

SPRING 2015

# **The News Media AND THE LAW**

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THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS

## **The clash of ethics and law**

**How the Rolling Stone  
report can help and  
hurt journalists**

# The News Media & The Law

## Spring 2015

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## **The News Media & The Law**

### **Spring 2015**

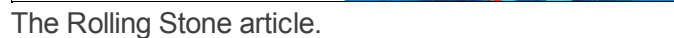
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As controversy swirled around



The Rolling Stone article.

story, but was ultimately centered around a false narrative. When the report, authored by Coll, academic dean Sheila Coronel, and postgrad scholar Derek Kravitz, was released in April, it was an indictment of the many points in *Rolling Stone*'s process where the system broke down: the writer, Sabrina Rubin Erdely, had not spoken to several of the victim Jackie's maligned "friends;" she didn't give the fraternity enough information to comment and defend itself; her editors didn't push back on the failure to investigate the alleged rapists, and more. *Rolling Stone* promptly retracted the article. Soon after, Phi Kappa Psi, the fraternity accused in the story of having a pledge process that involved the gang rape of the alleged victim, announced that it was exploring legal options against Erdely and *Rolling Stone*.

"The report by Columbia University's School of Journalism demonstrates the reckless nature in which *Rolling Stone* researched and failed to verify facts in its article that erroneously accused Phi Kappa Psi of crimes its members did not commit," fraternity chapter president Stephen Scipione said in a statement. "This type of reporting serves as a sad example of a serious decline of journalistic standards."

The fraternity's statement illustrates the issue at the heart of debate over use of such reports and ethics codes in lawsuits: the conflation of legal standards with professional ethical standards. By saying that the report demonstrated the "reckless" nature of the reporting, the fraternity appeared to be referring to the legal standard for defamation of a public figure, under which a plaintiff must show that the defendant acted with actual malice, which can be proven by reckless disregard for the truth. On the other hand, by pointing to the "serious decline of journalistic standards," the fraternity brought up ethical standards, which do not directly address the issue of legal culpability.

While Phi Kappa Psi has not yet taken legal action, another subject of the article has. On May 12, Dean Nicole Eramo [filed suit](#) against Erdely, *Rolling Stone*, and publisher Wenner Media, asking for \$7.85 million in compensatory and punitive damages. Her suit alleges that Erdely cast her as the "chief villain of the story," describing her as indifferent to the victim and other students' rape allegations, and saying she was discouraging when they tried to make official complaints.

Eramo's complaint cites the Columbia Journalism School report seven times to provide support for the dean's claims. She first points to the report's conclusion that the article was a "journalistic failure." She then refers to interviews that the report's authors conducted with Erdely and several of the article's subjects. The complaint states that Erdely told Coll that she chose UVA with an agenda in mind of portraying a shocking rape and rape culture that were inadequately addressed by the school administration, and that even though Erdely admitted to Coll that she was "incredulous" when she heard Jackie's story, she "ignored countless red flags" in going ahead with publishing it. The complaint cites the Columbia interviews with



others portrayed in the article, who told Coll that Erdely had not contacted them and that they would have set the record straight if she had. Finally, the complaint states that “Erdely admitted to the Columbia Journalism School that she had serious doubts about Jackie’s credibility” a week after the story was published, but that she continued to generate publicity for the story.

Like Phi Kappa Psi’s threat of legal action, Eramo’s complaint uses the evidence and conclusions of the report as fodder for libel suits. They are benefiting from the impetus behind the report, the desire to assess the journalistic practices employed and to learn from the mistakes that were made. In that spirit, Erdely and her editors spoke honestly about their thought processes and actions, and Coll was candid in his assessment. He used no legal terminology in the report, avoiding any conclusions that Erdely and Rolling Stone had been negligent or reckless. Instead, his analysis that the article fell short was based on professional ethical standards.

For Jane Kirtley, University of Minnesota professor and former director of the Reporters Committee for Freedom of the Press, “this is not a distinction without a difference.”

“I really think it’s important to keep the line between law and ethics very firmly drawn,” she said.

But in the courtroom, when plaintiffs’ attorneys are trying to convince the jury that the defendant was negligent or acted with actual malice, shown by knowledge of falsity or recklessness, evidence of unethical behavior is often raised, sometimes successfully.

## **Ethics codes in the courtroom**

Howard Cooper, a Boston attorney who has represented plaintiffs in several high-profile libel cases against the media, said he has often used the [Code of Ethics of the Society of Professional Journalists](#) to cross-examine reporters. He has referred to two provisions in particular to raise concerns about the professional conduct of these defendants — a provision on the use of anonymous sources and another recommending that the reporter should care about the subject of their story



AP Photo/Craig Ruttle

Columbia Journalism School Dean Steve Coll discusses findings of his report on Rolling Stone magazine's story on sex assaults at the University of Virginia.



and the impact that the story will have on that person. While Cooper says he uses reporters' noncompliance with the SPJ code as "some evidence on issues of negligence and actual malice," he acknowledges that the code is not binding on SPJ members.

Indeed, the aspirational and non-binding nature of the SPJ code is perhaps its most important caveat. The code comprises four principles of ethical journalism: seek truth and report it, minimize harm, act independently, and be accountable and transparent. Each principle contains numerous recommendations, including avoiding conflicts of interest and balancing the public's need for information against potential harm or discomfort. But the organization warns prominently that the code is not binding:

The code "is not a set of rules, rather a guide that encourages all who engage in journalism to take responsibility for the information they provide, regardless of medium. ... It is not, nor can it be under the First Amendment, legally enforceable."

In spite of what Kirtley describes as the efforts of some SPJ members to make the code enforceable, SPJ has never set up a system for judging whether members have adhered to the code or for removing offenders.

"[A]s a practical matter, professional enforcement of standards for news reporting would require a body of more detailed provisions and case law that are far beyond our resources to provide, even if that were desirable," the code reads. "Nor could any set of rules, however detailed, possibly apply to all the nuances and ambiguities of legitimate expression."

Despite the code's non-enforceability, plaintiffs' lawyers such as Cooper still bring it up in court to show that the reporter engaged in practices that others in the profession would look askance on. But as far as proving actual malice, noncompliance with the code cannot be dispositive because of the subjective nature of the actual malice standard: the reporter must have subjectively possessed knowledge of falsity or reckless disregard for the truth. It is not enough to say that a reasonable reporter would not have acted as he did. If the publication expressly adopted the code, it is slightly more probative, but still not conclusive proof of liability.

Therefore, Kirtley said, "it's up to the lawyers representing these [media] organizations to make sure judges and juries know the ethics codes aren't directly relevant."



AP Photo/Steve Helber

The Phi Kappa Psi fraternity house at the University of Virginia in Charlottesville, Va., which was described as the site of a gang rape.

