said it used AP phone records only after interviews with more than 500 people proved fruitless.

Sachtleben is the subject of the Obama administration's eighth leak-related prosecution. No link has been shown between the NSA programs and these investigations: the government obtained the AP phone records through a secret subpoena of more than 20 of the company's telephone lines. Still, for some investigative reporters who cover national and international news, the effects of surveillance — especially when combined with the rising number of leaks cases — are tangible.

Reporters interviewed say they and others they know have lost sources; written fewer investigative pieces; and have had to change the way they interact with potential interview subjects and editors to try to keep their communications off the grid.

“Like a drug dealer”

Jailed in 2005 for refusing to reveal a confidential source, former *New York Times* reporter Judith Miller is no stranger to government interest in her source relationships. She worries that this summer's revelations are deterring reporters from investigative work and causing sources to clam up.

“There's a reason that fewer and fewer investigative news stories are being broken,” said Miller, who now reports for Fox News and other outlets. “It's just that people are scared.”

Once routine tasks also take more work. For instance, a journalist might not want to e-mail or call an editor with updates about an interview for fear of surveillance. At *The Washington Post* and *The New York Times*, data security specialists are training reporters on how to use encryption technology, staff at both outlets said.

Reporters also must be cautious of storing even “remotely sensitive documents” on computer servers, said Mark Horvit, executive director of Investigative Reporters and Editors, Inc., a training center at the Missouri School of Journalism.

And for a while, journalists covering sensitive subjects have been cautioned to use disposable cell phones and to avoid putting names of confidential sources in e-mail messages and other documents, Handman said. More than anything, though, reporters are realizing “now more than ever the value of face-to-face communications,” she added.

Miller said she is working on fewer investigative pieces because she has to commute from her home in New York to Washington, D.C. to conduct clandestine, in-person interviews.

“I'm beginning to feel like a drug dealer, [with] the cell phone that I bought with cash or the SIM card that's not traceable to me,” Miller said.

Barstow, who won a Pulitzer this year for stories on a large-scale bribery cover-

up by Wal-Mart, said the chill does not just affect national security reporting. “Anyone who works remotely for the federal government is basically freaked out,” he said, as are corporate directors and non-governmental organization employees that are involved in publicly controversial topics.

To Horvit, the problem is that reporters and sources do not know what the government considers a national-security threat, and, by extension, what gets caught in its web of surveillance review.

“It’s knowing that they’re looking and not knowing what they’re looking for that makes this a much broader issue,” he said.

Obama promises safeguards

In an August speech, President Obama sought to ease surveillance anxiety by outlining four steps aimed at making the NSA more transparent. First, he said he would work with Congress to place greater oversight on Section 215 of the Patriot Act, the provision that authorizes the phone-data collection program.

Next, he pledged reforms to the Foreign Intelligence Surveillance Court, which decides the constitutionality of many NSA programs. Press advocates and others have criticized the FISA Court for keeping its opinions secret and for only having one side — the government — argue cases before it. Obama said he would take steps to allow an adversary to argue before the court “in appropriate cases.”

Third, he instructed intelligence officials to make more information about their programs public. The FISA Court has since declassified select opinions, including one that explained that call-log collection program is constitutional because it does not include content and because Section 215 allows for searches of business records relevant to a foreign intelligence investigation.

Finally, Obama formed a group of outside experts to review surveillance programs and write a report by the end of the year.

Through the summer and fall, the government has maintained that it is using the surveillance data for terrorist investigations and other national security concerns, such as nuclear proliferation and cyber attacks. Recent reports, however, have brought to light numerous abuses of the system.

An internal NSA audit from 2012, which *The Washington Post* published in August, revealed that the agency conducted unauthorized searches of people in the United States thousands of times each year since 2008. In a separate *Post* story, FISA Court Chief Judge Reggie B. Walton said his court “does not have the capacity to investigate issues of noncompliance.”

Government documents released in September showed that the NSA regularly searched call logs of about 15,000 numbers without a reasonable, articulable suspicion of terrorism for three years until March 2009.

The government has emphasized that the bulk of these violations are due to human error or the complexity of the surveillance programs. Still, many media

lawyers and journalists are left wondering if these reassurances are enough.

“I think it will all boil down for reporters as well as for every other citizen to the extent to which you can take the government at its word that the information it’s collecting is being used only for the purposes of tracking foreign terrorists,” said Lee Levine, a media attorney at Levine Sullivan Koch & Schulz in Washington, D.C. “There’s a certain amount of queasiness related to any government action the propriety of which devolves down to the assertion that you should just trust us.”

Moreover, what if the government discovers a leaker in the course of investigating a potential terrorist? George Freeman, an attorney with Jenner & Block who was in-house counsel at *The New York Times* for more than 30 years, wondered if officials would then be licensed to start pouring through reporters’ call and e-mail logs.

“I don’t think we have trust or faith enough to think that might not happen,” he said.

Stronger safeguards needed

Many media lawyers say stronger safeguards are needed than the ones Obama announced in August.

In suggestions submitted to Obama’s surveillance review group this fall, the Reporters Committee for Freedom of the Press, joined by 36 news organizations, asked the government to do a better job explaining how it uses journalists’ records. It also recommended that the FISA Court apply heightened scrutiny when determining if material that the government seeks from media outlets is related to terrorist investigations; and that it regularly release decisions of precedential value.

Additionally, the coalition suggested that the FISA Court appoint a permanent “attorney advocate” to advance the media’s point of view as journalists are not told if they are the subject of a request to the secret court.

Media lawyers also are calling for reform outside of the FISA Court. For Levine, legislation that specifically prohibits tracking reporters would be ideal. Next best, he said, would be Department of Justice guidelines on surveillance similar to the ones issued on journalist subpoenas this summer.

Tobin, of Holland & Knight, said the proposed federal shield law should reach the entire intelligence apparatus. News organizations must be notified of searches and receive heightened protection in the courts, he added.

“Only in the highest, most exigent level of alarm should the journalist be kept in the dark that their information is being monitored,” Tobin said.

Despite these pushes for more protection, Barstow, at *The New York Times*, worries that the damage, including lost sources and unwritten stories, has been done.

“The only way that it can be undone is if we can have some assurance that our digital lives are beyond the reach of the government,” he said.

Fighting on principle

Florida and Virginia papers win prior restraint suits

By Jamie Schuman

The Supreme Court in *Nebraska Press Association v. Stuart* called prior restraints “the most serious and the least tolerable infringement on First Amendment rights.” These bans, it stressed, are presumptively unconstitutional.

Despite the near impossibility of upholding prior restraints — which occur when government officials restrict speech prior to publication — courts around the country occasionally try to issue them. At least two caused frenzies in newsrooms this fall.

In *Florida v. Tadros*, in September, a judge told reporters that they could not publish portions of a police report that contained a supposed confession. The next month in *Virginia v. Steward*, a court prohibited the press from naming certain witnesses who had testified in a murder trial.

Although in both states appellate courts ultimately lifted the prior restraints, news outlets faced frightening scenarios while the bans were in place: They could either cover the news and risk being held in contempt or not publish the information and have their independent editorial judgment stripped away. After media companies pursued appeals, Virginia lifted its ban in four days while Florida’s was removed in 14 days.

Still, even a brief restriction can have a significant effect because it undercuts reporters’ ability to promptly report the news, said Holland & Knight media lawyer Tim Conner, who represented the *Florida Times-Union* and First Coast News in *Tadros*.