Longtime First Amendment lawyer Floyd Abrams of Cahill Gordon & Reindel LLP has defended libel cases in which plaintiffs attempted to use lack of compliance with journalistic guidelines against media defendants.

“Arguments followed from the journalistic perspective about the impropriety and harmful societal impact of allowing those standards to be used,” Abrams said. “Harmful in the sense that if the price tag of having them was that they would be used against journalists in litigation, that it might not be worthwhile to have them.”

### **The confusion of legal standards with ethical guidelines**

Ensuring the broad protections given to journalists under the First Amendment is the fundamental reason why ethical guidelines should not be enforced as legal standards, Kirtley said.

“The law gives journalists a lot of leeway to do a lot of things that as an ethical matter would be questionable,” she said, citing as an example the clear legality in many states of tape-recording a telephone conversation without the knowledge of the other participant, a practice that many ethicists would frown upon.

The dividing line is not always so clear. Rolling Stone’s ordeal is reminiscent of another high-profile journalism snafu that resulted in a third-party assessment and indictment. But in the case of CNN’s broadcast on Operation Tailwind, it was Abrams, along with CNN’s inside counsel, who did the post mortem, not a journalist like Coll.

When serious questions were raised about CNN’s 1998 “Valley of Death” report on the alleged use of nerve gas in Laos during the Vietnam War, Abrams reviewed interview outtakes and did interviews to get to the bottom of the problems. [His conclusion](#) that “CNN should retract the story and apologize” was based on findings that the evidence could not sustain the broadcast’s central thesis, despite the journalists’ deeply held faith in their reporting.

The report makes his point of view clear, starting out by saying, “We are lawyers, not journalists, and it must rest with journalists to determine how best to avoid in the future the pitfalls illustrated by this broadcast. We do offer the following thoughts that have occurred to us as we reviewed the broadcast.”

Abrams avoided legal terminology in his report, as Coll did — there is no mention of negligence, recklessness, or libel. That was deliberate, he said.

“I sought as carefully as possible not to get into anything specifically conclusory about the potential legal consequences of the report,” Abrams said. “I was really passing on fairness and the degree to which I concluded that the report had been substantiated.”

Yet at the time, Kirtley and others raised questions about the wisdom of having a lawyer perform the assessment.

“I say this with the massive respect I have for Floyd,” Kirtley said. “The issue that I had with a lawyer preparing the Tailwind report was that I was afraid it was

going to send the message that it was a legal analysis even though that wasn't what it was intended to be."

Kirtley said she would prefer that lawyers stuck to asking reporters whether they broke the law, such as by making illegal surreptitious recordings, rather than making editorial and ethical judgments about the propriety of newsgathering and editing techniques.

The Tailwind report, which meticulously laid out CNN's journalistic errors, was followed by several defamation suits. Abrams said that there is always a risk that libel suits will follow such evaluations, but that he felt he could, with his body of experience reviewing and assessing journalistic products, carefully articulate his conclusions in a way that would ultimately be very helpful to CNN.

## **The impact on Rolling Stone**

It remains to be seen how the *Rolling Stone* plaintiffs use the report to their advantage. Observing that Eramo's complaint makes much use of statements made during the course of the Columbia investigation, Cooper said that it is a fair use of the report for it to serve as an investigatory aid in establishing facts that can be asked about in depositions or at trial. But he said it would be problematic and generally inadmissible in court as evidence, unless *Rolling Stone* commissioned the report and adopted its conclusions by way of an admission.

"I think the report will be a tremendous guide during discovery," Cooper said. "It may serve to nail down the testimony of witnesses who are quoted and who are referenced, but it may not be usable in its findings against *Rolling Stone*."

The report could support the *Rolling Stone* team's assertions that they thought they had a good story and that as soon as there were doubts, they did the best they could, including commissioning the report, to fix mistakes. On the other hand, by showing that there were many sources who were not interviewed, the report could point to possible negligent failure to investigate, if not actual malice.

*Rolling Stone* may have handed potential plaintiffs a gift by committing fully to the Columbia report, but the careful analysis of its internal editorial standards as well as the transparent public accounting will benefit both the magazine and other journalists as a cautionary tale for the future. Likewise, the existence of ethics codes have surely more often prevented journalistic failures than they have caused journalists to be found liable.

"With respect to a flawed journalistic effort, I think having an outside entity have a look at it can have a cleansing impact which can lead to better journalism, and more careful journalism, in the future," Abrams said.

# Anti-SLAPP statutes face setbacks

*Congress may again consider an anti-SLAPP bill, but Washington state loses its law*

By Kimberly Chow

Not long after a [federal anti-SLAPP bill](#) with bipartisan co-sponsors was introduced in the U.S. House of Representatives last month, the Washington State Supreme Court struck down that state's anti-SLAPP law, saying it denied litigants their right to a trial by jury. As anti-SLAPP laws become ever more important to journalists, the loss of a strong state statute leaves many hoping that the federal effort will finally bear fruit.

If enacted, the federal SPEAK FREE Act, introduced by Reps. Blake Farenthold, R-Texas, and Anna Eshoo, D-Calif., would be an important step toward nationwide protection against meritless suits that chill speech.

A SLAPP suit is a "strategic lawsuit against public participation," or an attempt by one party to silence another in a controversy by burdening them with litigation.

A federal anti-SLAPP bill would fill current gaps in protection by providing a uniform defense against SLAPP suits nationwide, addressing the problems of some courts not applying state anti-SLAPP laws in federal court and other states not having anti-SLAPP legislation at all. The SPEAK FREE Act is largely based on the strong anti-SLAPP laws of Texas and California. While some worry that the ease with which defendants can remove actions to federal court would be a burden on the federal court system, proponents



AP Photo/Susan Walsh

A federal court upheld the dismissal of a libel suit brought by Yasser Abbas, son of Palestinian National Authority President Mahmoud Abbas, but did not apply the anti-SLAPP statute.



of the law argue that the burden will be minimal and that the removal provision is critical to the law's effectiveness.

The bill's other co-sponsors are Reps. Darrell Issa, R-Calif., Trent Franks, R-Ariz., and Jared Polis, D-Colo.

The anti-SLAPP statutes on the books in 28 states and the District of Columbia vary widely, but their general aim is to make it easier for defendants to dismiss lawsuits designed to intimidate speakers or bury them in legal fees, even though the claims are without merit. By suing for defamation or other speech-related claims and embroiling defendants in litigation, SLAPP plaintiffs effectively silence valuable public discourse. Stronger anti-SLAPP laws put the burden of proof on plaintiffs to show that their claims are not frivolous and allow defendants to move for dismissal if that showing cannot be made. Some of the weaker state anti-SLAPP laws only apply to narrow categories of speech, such as speech made in connection with a government proceeding.

Mirroring the Texas and California anti-SLAPP laws, the SPEAK FREE Act would broadly apply to lawsuits involving speech "in connection with an official proceeding or about a matter of public concern." The bill further gives relatively robust protection to speakers by putting the burden of proof on the plaintiff to avoid dismissal with prejudice by demonstrating that the claim is likely to succeed on the merits. The stay on discovery imposed during the adjudication of an anti-SLAPP motion to dismiss is also important in preventing a chilling effect on speech, as involving defendants in expensive, time-consuming discovery is another way to intimidate and silence. Finally, the act would award costs and reasonable attorney's fees to a defendant who prevails on an anti-SLAPP motion.

A significant feature of the law is its allowance for removal of state court cases implicating speech issues to federal court for consideration of the anti-SLAPP motion. If the federal court dismisses the motion, the action is remanded back to state court.

Evan Mascagni, policy director of the Public Participation Project, which was a driving force behind the bill, said concerns that the removal provision would burden the federal court system with many more cases are unfounded. The number of cases involving anti-SLAPP motions is very small in comparison to the overall number of civil cases, he said, citing California as an example. And yet, the number is significant enough to show that SLAPP



A management fight over the Olympia Food Co-op was led to a holding that the Washington anti-SLAPP statute was unconstitutional.

suits are a problem, he said.

According to Mascagni, the law must provide for removing SLAPP suits to federal court because the protections against SLAPPs vary widely from state to state, with some states having strong anti-SLAPP laws and others having very weak laws or none at all. A federal law from which anyone could benefit would discourage the forum-shopping that happens now.

“The removal provision is for individuals who live in states without any anti-SLAPP protection, which is almost half the states,” he said. “For me, the whole purpose of a federal anti-SLAPP law would be to provide uniform protection against SLAPPs for all Americans, no matter what state they live in.”

Coming on the heels of a decision by the U.S. Court of Appeals for the District of Columbia, which ruled in *Abbas v. Foreign Policy* that the D.C. anti-SLAPP law does not apply in federal court, the introduction of a federal anti-SLAPP bill is a welcome step forward for journalists. Federal anti-SLAPP legislation has been proposed in Congress in recent years but has not gained the momentum to become law. The House of Representatives first considered such a bill, the Citizen Participation Act of 2009, several years ago, but the act stalled in the House Judiciary Committee without moving to the floor for a vote, and similar bills have not progressed farther.

## **The Abbas decision**

The decision of the U.S. Court of Appeals for the District of Columbia to throw out a defamation suit in [\*Abbas v. Foreign Policy\*](#) in April was a bittersweet victory for First Amendment advocates, as the court also decided that the D.C. anti-SLAPP law did not apply in federal court. This negative result shows clearly why Congress should pass federal anti-SLAPP legislation that would protect speakers who cannot benefit from their state’s anti-SLAPP law, as well as those in states that have no such law.

The court’s ruling that the questions posed in *Foreign Policy*’s article on Yasser Abbas were merely questions and not actionable defamation was indeed welcome. In asking questions such as whether Abbas, a son of Palestinian Authority President Mahmoud Abbas, and his brother were “growing rich off their father’s system,” *Foreign Policy* writer Jonathan Schanzer was not making factual representations, the court held. Reporters ask questions to obtain information, the court wrote, and “a severe infringement on free speech” would result if those questions could not be asked.

But the troubling aspect of the court’s opinion was the holding that the D.C. anti-SLAPP law was inapplicable because the case was in federal court, and thus the D.C. law was preempted by federal procedural rules that supposedly addressed the same issue. The D.C. Anti-SLAPP Act, passed in 2010, makes it easier for defendants to dismiss meritless lawsuits consisting of “any claim arising from an act in

furtherance of the right of advocacy on issues of public interest.”

“Federal Rules of Civil Procedure 12 and 56 establish the standards for granting pre-trial judgment to defendants in cases in federal court,” the court wrote. “A federal court must apply those Federal Rules instead of the D.C. Anti-SLAPP Act’s special motion to dismiss provision.”

Since the federal rules do not require a plaintiff to show a likelihood of success on the merits, while the D.C. anti-SLAPP law does, the court held that the federal rules governed. And because the D.C. law was inapplicable, the media defendants were not entitled to attorney’s fees following the dismissal of the action.

The D.C. government had supported the applicability of the law in federal court with an [amicus brief](#) to the Court of Appeals. The Reporters Committee also joined an amicus effort supporting the defendants.

Several federal appellate courts, including the First, Fifth, and Ninth Circuits, have previously held that state anti-SLAPP laws apply in federal court. But the possibility that other courts would decide the issue differently is partly responsible for a push for federal anti-SLAPP legislation. In addition, efforts have been spurred by the fact that many states do not have such statutes and others only have narrow protections, such as only applying to speech on matters before public bodies.

### **Washington's anti-SLAPP law is struck down**

In a disappointing [ruling](#) in May, the Washington Supreme Court struck down the state’s anti-SLAPP law in its entirety, holding that it violates the right to trial by jury under the Washington Constitution.

The decision marks the first time an anti-SLAPP law has been held unconstitutional. The Washington law, RCW 4.24.525, required judges to weigh the disputed facts of cases and dismiss them if they determined that the plaintiff could not show by clear and convincing evidence a probability of prevailing on the claim. The Washington Supreme Court held that it must be juries, not judges, who make those determinations of fact.

The wide latitude that judges have to dismiss potentially nonfrivolous claims is what led the high court to find that the right of trial by jury was jeopardized.

“RCW 4.24.525(4)(b) creates a truncated adjudication of the merits of a plaintiff’s claim, including nonfrivolous factual issues, without a trial,” the Court wrote. “Such a procedure invades the jury’s essential role of deciding debatable questions of fact.”

Particularly problematic was the high standard of proof that the law required for plaintiffs to show that their case had merit. While the Washington law required plaintiffs to show by “clear and convincing” evidence a probability of prevailing, other anti-SLAPP laws require a lesser showing, such as “sufficient” evidence.

Finding that the section of the law allowing for swift dismissal of suits was not severable from the remainder of RCW 4.24.525, the Court struck down the entire



law.

“Naturally, we’re disappointed,” Bruce Johnson of the firm Davis Wright Tremaine LLP, which represented the defendants, said. “The 2010 law was designed to enable ordinary citizens to participate in discussions of public matters without fear of expensive and debilitating retaliatory litigation. That risk has returned, unfortunately.”

The Reporters Committee, joined by 29 other media parties, submitted an [amicus brief](#) in support of the defendants.

The decision of the Washington Supreme Court has already affected at least one other state’s anti-SLAPP law. Lawmakers in Nevada, facing attempts to modify their own law, agreed to change the standard of proof from “clear and convincing” evidence to the lower standard of “prima facie” evidence of a probability of prevailing. It remains to be seen whether the decision will affect the laws in other states. The proposed federal anti-SLAPP law requires that a plaintiff show that a claim is likely to succeed on the merits.