“News delayed is news denied,” Conner said, quoting *State of Florida ex rel. Miami Herald Publishing Company v. McIntosh*, which struck down a prior restraint in a securities fraud case. “Even a temporary prior restraint is going to delay the



In this screenshot of a WJXT TV segment on Sept. 11, reporter Kent Justice is explaining to viewers that a judge previously told reporters they could not publish portions of the police report he is holding that contained a supposed confession.

dissemination of news to the public.”

Despite their fight, Conner’s clients ended up not publishing the parts of the arrest report that were at issue, though at least one Florida news outlet ran excerpts. Similarly, *The Daily Press* of Newport News, Va., which got the *Steward* ban lifted, did not run the witness names.

But people involved in both cases said the fight was necessary to guard against government interference with editorial decisions.

“It wasn’t about the names to begin with,” said Marisa Porto, vice president of content for the Daily Press Media Group. “It’s about the principle of things.”

Defining prior restraints

The Supreme Court has never upheld a prior restraint, and media lawyers in *Tadros* and *Steward* pointed to key cases where justices explained that only in the rarest of circumstances would a ban be constitutional.

In 1931’s *Near v. Minnesota*, the Court speculated that one might only be allowed to prevent disclosure of the “number or location of troops” during wartime. The court there struck down a Minnesota law that had let the government halt the printing of “malicious,” “scandalous,” or “defamatory” articles after the state had tried to stop a known anti-Semitic paper from running stories critical of public officials.

Forty years later, in the famous “Pentagon Papers Case,” the Supreme Court cited *Near* when it found that *The New York Times* and *The Washington Post* could publish classified documents regarding the history of U.S. involvement in Vietnam. The court heard oral arguments in *New York Times v. United States* in an emergency Saturday session in June 1971 and decided the case just four days later. In a concurring opinion, Justice William Brennan suggested that, in addition to troop locations, “information that would set in motion a nuclear holocaust” might also justify a prior restraint.

The restricted items in *Tadros* and *Steward* are no doubt a far cry from the direct dangers to national security that *Near* and *New York Times* singled out. Why, then, did the courts issue the prior restraints in the first place?

Some media lawyers said judges may issue the bans because they are unaware of precedent in the area but feel the need to make a quick decision — especially if news



AP Photo

This is the city room of The New York Times after a federal judge ordered the paper to temporarily cease publication of a series of articles on the Vietnam war based on a Pentagon study, June 15, 1971. From left are Times editors James L. Greenfield, foreign editor; Max Frankel, chief Washington correspondent; and Fred P. Graham from the Times Washington bureau.

outlets are eager to publish the information. Moreover, disclosure of the facts can often implicate other constitutional rights, such as the Sixth Amendment guarantee of a fair trial.

But Supreme Court cases, such as *Nebraska Press Association v. Stuart* and *Sheppard v. Maxwell*, stress that judges have many methods — including not impaneling jurors who are well-versed in the case; giving jury instructions that emphasize that only evidence from the courtroom can be considered; and even changing the trial location — to ensure that defendants are not prejudiced. Other decisions, meanwhile, hold that news outlets cannot be punished for publishing truthful material that they lawfully obtained, absent the highest state interest.

In Florida, prior restraints are so uncommon partly because new judges receive training on these topics at orientation workshops known as “baby judges school,” media lawyer Jonathan D. Kaney said.

“One of the speakers there says, ‘if you really want to be famous, here’s what you do. Enter a prior restraint,’” said Kaney, who is general counsel at the First Amendment Foundation in Florida.

On the rare occasion a reporter is slapped with a prior restraint, Conner said the best course of action is to alert an editor and then immediately inform a lawyer who can file paperwork to get the ban lifted. Media organizations in *Tadros* and *Steward* did just that.

Florida v. Tadros

James Patrick Tadros’ arrest in Jacksonville, Fla. drew lots of local publicity.

Police had charged the Florida man in August with false imprisonment, criminal mischief and attempting to murder a 9-year-old girl in a Best Buy bathroom.

Upon his arrest, Tadros reportedly gave statements in which he explained that he lured the child into the bathroom by asking her to retrieve a phone that he told her he left there. Florida law allows alleged confessions to be redacted from police reports, but a television station got an unedited version after its lawyer found it on a section of a court database that is not available to the general public.

The station, WJXT TV4, planned to disclose the supposed confession on the six o’clock news on Aug. 28, but Tadros asked Duval County Circuit Court Judge Adrian G. Soud that afternoon to stop the broadcast. At an emergency hearing around 5:30 that day, Soud sided with Tadros. He explained that the restraint was only temporary, and that he issued it because he wanted time to analyze the law.

But WJXT TV4 ran a “screen shot” that contained the supposed confession that night, and Tadros then sought to hold it in contempt. Soud declined to do so, finding that the broadcast was unintentional. But at the evidentiary hearing on the issue, he issued a second prior restraint. This time, he forbade a *Florida Times-Union* reporter from publicizing the information from the arrest report as well.

On Sept. 11, following a hearing where news media representatives explained

why the prior restraint was unconstitutional, Soud lifted the ban. He wrote in his opinion, “Although a government may deny access to information and punish its theft, a government may not prohibit or punish the publication of information once it falls into the hands of the press unless the need for secrecy is ‘manifestly overwhelming.’”

Soud explained the court could take other measures if need be to ensure Tadros a fair trial, but he admonished the news outlets not to publish the information. “On the facts before this Court, while the law cannot require the embracing of this duty, the law expects it,” Soud wrote.

Soud also found that the unredacted report was available due to clerical error, and that the attorney who got it did not violate the law. But to Conner, the legality of how the report was obtained should not have factored into Soud’s initial decision to enter the prior restraint. There are other ways, such as theft and wiretap laws, to deal with that issue if need be, he said.

Virginia v. Steward

Craig Merritt, one of the attorneys who fought the prior restraint in *Steward*, called it nothing more than “an oddball situation that got out of hand” and that he “tried to contain as quickly as possible.”

Witness-safety concerns and not fair-trial rights prompted juvenile court judge Thomas Carpenter to issue the ban. It prevented reporters from naming people, aside from law-enforcement officials, who testified at a preliminary hearing for Antwain Steward.

Police arrested Steward, of Newport News, Va., in July for two 2007 killings after claiming that rap lyrics that he wrote referenced the unsolved murders.

Steward had threatened potential witnesses, according to court filings. At the end of the Oct. 2 hearing, state attorneys made an oral request for the ban. Carpenter immediately granted it, but noted that the state should have filed a written motion before the hearing.

“This was truly done on the fly at the end of the hearing,” said Merritt, attorney for *The Daily Press* in Newport News. “It goes to show that bad process leads to bad results.”

Just two days later, Merritt and colleague David Lacy filed a brief on behalf of *The Daily Press* in which they explained the presumptive unconstitutionality of prior restraints.

“When, as in this case, the information has already been disclosed, a prior restraint may not be used to unring the bell,” they wrote. The constitutionally permissible path, they argued, would have been for the court to weigh in on disclosure concerns before the information became public.

Before the Newport News Circuit Court — where the case had been transferred — could hold a hearing on the ban, the prosecution withdrew its request to suppress

the names.

“I give the prosecutors credit,” Merritt said. “They read our legal brief, they read the law, [and] they realized they were in an untenable position.”

Why fight prior restraints?

Only one of the publications involved in the two suits decided to publish the facts in question after getting the right to do so.

WJXT TV4 ran a story in which it described some details about how Tadros said he lured the child into the bathroom. The station thought the piece had an important public-safety purpose, said its attorney, Edward Birk.

The WJXT TV4 story repeatedly emphasized that it left out details from the report that were too graphic or that could interfere with Tadros’ Sixth Amendment rights.