*This story combines and updates three stories that initially appeared on our web site in April and May.*

# Tweeting from courts still slow in catching on

## *How courts across the country approach real-time reporting*

By Tom Isler

In April, the Pennsylvania Supreme Court [rejected a proposal](#) that would have banned real-time reporting — including tweeting and live-blogging from cell phones, tablets or laptops — from inside state courtrooms. Without the ban, Pennsylvania judges will continue to permit or prohibit real-time reporting on a case-by-case basis.

That ad hoc approach appears to be how the majority of courts across the country still treat courtroom reporting. At this time, there is no broad consensus about whether to permit journalists to use portable electronic devices to publish updates from the courtroom.

Even when cameras are permitted in the courtroom and a trial is broadcast live, some judges still restrict the use of cell phones or computers by observers. That's the case in the murder trial now proceeding in Colorado against James Holmes, who killed 12 people in a movie theater in Aurora three years ago. Reporters who want to live-tweet the proceedings have to be [stationed outside the courtroom](#) and provide updates based on the live camera feed.

It may seem inevitable that real-time reporting will become more common as more courts permit such activity without incident, as judges more comfortable with mobile technology join the bench, and as the public increasingly consumes news on social and mobile platforms. But courts that permit real-time reporting as a matter of course are still in the minority, according to a Reporters Committee review of media and cell phone policies from all 50 states.

A brief note on methodology: the 62 policies reviewed for this article are not necessarily representative of the roughly 900 federal and state judicial districts across the country. We examined one or two policies per state, which we identified using online searches. In a few cases, we contacted court information officers directly for more information. Some of the policies set default rules for the entire state, while others concern only a single district or courthouse. The purpose of this analysis was to better understand the variety of approaches that courts take on

courtroom media coverage, not to review a statistically representative sample of policies.

Only nine of the 62 policies examined permit real-time reporting with electronic devices as a matter of course or set up a presumption in favor of such activity. Twelve policies either ban the coverage or set up a presumption against it. Another 15 policies expressly leave the decision to the individual judge, without setting a default rule. The balance of the policies do not address the media's or the public's use of cell phones or computers in court, with most focusing on the procedures the media must follow to use cameras or other recording equipment.

Jurisdictions that permit real-time reporting by rule generally allow electronic devices to be used in the courtroom to transmit data or connect to the Internet, provided that the devices are silent and do not disrupt the proceedings, and further provided that the devices may not be used to take photographs or record audio without permission. At all times, the use of electronic devices is subject to the discretion of the judge.

Some of the policies, like the one in [Florida's Ninth Judicial District](#), permit the use of electronic devices only for authorized members of the media; others, like that in [Colorado's Fifth Judicial District](#), extend the right to members of the public generally. In [Utah](#), judges may restrict the use of electronic devices in court, but the rule expressly discourages judges from doing so unless "use of a portable electronic device might interfere with the administration of justice, disrupt the proceedings, pose any threat to safety or security, compromise the integrity of the proceedings, or threaten the interests of a minor."

Many jurisdictions leave the matter to the discretion of the judge. In [Kansas](#), cell phones are generally banned but may be used with court approval. The state's media coverage rule acknowledges that the use of cell phones and other devices in courts "continually challenges a court's legitimate concerns for courtroom security, participant distraction, and decorum." Nonetheless, the rule states that devices "are redefining the news media, the informational product disseminated, and the timeliness of the content. They also result in new expectations for the court and participants for immediate access to information. ... The courts should champion the enhanced access and the transparency made possible by use of these devices while protecting the integrity of proceedings within the courtroom."

In the Eighth Judicial District of Nevada, which encompasses Las Vegas, real-time reporting is permitted by custom, but not expressly authorized by a formal rule or guideline. In West Virginia, each judge "is in charge of his or her own courtroom and can allow or not allow any cameras/audio/electronic device, or not, depending upon the case and circumstance," Jennifer Bundy, public information officer for the Supreme Court of Appeals of West Virginia, wrote in an e-mail. "Some do, some don't. Some allow for some cases and not others. It varies widely."

The policy used in the [Delaware Court of Chancery](#), which expressly bans the use of laptops “to broadcast, webcast, record audio or video, photograph, e-mail, blog, tweet, text, post, or transmit by any other means” information from court, is notable because it offers a scientific rationale for the ban: “electronic transmissions” and “Internet usage” “interfere with the court reporters’ equipment and ability to provide a ‘live feed’ to the parties,” and therefore “electronic transmissions via WiFi, air card, wave card or any other means is strictly prohibited.”

Other examples of policies that expressly permit or create a presumption in favor of real-time reporting include those in [Arizona](#), [Georgia](#), [Mississippi](#), [New York](#), and [Washington](#). Policies that generally ban or leave the matter to the discretion to the judge include those in [Arkansas](#), [California](#), [Connecticut](#), [Iowa](#), [Maine](#), [Michigan](#), and [Oklahoma](#).

Whether and how to handle electronic courtroom reporting is a debate currently taking place at the Tennessee Supreme Court, which is considering adding cell phones, tablets and laptops to the list of equipment approved for use by journalists in the courtroom. Currently, the state’s media access rule outlines the procedure for bringing cameras or audio recording equipment into courtrooms but is silent on whether journalists must request permission to transmit real-time, text-based updates from personal devices.

“These proposed changes embrace the tools used by the media to keep the public informed about what’s happening in our court system,” Chief Judge Sharon Lee [said in a statement](#). She observed that reporters routinely use electronic devices to transmit descriptions of court proceedings.

Jack McElroy, editor of the *Knoxville News Sentinel*, said he appreciates the Supreme Court’s efforts “to make courtrooms as accessible to the public as possible,” but is concerned that the proposed rule “actually will result in a substantial step backward in public access to court proceedings.”

McElroy recently [outlined his concerns in written comments](#) sent to the Tennessee Supreme Court. One problem: by expanding the rule’s definition of media “coverage” to include information transmitted from personal devices, the rule’s formal request mechanism, which now governs only requests for cameras or other recording devices in the courtroom, would be triggered by journalists seeking to blog or post to social media from personal devices. Thus, reporters would be required to obtain permission from the court as much as two days in advance of any proceeding. Currently, McElroy points out, “judges in Knox County allow reporters virtually unrestricted use of digital phones and tablets as reporting tools” without making formal requests, and the added administrative hurdle “would seriously hamper the flexibility of reporters to cover a variety of proceedings, even if the 48-hour deadline routinely were waived.”

McElroy is also concerned that by adding tweeting or blogging to the definition of media coverage, the current ban on “coverage” of the jury selection process, which now only bans audio-visual recording of that process, would subsume other kinds of reporting, too. “This would mean that a reporter using a traditional pen and notebook could take notes on voir dire” but that a “reporter would be prohibited from posting the same information from an electronic device.”

The Tennessee Supreme Court has extended the comment period on the proposed rule change to August 15.

# White paper: Access to divorce court proceedings

*Intruding into some cases may appear unseemly, but openness is essential for accountability*

By Jamie Schuman

*This is a condensed version of a white paper on access to family court proceedings, which will be published soon on our web site.*

Davis Wright Tremaine media lawyer Alonzo Wickers IV likes to point out that access battles for divorce-court records helped launch President Barack Obama's political career.

When Obama first ran for U.S. Senate, in 2004, he trailed opponent Blair Hull in the Democratic primary in Illinois.

But, as part of its "regular scrubbing of all of the candidates," the *Chicago Tribune* tried to get records from Hull's 1998 divorce, recalls John Chase, a politics reporter at the paper. A court had sealed most of Hull's divorce files, but the *Tribune* discovered and divulged that Hull's ex-wife had sought a protective order against him. Amidst public pressure, Hull personally released his closed files, which revealed that his ex-wife alleged that that he emotionally abused her.<sup>[1](#)</sup>

Obama then cruised to victory in the primary. His opponent in the general election was Jack Ryan, a wealthy banker who had divorced actress Jeri Lynn Ryan



Photo by Richard Shotwell/Invision/AP

The unsealing of actress Jeri Lynn Ryan's divorce case prompted her husband to withdraw from a U.S. Senate election.

in a California court. These records were sealed, too, and the *Tribune* and WLS-TV fought to open them and won.

The materials revealed that Jeri Lynn Ryan alleged that the Republican candidate had forced her to go to “sex clubs” in Paris, New York, and New Orleans, where he insisted that the two have public sex.<sup>2</sup>

Many Republicans urged Ryan to drop out of the race, and he did so just a few days after the news broke. This paved the way for Obama to become a senator.

Chase remembers that some readers blamed the *Tribune* for suing to open Ryan’s divorce files. The candidate criticized the newspaper as well.

“The media has gotten out of control,” Ryan said in a statement. “The fact that The Chicago Tribune sues for access to sealed custody documents and then takes unto itself the right to public details of a custody dispute — over the objections of two parents who agree that the re-airing of their arguments will hurt their ability to co-parent their child and hurt their child — is truly outrageous.”<sup>3</sup>

Chase thinks the stories were fair game. Ryan had publicly denied that the files contained red flags, and that put the candidate’s trustworthiness at issue, the reporter said.

“They’re court records for god’s sake,” Chase said. “That’s one of the principles of democracy – being able to have your court records public.”

These episodes illustrate the competing issues that arise when the media wants access to divorce records or proceedings. On the one hand, openness gives the public a tool to check political candidates and other civic leaders, and it helps ensure that the rich and powerful are not getting special treatment in the courts. On the other, divorce files can contain very intimate personal details, and children’s well-being can be at stake.

Courts nationwide grapple with these competing interests. Although divorce proceedings have historically been open, judges sometimes close them.

This guide provides background on divorce proceedings, and an overview of access law in these areas. It also looks at the types of stories that can arise from these cases, and arguments that attorneys can make as well as factors that they should consider when seeking access.

## **Background on family and divorce courts**

Divorce cases are civil proceedings that are normally held in family divisions of courts. Sometimes, though, they are in general civil divisions of state courts. These cases often include custody and child-support matters that are related to the dissolution of marriage.

Family courts handle many matters separate from divorce. These can include juvenile dependency issues, such as abuse, neglect, abandonment, visitation, and custody, as well as juvenile delinquency cases. The Reporters Committee for Freedom of the Press’s “[Access to Juvenile Justice](#)” guide details the law for



dependency and delinquency proceedings. Historically and due to concerns for children's wellbeing, courts typically are more willing to close those juvenile cases than they are many other types of proceedings, including divorce proceedings.<sup>4</sup>

Still, many courts do close divorce cases. When closures occur, they normally stem from privacy concerns relating to children or finances.

Wickers explained that family court judges can be more trigger happy to close courtrooms, including in divorce cases, because they often view their jobs differently than other judges do. They want to "find a win-win," a good result for an entire family rather than one party, he said.

The unique culture of the family bar also can lead to sealing efforts, Wickers said. "The family bar is a much more insular bar," he said. "They know each other. They're in court every day against each other. They're all kind of in cahoots. They all want it secret."

South Carolina family lawyer Melissa Brown said there is good reason to seal many divorce cases: They reveal so many intimate details about clients' lives (from their parenting decisions to where they shop) yet many of the clients never wanted to end up in court.

"Family court is a different place," said Brown, who wrote a law review article on identity theft in family courts.<sup>5</sup> "You're dealing with real people's personal situations. It's not just a wreck or an employment dispute where it's very narrowly tailored. It's everything about their lives."

Another unique feature of divorce cases is that the vast majority of them settle out of court, explained David Sarif, chair of the family law division of the American Bar Association's committee on trial practice and techniques. This can affect access.

In South Carolina, at least, when parties settle with a formal agreement by the court, the agreement is normally public but is much less detailed than a trial order. The document focuses on the terms of the agreement rather than the underlying allegations, Brown said. If parties use a private arbitrator, their information will normally be private.

## **The law of access in divorce cases**

This guide focuses on divorce cases that reach trial.

The Supreme Court has not directly addressed whether the public has a constitutional right to attend civil proceedings such as divorce cases, though a plurality found that "historically both civil and criminal trials have been presumptively open."<sup>6</sup> In *Nixon v. Warner Communications*, the Court found that the public has a right at common law to access civil records.<sup>7</sup>

Policies and practices for access to divorce cases vary from state to state and even from courtroom to courtroom.

According to the legal encyclopedia *American Jurisprudence*, public access to

matrimonial cases “is strongly favored.”<sup>8</sup> American Jurisprudence continues, “The mere desire of divorce litigants to hold a private divorce proceeding is insufficient justification to close the hearing to the public and the press.”<sup>9</sup>

In many states, divorce proceedings and records are presumptively open, and judges will only close them if they make specific findings that privacy outweighs the public right of access. Some states have statutes that restrict public access to parts of divorce cases, such as certain matters dealing with children or financial documents. (Our 50-state guide gives the legal standards for access to divorce cases in all 50 states, plus the District of Columbia.)

Historically, divorce cases, like other cases in the American court system, have been presumptively open.