The Florida Times Union and First Coast News, meanwhile, did not publish the information at issue, Conner said. It was crucial that the editors — and not a judge — got to make that decision, he said.

“It’s a matter of principle,” Conner said. “Prior restraints cannot be tolerated so we felt like it was an important principle to address.”

The Daily Press did not publish the names, and never intended to do so, Porto said. The purpose of the suit wasn’t about the names, she said, but about maintaining journalistic independence.

“We need to force legal professionals to make the right decisions,” Porto said. “We’ll continue to do this, and we’ll do it every time we find improper law when it comes to freedom of the press.”

Running on transparency

A look at eight new governors we profiled in 2011 and where they are today on their open government promises

By Emily Grannis

In the 2010 elections, a number of challengers made increasing government transparency a major issue in their campaigns. Of those who did not run on a transparency platform, several faced immediate questions about their commitment to open government once they took office.

News Media and the Law profiled eight of the new governors (seven Republicans and one Democrat) in the spring of 2011 to see how they were doing on their transparency pledges one year into their terms. Now, with all of them running for re-election, we have checked in with the governors' teams and open government groups in those states to see if there has been progress.

David Cuillier, president of the Society of Professional Journalists and director of the journalism school at the University of Arizona, said the rise of the Tea Party movement spurred calls for greater government accountability and transparency.

"That's healthy, I think, for our government to have people who want to question it and push for transparency," he said.

But Cuillier added that he is not surprised to have seen this group of governors have difficulty following through on their promises of a more transparent government.

"Time after time politicians say they'll be transparent, they get elected and they renege on their promise. That's what we see at all levels of government," he said. "There are exceptions, but it's really frustrating when people tout something to win



AP Photo by Robert F. Bukaty

Gov. Paul LePage speaks to reporters at the State House in Augusta, Maine. Citizens for Responsibility and Ethics in Washington put LePage on its list of worst governors this year, criticizing him for trying to exempt working papers, memoranda, and legislative proposals from the public records law.

favor, particularly from the media perhaps, and then go back on their words.”

With those governors now finishing their first terms and many heading into re-election campaigns, press groups in several of the states say the governors have mostly maintained the status quo in terms of transparency, with a few raising concerns about specific programs.

Maine

When Gov. Paul LePage ran in 2010, his campaign website promised “he will fight for stronger laws to protect and expand Maine citizens’ right to access information from state and local government.”

But within months of the election, the *Kennebec Journal* reported LePage had referred to people using public records laws as “a form of internal terrorism.” Around the same time, the governor also drew criticism for refusing to release his travel records.

Three years later, LePage has improved government transparency in Maine, according to the U.S. Public Interest Research Group, which evaluates state transparency websites. The group praised LePage in particular for launching the Maine Open Checkbook site, a move that followed through on a campaign promise the governor made to create an online tool for explaining how the state uses taxpayer money.

The site allows members of the public to search for details about state spending, state employee compensation and payments to vendors. Adrienne Bennett, LePage’s press secretary, said the governor’s office is planning to expand the site in the next few months to include revenue data, graphs and budget reports.

LePage has also pushed for more transparency in financial disclosures from public officials, Bennett said. A law LePage signed earlier this year aimed to close a loophole whereby the state hired groups headed by state political leaders or their spouses, but did not have to disclose who was getting the money.

“It is reasonable to ask our elected leaders to disclose who is paying them. It is good for the health of our democracy and the people of Maine,” LePage said when he signed the bill in April. “This will increase trust in the system and ensure that people have the opportunity to take appropriate action and make decisions accordingly.”



AP Photo by Oskar Garcia

Hawaii Gov. Neil Abercrombie speaks at the state Capitol in Honolulu. The Democrat did not run on a platform of promoting transparency, but he encountered questions early in his term about his commitment to open government.

But Citizens for Responsibility and Ethics in Washington put LePage on its list of worst governors this year, criticizing him for trying to exempt working papers, memoranda, and legislative proposals from the public records law. The legislature refused to pass the law.

LePage officially launched his re-election campaign Nov. 5.

Wisconsin

As a candidate for governor, Scott Walker said he “absolutely” would pledge to run the most transparent gubernatorial administration ever in Wisconsin.

The former chief executive of Milwaukee County told *The Lakeland Times* during the campaign that he wasn’t just going to talk about transparency. “I don’t just say that, I’ve lived it,” Walker said, pointing to the fact that his administration posted all government purchases online.

Press groups were initially skeptical when early in his term, they had to sue to get copies of e-mail messages Walker cited in speeches. The governor’s office claimed the messages would cost \$30,000 to produce, and the *Isthmus* newspaper along with the Wisconsin Associated Press, sued Walker for violating the public records law.

Since then, media reports continue to complain of closed government meetings and delaying the launch of a promised transparency website that would have required lobbyists to make public any attempts to influence state agencies.

“Past the halfway mark in his term, the lobbying disclosure requirements are unchanged,” Dave Umhoefer wrote for the *Milwaukee Journal Sentinel* in April. “Neither Walker nor the Republican-controlled Legislature has acted on broadening the disclosure requirements.”

The governor’s office could not be reached for comment. Walker is running for re-election this year.

Ohio

Although Gov. John Kasich did not run on a transparency platform in 2010, the issue of access to government records surfaced early in his term.

At the start of his term, Kasich declined to release the resumes of people applying for political appointee jobs, angering transparency advocates by using a private web portal to accept applications.

Kasich’s term has also been affected by an ongoing fight with Democrats and open government advocates over JobsOhio, a private non-profit organization meant to improve the state’s economy and unemployment rate.

The fight over how public to make JobsOhio has led to at least one lawsuit in Ohio, as well as a negative report from a research center that investigates public-private deals. Good Jobs First said in its October report that JobsOhio was an example of a “particularly problematic” public-private partnership. In response to

the report, the Kasich administration told City Beat in Cincinnati that, “We don’t pay much attention to politically-motivated opponents.”

Kasich spokesman Rob Nichols said there is no question about JobsOhio and whether it should be subject to the state’s public records law.

“There’s no debate. It’s just a private non-profit entity,” Nichols said. “The question of whether it’s public or private is not a question.”

Dennis Hetzel, president of the Ohio Newspaper Association, said he would give the governor a grade of “incomplete” on the question of transparency.

“He’s been subject to a lot of criticism on the subject of transparency, particularly in regards to JobsOhio, and we’ve been among those critics [but] I really don’t think it’s been as extreme as some of his harshest critics portray it,” Hetzel said, adding that Kasich has been open to working with transparency groups on other questions. “They’ve been willing to talk with us and work with us on some other sunshine issues that maybe haven’t been quite as visible as those.”

Kasich is now running for re-election.

Tennessee

Unlike his fellow Republican candidates in 2010, Bill Haslam made clear from the start that he opposed certain transparency movements, particularly efforts to make executive branch officials disclose their personal income records.

Although Haslam said voters knew where he stood on disclosure before they elected him, in a statement he released in January 2011, Haslam also said, “My Cabinet and I are dedicated to openness, transparency and ethical governing.”

But other than clashing with open government groups over the income reports, Haslam has not done much to affect transparency in Tennessee, according to Frank Gibson, the public policy director at the Tennessee Press Association.

“There’s always room for improvement,” Gibson said. “I don’t think that things have gotten any better since Gov. Haslam took office, but on the other hand, I don’t see that they have gotten worse because of anything he’s done.”

Haslam’s office did not respond to requests for comment. The governor is running for re-election in 2014.

South Carolina

Like Haslam, Nikki Haley faced questions about her commitment to open government before even being elected governor of South Carolina. During her campaign, Haley drew criticism for releasing only laudatory e-mail messages from constituents, rather than all e-mail messages she received.

The fight over Haley’s email continued once she was elected. In November 2011, Haley’s administration drew criticism for deleting messages sent between the governor and her staff. She was also criticized late in 2011 for closing most meetings she held with cabinet officers.

Bill Rogers, executive director of the South Carolina Press Association, said there has been no improvement in Haley's release of e-mail messages since then. But, he said, Haley did lobby for reform of the state's freedom of information laws to cut the costs to requesters and reduce wait-time for responses. Those reforms have not yet passed in the legislature.

Overall, Rogers gave a tepid review of Haley's transparency efforts.

"I would think things have pretty much stayed the same," he said. "I don't think we've seen any improvement."

The governor's office did not respond to a request for comment.

Haley announced in August that she is running for re-election.

Florida

Rick Scott told voters in 2010 when he was running for governor that "without transparency, there is no accountability."

Once he was elected governor, though, Scott faced criticism for allegedly cutting off access to his administration and limiting who could attend press conferences.

The problems continued for Scott in 2012 when he promised to post online all the e-mail messages from his executive staff's accounts. Although the "Project Sunburst" site did go live in May 2012, by July various outlets were reporting that Scott and his staff were using separate email accounts for the messages that were filtered into Project Sunburst. In May 2013, the *Tampa Bay Times* reported that Scott was still not meeting the deadlines he had set for posting messages to the site.

Barbara Petersen, president of the First Amendment Foundation, said she finds many of the sites Scott has promoted to be "worthless" because they either don't contain all the information promised, as in the case of his e-mail messages, or they do not list all of the information necessary for users to understand the context of the information posted.

Petersen is a member of a newly-formed taskforce to make recommendations about how to build a comprehensive transparency site for Florida. She said that while the governor has not been advocating for more openness, other members of the government have been.

"There is a big movement toward increased and better transparency, but it's not coming from the governor specifically," she said, adding that the state's chief financial officer and Senate have been making the push. "One of the issues I keep trying to reinforce for people is the difference between access and transparency . . . Access is what we can demand government give us. Transparency is what they decide to give us."

In better news for transparency advocates, also in May of this year, Scott signed a law to increase transparency in a public-private jobs incentives program.

The governor's office could not be reached for comment. Scott is running for

re-election now.

Utah

Gov. Gary Herbert, who took office in 2009 when then-Gov. Jon Huntsman resigned, made headlines in March 2011 for signing a bill that exempted voicemail, instant messages, video chats and text messages from the public records law in most situations. The bill also increased the cost agencies could charge to requesters for producing records. The Society of Professional Journalists gave Utah a Black Hole Award that year for the state's lack of transparency.

Since then, the U.S. Public Interest Research Group has given the state a B+ for online access to government data in 2012, and the governor signed a law to expand what is available under open records laws in March of this year. The report identified Utah as an "advancing state."

Linda Petersen, the president of the Utah Foundation for Open Government and national Society for Professional Journalists Freedom of Information Committee Chairwoman, said Herbert is more transparent than previous administrations, but that he hasn't been "visible doing anything for transparency."

"He does play it pretty straight, Gary Herbert does. But to say that he is a transparency advocate would be certainly going too far," she said.

Ally Isom, Herbert's deputy for communication, said improving transparency in Utah's government is very important to the governor.

"The state of Utah, and particularly Gov. Herbert, have made tremendous strides in our efforts to be more transparent," she said. "The governor is personally very committed to a policy of transparency and accountability both in budget and accounting as well as in process and outcome."

Isom cited six years of the "Best on the Web" awards from the Center for Digital Government as evidence that Utah is "making a very strong effort to ensure government services are both accessible and transparent to the citizens of the state."

"While there's always room for improvement and we know there's more to do, Utah keeps getting better in our efforts to be more transparent," she added.

Hawaii

Gov. Neil Abercrombie, a Democrat, did not run on a platform of promoting transparency, but he encountered questions early in his term about his commitment to open government.

Since initially drawing criticism for withholding the names of Hawaii Supreme Court candidates and holding "press conferences" to which no reporters were invited, Abercrombie has continued to anger press groups by refusing to release for little or no cost his travel records from his time in office.

"His office just isn't going to give up the records for little or no cost, and refuses to consider other ways to accommodate a public records request,"

according to Honolulu Civil Beat, an online news service that requested the records in June.

The governor's office told Civil Beat it would cost \$1,016 for the government to produce records of Abercrombie's travel since he took office in December 2010.

In April, U.S. Public Interest Research Group gave Hawaii an F for online transparency of government spending, ranking the state 48th with 39 possible points out of 100. Abercrombie signed a bill three months later requiring the executive branch to post more data online.

Christine Hiras, Abercrombie's deputy director of communications, said the governor has taken several steps in the past year to improve transparency in Hawaii.

"Open data has been a top initiative of the Abercrombie Administration," Hiras said. "Gov. Abercrombie recognizes that technology is ever-changing, and that the state needs to upgrade its system to better promote government accountability and transparency."

Among Abercrombie's efforts, Hiras said, was the launch of a statewide open data site in August 2012, the new electronic data law from July of this year, and a project set to launch later this month on open data.

Abercrombie has announced that he is running for re-election.

State of sunshine laws

As many of the 2010 class of governors begin their re-election campaigns, media and open government advocacy groups will be watching for the incumbents' comments on and further commitments to improving transparency in their states.

Cuillier of the SPJ said he thinks access generally across the country is becoming more limited.

"It varies by state ... but on the whole, if you look nationwide overall, the general trend is toward more secrecy," he said. "If we don't push back hard and do something about it, then frankly, we might as well just give up on this democracy."

Sunshine laws and the privatization of government

By Emily Grannis

In the past three years, governors in several states have created or pushed for public-private partnership agencies to promote job creation in their states. But the move toward privatizing traditional government functions is not new.

Since 1999, the federal government has consistently employed about 2 million people. “But the number of private contractors has ballooned, from 4.4 million to 7.6 million in 2005 (these numbers turn out to be surprisingly difficult to pin down, since records on contractors are fairly unreliable),” according to a September 2011 *Washington Post* article by Brad Plumer. In 2010, Plumer found, the federal government spent \$320 billion on those contracts.

Although Plumer recently said the outsourcing has not affected his ability to report effectively on energy and environmental issues, it raises larger concerns for journalists in the realm of access to government documents.

A trend toward privatization in government, defined simply as a shift of activities or functions from the state to the private sector, has raised questions of the wisdom of outsourcing government work, the impact of doing so on the national economy, and the impact such shifts have on various sectors of society. While the debates over the merits of privatization continue, the movement toward greater reliance on the private sector raises additional problems in the realm of government accountability.

By the 1960s and 1970s, every state and the federal government had passed open records and meetings laws designed to shine light on the workings of government. These laws guarantee access to certain government documents and meetings, and apply to varying degrees any time the government acts.

In the face of privatization, though, questions remain as to what extent these openness laws extend to private entities doing governmental work.



AP Photo by Ted S. Warren

Greg Frus, a contract airplane mechanic with L-3 Vertex, is working at a National Guard aircraft maintenance facility at Joint Base Lewis-McChord in Wash. Frus is one of millions of private contractors employed by the federal government.

Private companies are not subject to public records laws. That limitation is in keeping with the laws' purpose of promoting open government and better civic understanding. In fact, applying public records law to private entities as a blanket rule would raise privacy and intellectual property concerns, among other issues. But when the line between government entity and private entity starts to blur, questions about the need for openness start to arise.