An 1891 treatise on marriage and divorce cases emphasizes that there is a public right of access to these matters: “As a general rule, wherever, the common law prevails, trials in all causes are in open court, to which spectators are admitted. This method is regarded for the purity of our judicial system, and as a precaution against possible injustice. In reason and in ordinary practice, it extends to divorce causes.”<sup>10</sup>

By 1931, 19 states had statutes that governed access to divorce proceedings, and openness was the starting presumption in most instances.<sup>11</sup>

Some early case law tried to chip away at this transparency by arguing that divorces are different than other legal matters. In 1893, in *In re Caswell*, the Supreme Court of Rhode Island rejected a reporter’s request for divorce records.<sup>12</sup> The court explained: to “broadcast the painful, and sometimes disgusting, details of a divorce case, not only fails to serve any useful purpose in the community, but, on the other hand, directly tends to the demoralization and corruption thereof, by catering to a morbid craving for that which is sensational and impure.”<sup>13</sup>

The *Caswell* court further found that, while people can get records for “proper purposes,” they cannot do so to “gratify private spite or promote public scandal.”<sup>14</sup> The U.S. Supreme Court used that language in dicta in *Nixon*, and parties opposing access often cite those words today.<sup>15</sup>

However, one leading pro-access case, *Petition of Keene Sentinel*, rejected this argument: “The motivations of [the press] – or any member of the public – are irrelevant to the question of access. We cannot dictate what should and should not interest the public.”<sup>16</sup>

*Keene Sentinel* involved a New Hampshire newspaper’s attempt to unseal the records of two separate divorces of Charles G. Douglas III, an incumbent candidate for the U.S. House of Representatives. Douglas argued that his privacy outweighed the public interest, and that the newspaper had no proper interest in his divorce.<sup>17</sup>

In rejecting Douglas’ arguments, the Supreme Court of New Hampshire established detailed guidelines for divorce access cases. It found that divorce court

records are presumptively open and the burden of proof rests with the party seeking closure to “demonstrate with specificity” that there is a “sufficiently compelling interest” that outweighs the public’s right of access.[18](#)

The opinion continued that a “general privacy interest” is insufficient and that courts must examine all documents separately to determine if they should be sealed.[19](#) Any closure must be as unrestrictive as possible – for instance, redactions of small segments are better than wholesale sealing, the court explained.[20](#)

Other key pro-access cases are *Barron v. Florida Freedom Newspapers, Inc.*[21](#) and California’s *Burkle v. Burkle*,[22](#) which both found that divorce proceedings are no different than any other civil matter.

But *Katz v. Katz*,[23](#) in Pennsylvania, held the opposite. There, former Philadelphia 76ers owner Harold Katz argued that his equitable distribution proceeding should be closed because he has a right to have privacy in his personal life, and because publicity could cause harassment and harm his business interests.

The court “sympathize[d]” with Katz, reasoning that “he need not be exposed more than is necessary to the less enviable features which accompany [his] public status.”[24](#)

In contrast with *Keene Sentinel*, which found the public’s reason for seeking access irrelevant, the *Katz* court concluded that “no legitimate public purpose can be served by broadcasting the intimate details of a soured marital relationship.”[25](#) Such disclosure “could serve only to embarrass and humiliate the litigants,” as the public can have little or no interest in how marital property is divided, the court explained.[26](#)

State statutes and court rules also help define the right of access to divorce proceedings.

Though divorce proceedings are presumptively open in many states, statutes define the right in different ways. The Iowa Code states that divorce hearings “shall be held in open court” but the “court may in its discretion close the hearings.”[27](#) In Idaho, the “court may exclude all persons” in divorce cases.[28](#) In Virginia, the presumption is that testimony in divorce proceedings is closed unless the court deems it otherwise: “In any suit for divorce, the trial court may require the whole or any part of the testimony to be given orally in open court.”[29](#)

The least access-friendly law is in Nevada, where divorce proceedings are private upon demand of either party.[30](#)

New York is unique because divorce proceedings are presumptively open, but divorce records are presumptively closed. But it is not uncommon for parties to leak divorce records to the press, said Edward Davis, a media lawyer at Davis Wright Tremaine in New York. While reporters are free to rely on leaked divorce records, they do not get the benefit of the fair and accurate report privilege if the information in the files is not accurate.[31](#) This means that if the journalists are sued

for defamation, they must rely on traditional fault defenses.

Some states have explicit provisions that let courts close certain parts of divorce hearings that deal with child custody. Some states also have statutory provisions that either automatically seal financial records or do so at the request of a party in a divorce case. This guide has sections on children's interests and financial matters.

## **Making the case for access to divorce records**

The Supreme Court in *Nixon v. Warner Communications, Inc.* warned in dicta that people should not get to see divorce records to gratify spite or promote scandal.[32](#) When, then, do these cases provide newsworthy information for the press and public?

Media lawyers say their case is strongest when the divorce involves an influential businessperson whose finances are of legitimate public concern or a candidate's fitness for office. But these are some of the very people who try to seal their divorce records in the first place.

California is especially pro-access in divorce proceedings. Two cases that established the state's standards involved parties with a big civic presence, explained Karlene Goller, former deputy general counsel at the *Los Angeles Times*.

*Burkle v. Burkle*, in 2006, involved billionaire grocery-store magnate and political donor Ronald Burkle.[33](#) After finding that the First Amendment right of access to civil proceedings in California extends to divorce proceedings, the court struck down a statute that let parties seal financial records.

Goller said Burkle's dissolution of assets with his ex-wife were newsworthy because of his influence in Los Angeles and beyond. "He has financial tentacles everywhere," she said.

A second access victory in California involved the divorce records of Broadcom co-founder Henry Nicholas.[34](#) Around the time of his divorce proceedings, Nicholas was indicted on stock fraud and options backdating charges, and well as on drug charges. (All of the charges were eventually dropped.)

News outlets had already written extensively of Nicholas' alleged hard drug use and sexual exploits.[35](#) The media needed the divorce records because, as head of a large publicly held company, his legal matters affected shareholders, explained E. Scott Reckard, a *Los Angeles Times* business reporter who covered the case.

"I don't think anybody wants to poke around in an ugly divorce just for the sake of poking around in an ugly divorce," Reckard said. "The issue becomes what elevates any of this stuff to a level of where you want to tell people about it."

In contrast to the Burkle and Nicholas cases, the media did not fare as well in attempts to get divorce records from pop stars Britney Spears and Kevin Federline, said Wickers, who litigated the access matter. The court only unsealed certain documents, and likely viewed the suit as "prurient interest in the disaster that was K-Fed and Britney Spears' relationship," Wickers said.

Another instance when courts are especially willing to open files that were initially sealed is if the character of a candidate for public office could be at issue. This was the case in the 2004 U.S. Senate campaigns of Jack Ryan and Blair Hull.

It also was at issue when Freedom Newspapers sued for the divorce records of Florida state senator Dempsey Barron.<sup>36</sup> Barron's ex-wife claimed he defrauded her by attempting to convey property in Wyoming to his aide, whom he later married.