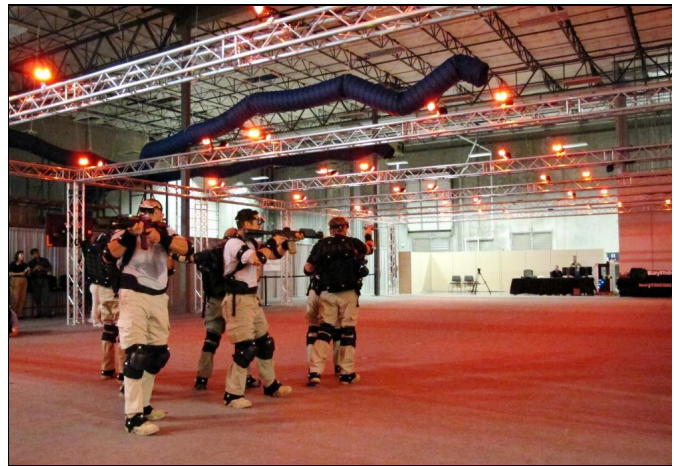
Among the justifications for outsourcing government work to private contractors is the theory that government should be smaller — that the government should do fewer things. But if private companies take over government work, then tax dollars move into the private sector without a check on how they are spent. If private entities are never subject to public records laws, the government can circumvent those laws (and with them, the goals of transparency and accountability) by turning government work over to private companies. Regardless of the merits of the privatization movement, its increased use promises to make access questions even more important.

At least one court has specifically said as much. “To ensure that citizens of this state receive high quality public services at low costs, with due regard for the taxpayers of this state, and the service recipients, the legislature finds it necessary to ensure that access to public information guaranteed by the access to public records act is not in any way hindered by the fact that public services are provided by private contractors,” the Rhode Island Supreme Court wrote in *Downey v. Carcieri*.

State analyses of the public/private records distinction

Only 10 states have judicial rulings addressing the question of when documents created by private entities may be deemed public for Sunshine Law purposes, and each of those states uses a different test to draw that line.

California, North Carolina, and New York have the most restrictive tests for determining when documents are public. California courts created a three-part test in *San Gabriel Tribune v. Superior Court of Los Angeles County*: (1) whether the government has a contractual relationship with the company; (2) whether the government delegated its duties but still retained the power and duty to monitor the performance of the work; and (3) whether the company is providing services to residents by way of a contract with the government. *San Gabriel* involved a long-



AP Photo by Nomaan Merchant

Police officers demonstrate virtual reality simulation technology created by defense contractor Raytheon in Plano, Texas. Raytheon is marketing the technology to local law enforcement.

term contract between the city and a waste removal company. The city approved a company-requested rate increase, and a newspaper requested the financial data the company had submitted to the city to justify the increase. The California appeals court ordered the city to release the documents and refused to uphold contractual agreements in which the government promises a private company that it will not release documents related to its deal. In theory, though, given the wording of the California test, the government could avoid public records law by abdicating its responsibility to oversee the project it hires any private entity to undertake.

New York has an even more difficult test to meet, which comes from *Justice v. King* and requires judges to balance six factors, all of which give a narrow reading to the concept of public work: whether the agency (1) is required to disclose its annual budget; (2) maintains offices in a public building; (3) is subject to a governmental entity's authority over hiring or firing personnel; (4) has a board comprised primarily of governmental officials; (5) was created by government agency; or (6) describes itself as an agent of a governmental agency. *Justice* involved an organization that contracted with the state to provide halfway house services to recently released parolees. The group worked closely with New York's Division of Parole, enforcing the agency's rules and performing functions the DOP would normally perform. The private entity in *Justice* had about as close a connection to the state as possible, yet it was not considered to be public for the purposes of Sunshine Laws. Given that conclusion by the New York courts, very few, if any, private contractors will ever fall subject to public records law under New York's test.

Like New York, North Carolina assumes a contractor must qualify as an agency of the state government or its subdivisions before it may be subject to public records law. If the entity passes that first test, courts must examine whether its records are "public records" that were "made or received pursuant to law or ordinance in connection with the transaction of public business," according to a court decision in *Durham Herald Co. v. North Carolina Low-Level Radioactive Waste Management Authority*. The *Durham Herald* case involved a records request for documents from the North Carolina Low-Level Radioactive Waste Management Authority. Although it admitted that the agency itself was subject to public records law, the Authority argued that documents it had received from private subcontractors were not public records. The court held that under North Carolina law, which did not specify at what point records turned over to public entities became public, the subcontractor records did not become public records immediately upon being turned over to the Authority. Therefore, the court held for the Authority in concluding records that qualify under the first two elements of the test only become subject to public records law when the contractor turns them over to the government, not when they are created.

Several other states that have addressed this issue of private/public distinction in the records context have each crafted their own tests, but manage to offer the public much broader access. Oregon, for example, has the simplest test (from *Marks v. McKenzie High School Fact-Finding Team*) of any state and would likely provide the most access. Records in that state are public any time a private entity is performing duties at the request of a governmental body.

Wisconsin, under *Wireddata, Inc. v. Village of Sussex*, requires the government to disclose “any record produced or collected under a contract entered into by the [government] with a person other than [the government] to the same extent as if the record were maintained by the [government].”

Pennsylvania, applying only a slightly more complicated test from *SWB Yankees LLC v. Wintermantel*, asks (1) whether the contractor performs a governmental function on behalf of a government agency and (2) whether the records relate directly to the contractor’s performance of that function.

Rhode Island and Texas, unlike the other states, each include elements in their tests that speak to how much money the state is paying to the contractor. Rhode Island’s three-part test, from *Downey*, asks (1) whether the non-governmental entity has agreed to provide services; (2) whether those services are worth more than \$100,000; and (3) whether the services are substantially similar to and in lieu of services previously provided by the government.

Texas, under the framework from *Greater Houston Partnership v. Abbott*, presumes any entity receiving public funds is treated as a governmental body if the relationship indicates a common purpose or objective and creates an agency-like relationship, or if the relationship requires the private entity to provide services typically provided by government. The exception to the presumption, though, is when the relationship with the government imposes a specific and definite obligation to provide a measurable amount of service for a set amount of money — in other words, when there is a normal arms-length contract.

Interestingly, under *Wireddata, Inc.*, Wisconsin also specifies that only the government may be held liable for failure to make public records available. This precludes monetary recovery from private companies, but still ensures accountability to the public.

Ohio and Tennessee both apply what they call the Functional Equivalency Test to determine when a private contractor is subject to public records law. Tennessee expresses its test as one holistic question from *Friedmann v. Corrections Corporation of America*: Is the relationship with the government so extensive that the private entity serves as the functional equivalent of a governmental agency?

Ohio, by contrast, breaks the test into three components that mirror the intent of the Tennessee test, and a fourth that acts as a final check on the government. The Ohio Supreme Court developed the test in *State ex rel. Oriana House, Inc. v.*

Montgomery.

Ohio's test asks (1) whether the private entity performs a government function, (2) what the extent of the state funding for the private entity is, (3) the extent of government involvement with or regulation of the contractor's operations, and (4) whether the private contractor was created by the government, or was used specifically to avoid the requirements of public records laws. Courts in Ohio are to evaluate all of the factors, so even absent bad intent on the part of the government, the courts may find the records to be subject to Sunshine Laws.

Moving forward

It will be very important moving forward, as all levels of government continue to turn to private entities to perform government services, for journalists to be mindful of how their states treat records created under these public-private partnerships.

There is some guidance in the 10 states where courts have addressed the issue, but some of those tests are still somewhat ambiguous and all will require further case-by-case interpretation.

Getting "dirty" online jeopardizes immunity

Federal court ruling in TheDirty defamation claim could expose website operators to greater liability

By Cindy Gierhart

A recent federal court decision has sent a warning to website owners who get too involved in the comments readers post to their sites.

A federal district court in Kentucky ruled in August that the owner of the website TheDirty.com cannot claim immunity under the Communications Decency Act (CDA) because he “invite[d] invidious postings” and added his own comments to third-party posts.

TheDirty.com — a gossip website that allows users to post photos, anecdotes, and rumors about everyday people or celebrities — was sued for defamation by former Bengals cheerleader Sarah Jones regarding statements that website users made about her.

The third-party post relevant to this case claimed that Jones, also a high school teacher at the time, had contracted sexually transmitted diseases from her ex-boyfriend and that he had bragged about having sex with her on the football field and in her classroom.

Hooman Karamian, the founder of TheDirty and better known as Nik Richie, then added his own comment to the post: “Why are all high school teachers freaks in the sack? — nik.”

The court said it was irrelevant whether Richie’s comment itself was defamatory but that it “adopted” the defamatory third-party post and that, through other



TheDirty.com — a gossip website that allows users to post photos, anecdotes and rumors about everyday people or celebrities — was sued for defamation by former Bengals cheerleader Sarah Jones regarding statements that website users made about her.

comments, he encouraged further defamatory posts.

“What’s really striking about this case is that the judge clearly ruled that the website here could be liable simply for adding generally distasteful comments on top of other users’ defamatory posts,” said Lee Rowland, staff attorney with the American Civil Liberties Union (ACLU), which is writing a friend-of-the-court brief in support of Richie’s immunity under the CDA in an appeal of this case.

Rowland acknowledged that the comments on the website are “naturally objectionable to most people,” but critical speech does not equal unlawful speech — and that is where the ruling erred, she said.

“[The ruling] is wrong as a matter of law, and it’s dangerous as a matter of policy,” Rowland said.

What is Section 230?

Section 230 of the CDA, enacted in 1996, shields website operators and Internet service providers from liability for most third-party content posted on their sites.

Rowland said the “robust culture of online speech” that exists today is directly attributable to Section 230. If website operators feared being sued for users’ content, they would more heavily censor what is allowed on their sites.

The Electronic Frontier Foundation (EFF) notes on its website that Section 230 gives website operators a sense of security in allowing third-party posts, so that YouTube can allow users to post videos, Amazon and Yelp can let users offer product and service reviews, Craigslist can host users’ classified ads, and Facebook and Twitter can allow uncensored social commentary.

News organizations, likewise, may offer “comments” sections at the ends of stories posted online or allow the community to upload photos of newsworthy events without being held liable for users’ content.

As an example of how Section 230 works in practice, the Seventh Circuit ruled in *Chicago Lawyers’ Committee for Civil Rights Under Law, Inc. v. Craigslist, Inc.* that Craigslist itself did not violate the Fair Housing Act by displaying discriminatory housing ads because it merely offered a space for people to post their own ads.

Some of the housing ads in question indicated a preference for “no minorities” or “no children,” which is generally prohibited under the Fair Housing Act.

But the court ruled that “[Craigslist] is not the author of the ads and could not be treated as the ‘speaker’ of the posters’ words”; therefore, it could not be held liable.

Likewise, the Fourth Circuit ruled in *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.* that the website Consumeraffairs.com could not be held liable for defamation for the roughly 20 negative comments users posted on the website about a car dealership.

A shift in Section 230 protections?

However, the line between innocuous website operators who merely offer a blank canvas and website operators who create content for the site is becoming increasingly blurred by decisions like *Jones v. Dirty World Entertainment Recordings, LLC*.

Bruce Johnson, a partner with Davis Wright Tremaine — a law firm that plans to file a friend-of-the-court brief on behalf of media organizations in support of TheDirty.com in its appeal — said the *Dirty World* ruling was a surprise.

“Section 230 case law has been very consistent since the *Zeran* [v. *America Online*] case in 1990s,” during which time courts had consistently been finding website operators were not liable for third-party content, Johnson said.

Then, in 2008, the Ninth Circuit issued a surprising opinion in *Fair Housing Council of San Fernando Valley v. Roommates.com*, stating that a roommate-finding website *could* be held liable for violating the Fair Housing Act because it required users to answer a questionnaire about their sex, sexual orientation, and whether they had children.

Because the website created the discriminatory questions and choice of answers, and because users were required to answer them to gain access to the site (and roommate search results were then sorted depending on the answers), the court ruled that the website “developed” the discriminatory content and therefore could be held liable for it.

Notably, however, the court in *Roommates* ruled that the website could not be held responsible for discriminatory preferences indicated by users in the “additional comments” section of the questionnaire. Those comments came “entirely from subscribers and [were] passively displayed by Roommate,” the court wrote.

In the *Dirty World* case, the federal district court in Kentucky ruled that, by naming the site TheDirty.com and by calling its followers “the Dirty Army,” founder Nik Richie “invited and encouraged” defamatory postings. Furthermore, by adding his own comments to the posts, Richie “ratified and adopted the defamatory third-party post,” the court wrote in its opinion.

“There’s no other case that I know of that’s gone to a jury . . . where a website is accused of nothing more than taking pleasure in the unlawful conduct of others,” Rowland said.

Johnson said the fact that the court found that the name of the TheDirty website contributed to its liability was especially surprising and unique among Section 230 cases.

“It just came out of the blue,” he said.

The primary point to stress in the appeal of this case, Johnson said, “is that reviewing, selecting, and removing content are core editorial functions that Section 230 was designed to protect. . . . And this decision presents problems in that regard.”

Potential impact of the *Dirty World* ruling

Johnson said it is difficult to pull useful guidance from the *Dirty World* opinion because it is “imprecise, to put it bluntly.”

He says the ruling “has all sorts of potential ramifications, if it were to survive appeal,” but it is difficult to determine just what those ramifications are or how to comply with the ruling.

He said the ruling could affect virtually anyone with a website who hosts third-party content.

Rowland agreed that the ruling “could have major ramifications of all kinds of speech online, especially critical speech.”

She gave the example of an environmental organization that urges people to come forward with horror stories about a particular company’s environmental damage or waste. Simply by inviting critical commentary, the organization could potentially be held responsible for defamation or other claims regarding the third-party posts, based on the *Dirty World* ruling.

“I think what we might see [as a reaction to *Dirty World*, if it is not reversed on appeal] . . . is less interactive message boards,” Rowland said. Website operators will be less likely to participate in the commentary on their sites or interact with users, she added.

Richie has appealed the decision in *Jones v. Dirty World Entertainment Recordings, LLC*, which is currently pending before the U.S. Court of Appeals for the Sixth Circuit. A date has not yet been set for oral arguments.

While cases such as *Roommates* and *Dirty World* are important to keep an eye on, Johnson said it is too soon to declare them a trend.

“Two robins don’t make a spring,” he said. “Hopefully.”

Social media creates copyright problem

Photographers struggle to recoup fees when photos go viral

By Latara Appleby

Photojournalist Yunghi Kim discovered earlier this year that many of the news photographs she had taken over the years, including images from war-torn Rwanda and a project in South Korea, have been used by a number of websites without her consent. Kim estimates one image alone, had it been properly licensed, could have earned her \$14,000.



Sara Lewkowicz

“If it’s acceptable that that is the norm, then we won’t survive,” Kim said. “No industry survives with giving their product away.”

While photojournalists have always battled with protecting their images, the rise of social media, especially photo-based sites such as Pinterest and Instagram, has made it easier to distribute unlicensed work. It is easier now than ever for a photo to reach a massive audience.

But photographers are not without recourse, and can often take action to stop improper uses, if they know their rights.