Barron was involved in a reelection campaign in 1988, but argued that his divorce was a proceeding between private individuals that did not involve the state.<sup>37</sup> He reasoned that even if he is a public figure, he should have a right to privacy.<sup>38</sup> The media won, and Barron lost his state senate seat that year. Obituaries years later linked Barron's defeat to his "unusually public divorce fight."<sup>39</sup>

While wealthy people or public figures are often the ones that seek closure, Goller said media victories in these cases are an important way to show people that courts are dispensing justice fairly.

"It takes these big cases to make the case law for the average case, and to make sure that judges are aware that these rules of openness apply," she said.

There are many policy reasons why transparency is especially important in divorce proceedings. One side often has more power and leverage in these cases, so the prospect of publicity can even the playing field.<sup>40</sup> Additionally, a single judge, instead of a jury, typically decides these matters, so openness is an important check on the power of the one person.<sup>41</sup> Moreover, many of the factors a judge in divorce cases decides, such as the "best interest of the child standard," have gray areas.<sup>42</sup>

## Endnotes:

<sup>1</sup> David Mendell, *Hull's ex-wife called him violent man in divorce file*, Chi. Trib., Feb. 28, 2004, <http://trib.in/1tyrdbE>.

<sup>2</sup> John Chase & Liam Ford, *Ryan file a bombshell*, Chi. Trib., June 22, 2004, <http://trib.in/1q9CgWW>.

<sup>3</sup> Dan Collins, *Sex Scandal Ends Ryan Senate Bid*, Associated Press, June 25, 2004, <http://cbsn.ws/XJDP4J>.

<sup>4</sup> See Jennifer L. Rosato, *The Future of Access to the Family Court: Beyond Naming and Blaming*, 9 J.L. & Pol'y 149, 150-51 (2000).

<sup>5</sup> Melissa F. Brown, *Family Court Files: A Treasure Trove for Identity Thieves?*, 55 S.C. L. Rev. 777 (2004).

<sup>6</sup> *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 n.17 (1980) (plurality opinion).

<sup>7</sup> *Nixon v. Warner Commc'ns., Inc.*, 435 U.S. 589, 597 (1978) (footnote omitted).

<sup>8</sup> 24 Am. Jur. 2d, *Divorce and Separation*, § 283 (1998).

<sup>9</sup> *Id.*

<sup>10</sup> Mary Mcdevitt Gofen, *The Right of Access to Child Custody and Dependency*

Cases, 62 U. Chi. L. Rev. 857, 867 (1995), *citing* Joel Prentiss Bishop, 2 Marriage, Divorce, and Separation § 674 at 278 (T.H. Flood, 1891).

[11](#) *Id.* at 867-68.

[12](#) *In re Caswell*, 29 A. 259, 259 (R.I. 1893).

[13](#) *Id.*

[14](#) *Id.*

[15](#) *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. at 598.

[16](#) *Petition of Keene Sentinel*, 612 A.2d 911, 915 (N.H. 1992).

[17](#) *Id.* at 913.

[18](#) *Id.* at 916.

[19](#) *Id.*

[20](#) *Id.* at 917.

[21](#) 531 So.2d 113 (Fla. 1988).

[22](#) 135 Cal.App.4th 1045 (Cal. Ct. App. 2006).

[23](#) 514 A.2d 1374 (Pa. Super. Ct. 1986).

[24](#) *Id.* at 1380.

[25](#) *Id.* at 1379.

[26](#) *Id.* at 1379-80.

[27](#) Iowa Code § 598.8 (2000).

[28](#) Idaho R. Civ. P. 77(b).

[29](#) Va. Code Ann. § 20-106 (1990).

[30](#) Nev. Rev. Stat. Ann. § 125.080 (LexisNexis 2000).

[31](#) *Shiles v. News Syndicate Co.*, 27 N.Y. 2d 9, 19 (N.Y. 1970).

[32](#) 435 U.S. 589, 598 (1978).

[33](#) Peter Y. Hong, Jean Guccione & Carla Hall, *Court Unseals Burkle Divorce Papers*, L.A. Times, May 20, 2006, <http://lat.ms/1v2anob>.

[34](#) *In re the Marriage of Stacey & Henry T. Nicholas*, 186 Cal.App.4th 1566 (Cal. Ct. App. 2010).

[35](#) See, e.g., Bethany McLean, *Dr. Nicholas and Mr. Hyde*, Vanity Fair, Nov. 2008, <http://vnty.fr/1mueKPF>; Keren Blankfeld & Matthew Miller, *Broadcom's Nicholas After The Fall*, Forbes, Oct. 1, 2009, <http://onforb.es/1qB62Bd>; R. Scott Moxley, *Henry Nicholas' Divorce Is More Secret Than Yours*, OC Weekly, July 8, 2010, <http://bit.ly/1sgwnGO>.

[36](#) *Barron v. Fla. Freedom Newspapers, Inc.*, 531 So.2d 113, 115 (Fla. 1988); Donna O'Neal, *File Open In Divorce of Barron Supreme Court Ruling Has Wide Implications*, Orlando Sentinel, Aug. 26, 1988, <http://bit.ly/1twh26Q>.

[37](#) *Barron*, 531 So.2d at 116.

[38](#) *Id.*

[39](#) Craig Base & Lucy Morgan, *Dempsey Barron dead at 79*, St. Petersburg Times, July 8, 2001, <http://bit.ly/1AIf8TX>.



[40](#) W. Thomas McGough, Jr., *Public Access to Divorce Proceedings: A Media Lawyer's Perspective*, 17 J. Am. Acad. Matrim. Law. 29, 37-38 (2001).

[41](#) *Id.* at 38.

[42](#) Mary Mcdevitt Gofen, *The Right of Access to Child Custody and Dependency Cases*, 62 U. Chi. L. Rev. at 857 (1995).



# Anatomy of a Brief: Merrill v. Holder et al.

## *A detailed look at a recent Reporters Committee amicus brief*

By Hannah Bloch-Wehba

In March, the Reporters Committee filed a [friend-of-the-court brief](#) in the United States District Court for the Southern District of New York weighing in on the right to know more about a shadowy administrative subpoena process: "national security letters," known as NSLs.

### **National security letters and gag orders**

NSLs are warrantless requests that are issued by high-ranking FBI officials to third parties for non-content records relevant to national security investigations. By far the most commonly used NSL authority is that in the Electronic Communications Privacy Act (ECPA), which enables the FBI to request the "local and long distance toll billing records" of any person from a "wire or electronic communication service provider," such as ISPs, email providers, and phone companies.