Photographers aren’t just concerned that they won’t be paid for their work. They’re also worried that their photographs will be used in a way they would not like, such as on blogs they would not support.

Sara Lewkowicz, a grad student at Ohio University, had a similar experience when she was photographing a story about a man readjusting to life after being released from jail. While working on the story, the man she had been following began to physically assault his girlfriend. She caught it all on camera. Lewkowicz’s images spread through the Internet. She called the experience both “nerve wracking” and “infuriating” and worried that it could influence exclusivity agreements she had entered into.

Lewkowicz said no one wants to feel like their work is no longer under their direction.

Kim echoed this concern. “It bothers me that my images may be used as propaganda on some blog,” she said.

“Unfortunately, most people think the Internet is public domain,” said Mickey Osterreicher, general counsel of the National Press Photographers Association. Work in the “public domain” is no longer protected by a copyright — such as work that was created so long ago that the copyright has since lapsed. He said photographers can spend an “inordinate” amount of their time policing their images.

Protecting your work

Osterreicher said there are ways photojournalists can protect themselves, and he recommends that they register their work with the U.S. Copyright Office as a starting point, which enables them to collect attorney fees and statutory damages should copyright infringement occur. Photographers can batch register work with the copyright office through an online service called “eCo,” for Electronic Copyright Office (eco.copyright.gov). Using an eCO form and completing the process online is recommended. If that is not possible, photographers can also fill out hard copies of the paperwork and return it, along with two copies of the images and payment of an applicable fee to the Copyright Office.

Photographers have to take an active approach in looking for their work online and contacting the web organizations when they see images being used without their consent, Kim said.

“The burden is being put on the creators,” Kim said. It is up to the photographers to police their work and communicate with websites about either taking down their images or properly compensating them.

Photographers can file a Digital Millennium Copyright Act takedown notice requesting that the images be removed. The Digital Millennium Copyright Act provides a “safe harbor” provision for publishers that minimizes their liability for posting the copyrighted works of others. To qualify for that protection, the publisher must be unaware that the material infringes on a copyright and, once they are made aware of the issue, they have to move quickly toward taking it down.

Publishers must also have a policy of terminating the accounts of people who repeatedly use copyrighted works unlawfully. The providers must have “notice and takedown” procedure posted on their website. The provider must respond to the takedown request within five days.

According to the law, the photographer, or any person whose intellectual property is being infringed upon, must notify the Internet service provider of what is happening and identify the works. They have to give the provider enough information to locate the material. They also have to include the copyright holder’s contact information, signature and a statement that they believe the work is infringing. They have to state under penalty of perjury that they are authorized to act



Yunghi Kim

on behalf of the owner of the copyrighted work.

Allowable uses

Courts typically allow another to use a copyrighted work when the amount taken constitutes a “fair use” of the work, which often turns on whether the subsequent work is a “transformative” use of the original.

Fair use is an affirmative defense to copyright infringement. The court uses four factors in determining whether something is fair use: the purpose of the use, the nature of the copyrighted work, the amount of the work used in relation to the work as a whole and the effect of the use on the value of the copyrighted work. The “transformative” nature of the use is considered in the first element of that test; merely repackaging the same content is much less likely to be considered a fair use.

While there is no defined amount of a written work that is allowed under fair use, photographs are different in that they are almost always used in their entirety.

Paul Goldstein, a professor of intellectual property law at Stanford Law School, is worried about how courts are interpreting the law, noting the case of *Cariou v. Prince* as a “particularly notorious example of eviscerating photographer’s rights.” Photographer Patrick Cariou sued artist Richard Prince for using photographs Cariou had taken of Rastafarians in Jamaica. Prince had taken the images from a book Cariou published and incorporated them into collages of his own. The district court ruled in favor of Cariou, but the Second Circuit disagreed on appeal and found the use to be transformative.

“Prince’s composition, presentation, scale, color palette, and media are fundamentally different and new compared to the photographs,” the opinion read.

Going viral

Lewkowicz spent months working on her story about Shane and Maggie. The story’s original focus was on how inmates readjust to life after being released from jail, and Shane had just been released. Last November, Lewkowicz was photographing her story when the situation suddenly turned violent. Her photographs show Shane hitting and choking Maggie.

Her photos were published by Time Magazine and were quickly picked up elsewhere on the Internet. She had entered into exclusivity agreements with certain publications and was worried about how her photos appearing on other sites would affect that.

Many of the people who used her photographs without permission did not seem to understand why she was upset when she contacted them. They thought they were doing her a favor by giving her exposure, she said. However, the problem with exposure is that it diminishes exclusivity. The wider the photos spread, the less valuable they become.

Now, when Lewkowicz comes across someone using one of her photos without

permission, she sends them a screen shot and asks them about it. She said that 99 percent of the time people respond respectfully, and they are able to come to an agreement, whether that be taking down the image or properly compensating and crediting her.

Lewkowicz acknowledged that she didn't want blogs in hot water, but that she, along with other photographers, shouldn't have to worry about their work being used without permission either.

"I think that we're in a new era, and there's a lot of navigation that needs to be done, but I think that it's possible to have a civil discussion about all this," she said.

A winning image goes viral, a photographer goes unpaid

By Latara Appleby

When I was in college and working for the University of Kentucky student newspaper, I was lucky enough to photograph two NCAA Final Four games and one National Championship.

In March 2012, I drove to New Orleans with three journalism comrades for the big game. The men's basketball team had been a heavy favorite going into the tournament. As another photographer had told me in an earlier round, it was ours to lose.

Before we left for New Orleans, two of the newspaper's staff advisers told me, more or less, that quite a bit of ad revenue was contingent on the photo I got of the team celebrating after a win. They reminded me that if the team won, those photos would be used repeatedly for years down the road.

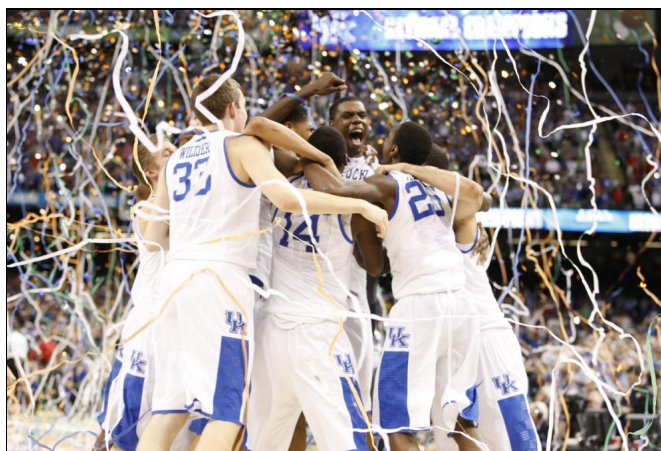
As a sports journalist, you're supposed to be completely unbiased. But, to be honest, I wanted my school to keep advancing. I had my own reasons, too. I wanted to be able to photograph an NCAA National Championship game.

I wanted the confetti, the celebration shot and the trophy presentation.

At some point in the game, an official had told the photographers what the protocol was for the final moments of play and immediately following the game. I trust I did what I was told, but autopilot almost completely took over.

Later, after all of the on-court excitement ended, the real work began. Photographers left the court for a work room right inside the tunnel. We had hundreds of photos to edit, caption and send to our editors. Once our work was done, the work for our friends back at home was just beginning. They had celebrations to cover, stories to edit and pages to layout. They made a beautiful newspaper, complete with a full page photo I had taken of the team celebrating together after their big win.

At some point in the following days, I started noticing that photo being shared on Facebook. Initially, it was somewhat gratifying to see my peers using the photo. That feeling wore off pretty quickly.



In this case of copyright infringement, I did not personally lose any money. Because I was employed by a newspaper, they owned the rights to the photograph. Regardless, I was not happy with the photo being used without attribution.

I then saw the photo being used by a local social media marketing website. This crossed a line and was distinctly different from some undergrads using the photo for their personal enjoyment.

I practiced what I would say so I would sound very authoritative and called the person who ran the website to request he take it down. When he did not seem to understand why I would request that, I tried explaining to him how he did not own the rights to use the photo.

He said he would look into it. The company has since moved out of state, and it has started fresh with a new website. All of the old work is gone. But the man I spoke with is still using my photo on his personal Facebook page.

That photo has since made the rounds on various blogs, including one very popular fan site. It was not attributed to me or my newspaper. We were never contacted for licensing or permission.

The use of one basketball image is so minor compared to the war images Yunghi Kim spent countless hours creating or Sara Lewkowicz's images of domestic violence. These are real, important issues, and their photos can help facilitate discussions about these things.

But theft is still theft, and sports photographers have to earn a living too.

Asked & Answered

The Reporters Committee attorneys discuss questions about recent issues in media law.

Answers are not meant to be relied upon as legal advice specific to any reader's situation, but are for informational purposes to help journalists understand how the law affects their work.

Q: I have just been sued for defamation for something I wrote online. I've heard "anti-SLAPP" laws can help, but how?

A: As a first step, you should consult a lawyer, and you should do it quickly to ensure you file the appropriate responses with the court on time. If you are not sure where to find a lawyer, you can call the Reporters Committee (800-336-4243). Many law firms will take pro bono cases, but you may have to meet certain requirements to show financial need.

If you live in one of the 27 states that have enacted anti-SLAPP statutes or the District of Columbia (which also has an anti-SLAPP statute), you may be able to resolve the case quickly in your favor, before legal costs become too burdensome.

SLAPP stands for "strategic lawsuits against public participation," and it refers generally to cases where corporations or developers sue people or organizations in an effort to silence their protests against the company's activities. So, a developer that wants to build a big-box store might sue local residents who are protesting the development, using the high cost of litigation as weapon to silence them.

It could just as well apply to a high-profile community figure suing a newspaper reporter for being critical of him or her in the hopes a lawsuit will squelch future criticism.

States enacted anti-SLAPP statutes to combat that practice. Anyone from community activists to bloggers and newspaper reporters can be protected by the statutes, and in many states it need not necessarily be a corporation or developer suing but anybody.

According to a typical anti-SLAPP statute, after being served the complaint (that is, being informed that you've been sued and why), you will file a special motion to dismiss right away. If the speech was on a matter of public interest, and if the party suing you is not likely to win, then the judge will dismiss the case immediately, before legal costs become burdensome.

Furthermore, according to many anti-SLAPP statutes, if you win your motion to dismiss under the anti-SLAPP statute, the person suing you may have to pay your attorney's fees and other court costs.

In all of these ways, anti-SLAPP statutes offer strong protections of free speech, and they will likely be your strongest tool in defending a defamation lawsuit.

Q: What records can I get relating to someone's immigration status or application for citizenship?

A: U.S. Citizenship and Immigration Services (USCIS) manages records related to asylum, immigration and citizenship status. The agency is subject to the Freedom of Information Act and does release information to requesters, but there are two commonly-cited exemptions reporters should be aware of when requesting documents from USCIS: privacy and proprietary information.

The privacy exemption, found in section (b)(6) of FOIA, applies to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." In the context of immigration records, that means USCIS will redact any information that could identify a living individual.

Practically speaking, therefore, it is often not possible to get a specific person's immigration file through a FOIA request. However, requesters may avoid the redactions by getting a signed waiver from the individuals identified in the document and submitting that along with the FOIA request. Only those people who specifically waive their privacy rights will appear unredacted in the document. Others who may be identifiable through the information in the file will have their information redacted before USCIS releases the documents. If the person whose file it is does not waive his or her rights, USCIS will not release the file, even in redacted form.

USCIS will release information under FOIA about any individual who is deceased. Requesters do not need waivers to get that information, though if that file mentions people who are still alive, those names and identifying information will be redacted under the (b)(6) exemption.

One less nuanced element of USCIS's FOIA processing relates to asylum requests. No individual asylum or refugee case information may be released under FOIA. A separate federal statute forbids the agency from even confirming or denying if an individual has filed an asylum application.

FOIA's exemption for proprietary information, found in section (b)(4) affects what information requesters can get about businesses that apply for particular visas for their workers, or foreign investors who invest in U.S. companies as a step toward immigrating to this country.

Finally, USCIS does keep aggregate data on many subjects, including green card, citizenship and asylum applications. The agency will release that data in response to a FOIA request, but again, journalists should be aware of the form those

numbers might take. If any category broken out in the data contains fewer than 10 people, the agency will either not specify the group, or will combine it with other small groups into an “Other” category. This, again, is to comply with the Privacy Act and FOIA’s (b)(6) exemption.

In general, if there’s a question about whether USCIS will release a particular document under FOIA, the journalist should make the request. The agency will then determine on a case-by-case basis what portion of the requested information is releasable.

"Open & Shut"

A collection of notable quotations

“Due to the Federal Government shutdown, this National Park Service area is closed, except for 1st Amendment activities.”

– *A sign at the National World War II memorial in Washington, D.C., during the government shutdown in October.*

“I believe this is a fight for the First Amendment and for the freedom of the press in America. I won’t back down.”

– *New York Times reporter James*

Risen (@JRisen) tweeted on Oct. 14. The next day, the U.S. Court of Appeals for the Fourth Circuit declined his rehearing request regarding a July ruling that Risen must testify in court about the identity of his confidential source.

“I’m beginning to feel like a drug dealer, [with] the cell phone that I bought with cash or the SIM card that’s not traceable to me.”

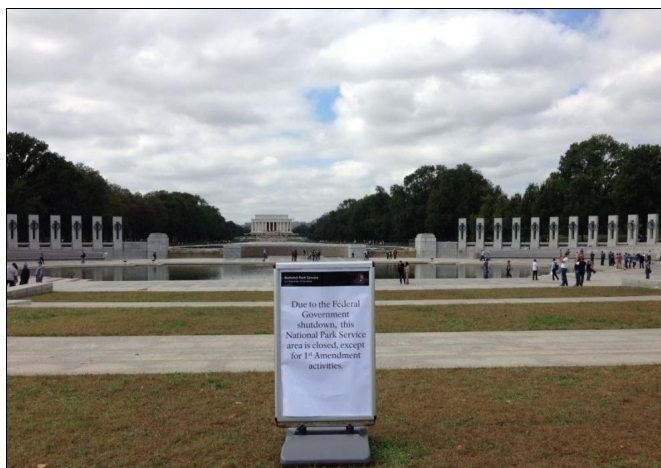
– *Fox News’ Judith Miller on how the NSA’s secret surveillance has affected her reporting.*

“We sometimes find we get far more in the newspapers -- we get crossword puzzles as well -- we get more in the newspapers than in classified briefings.”

– *Sen. Patrick Leahy (D-Vt.) said at a NSA hearing when asked whether a New York Times article about the agency’s use of social network analysis of metadata was accurate.*

“We thought maybe the judge would throw it out. We didn’t think the judge would throw us out!”

– *Steve Soboroff, owner of Coralville, Iowa radio station KCJJ, on a Johnson County judge barring one of his reporters from covering a misdemeanor assault trial to highlight a case that Soboroff considered a waste of prosecutorial resources.*



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