NSLs are frequently accompanied by a nondisclosure order that prevents the recipient from publicly acknowledging that they have received the request. The gag orders are issued by the FBI if the issuing official certifies that disclosure "may result" in a danger to national security or to the safety of any person. The nondisclosure orders are usually issued at the same time as the NSL is issued, without any judicial oversight. Recently, the Office of the Director of National Intelligence [announced](#) impending changes to the policy governing the issuance of gag orders: "the FBI will now presumptively terminate National Security Letter nondisclosure orders at the earlier of three years after the opening of a fully predicated investigation or the investigation's close." While the three-year limit is an improvement, it does not solve the serious constitutional problems with the NSL authority and the nondisclosure provisions.

This is not the first time the Reporters Committee has weighed in on the FBI's NSL authority. In April 2014, the Reporters Committee filed an [amicus brief](#) in support of petitioners challenging ECPA NSLs in two cases in the Ninth Circuit. Those cases have not yet been decided.

## The facts of the case

In 2004, Nicholas Merrill received an ECPA NSL with a nondisclosure order. Merrill, who ran an Internet Service Provider called Calyx Internet Access, challenged the NSL and the gag order. In subsequent litigation in the Southern District of New York, the scope of the nondisclosure order was narrowed significantly. In 2010, Merrill was permitted to acknowledge that he was the litigant and the recipient of the NSL. And in February 2014, the FBI permitted Merrill to reveal the *target* of the NSL: the customer whose records were sought. But the FBI continues to maintain that Merrill may not reveal the Attachment to the NSL that specifies the kinds of information that the FBI sought using the NSL. As a result, the gag order has been in place for over ten years. Merrill brought this suit to lift the gag preventing him from disclosing what types of information the FBI sought pursuant to their authority to compel disclosure of “electronic communications transactional records.”

## The right to receive information from Merrill about the Attachment to the NSL

The Reporters Committee argued that the press and the public have a First Amendment right to receive the information that Merrill wants to disseminate: the content of the Attachment to the NSL.

The right to receive information is an independent “corollary” of the guarantees of free speech and a free press. *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 76 (1976) (Powell, J., concurring). “The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read . . . .” *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965).

...

The “willing speaker” doctrine is usually invoked to establish that the press has standing to challenge an unconstitutional restraint on speech that purports to bind a third party. See, e.g., *United States v. Simon*, 664 F. Supp. 780, 786 (S.D.N.Y. 1987) .... But the doctrine also demonstrates the inextricable connection between the First Amendment rights of the speaker and the related, independent rights of his or her audience. Indeed, “[i]t would be a barren marketplace of ideas that had only sellers and no buyers.” *Lamont v. Postmaster General of United States*, 381 U.S. 301, 308 (1965) (Brennan, J., concurring). Accordingly, in the free marketplace of ideas, “the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences” is paramount. *Red Lion Broad. Co. v. F.C.C.*, 395 U.S. 367, 390 (1969).

The Reporters Committee argued that the content of the Attachment is of heightened interest to the press and the public because it concerns government conduct: it is evidence of the government's interpretation of its own authority to compel the disclosure of communication records to law enforcement.

[Disclosure of the Attachment] would inform public debate about government conduct — specifically the government's use of NSLs — and enable public oversight of the executive branch. Speech of this kind lies at the core of the protections guaranteed by the First Amendment, which were “fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.” *Roth v. United States*, 354 U.S. 476, 484 (1957).

...

Indeed, the only publicly available government interpretation of the FBI's authority to compel the production of communications records is a 2008 memo from the Office of Legal Counsel, which concluded that NSLs may only be used to seek subscriber information, “toll billing records,” and “parallel” categories of information. See Requests for Info. Under the Elec. Commc'ns Privacy Act, 32 Op. O.L.C. 2 (2008). The OLC, however, acknowledged that ambiguity exists in the application of the phrase “toll billing records” to electronic communications. See Dep't of Justice, A Review of the FBI's Use of NSLs: Assessment of Progress in Implementing Recommendations and Examination of Use in 2007 through 2009 (Aug. 2014) (“NSL Report III”), at 74. Nondisclosure requirements like the one at issue here prevent the public from knowing how the FBI interprets that ambiguous phrase and what types of communications records it believes it is authorized to seek with NSLs. The result is that citizens are essentially unable to gain access to the executive branch's interpretation of a federal statute.

### **The gag order impedes speech that has significant legal and political implications**

The Reporters Committee argued that the content of the Attachment is of particular value because only by knowing what types of information the government obtains through NSLs can the public evaluate the statutory and constitutional implications of the program.

For example, the collection of email content is not authorized under ECPA's NSL provision. See 18 U.S.C. § 2709(a) (authorizing requests for

subscriber information and toll billing records). Indeed, courts have held that the acquisition of the content of email requires a warrant under the Fourth Amendment. See *Warshak v. United States*, 631 F.3d 266, 282 (6th Cir. 2010) (finding that compelling a service provider to turn over the content of email without a warrant is a Fourth Amendment violation). Yet, as the OIG has found, the lack of clarity surrounding the definition of communications records has resulted in at least five “unauthorized collections” of content information from “one of the larger email service providers.” NSL Report III, 131–32.

Moreover, the types of communications records that the FBI might seek using an NSL also implicates other statutory provisions of federal law. In response to Stanford Daily, Congress enacted the Privacy Protection Act of 1980, 42 U.S.C. § 2000aa (“PPA”), which prohibits searches for certain types of materials related to newsgathering. The PPA “affords the press and certain other persons not suspected of committing a crime with protections not provided currently by the Fourth Amendment.” S. Rep. No. 96–874, at 4 (1980), reprinted in 1980 U.S.C.C.A.N. 3950, 3950–51. As a result, to the extent that NSLs purport to authorize searches or seizures of materials belonging to persons engaged in newsgathering, those searches are barred by the PPA, except in very few, limited circumstances. For this reason too, public scrutiny of the FBI’s use of NSLs to obtain communications records is necessary.

The Reporters Committee also emphasized that, to the extent that NSLs are used to obtain records belonging to members of the news media, [additional regulatory protections](#) limit the FBI’s authority to compel disclosure of those records.

Federal regulations constrain the circumstances under which the FBI can obtain records of members of the news media. 28 C.F.R. § 50.10. Generally speaking, the Attorney General must authorize the use of a subpoena or warrant to obtain records, including communications transactional records, of members of the news media. § 50.10(a)(3). The “affected member of the news media” must also be given “reasonable and timely notice” of the request. § 50.10(a)(4). While these regulations do not refer expressly to NSLs or FISA warrants or applications, they raise questions as to the propriety of the FBI’s usage of NSLs to obtain records of members of the news media.

...

The use of NSLs to obtain the communications records of reporters

flouts, at a minimum, regulatory protections for journalists and undermines press freedom. Information of the kind that Merrill is restrained from making public concerning how the FBI interprets communications records for purposes of requesting information in an NSL is needed in order for the press and the public to ensure that the FBI is acting within its authority and with adequate regard for First Amendment values.

These concerns are especially strong here because the use of NSLs to obtain reporters' electronic communication transactional records puts confidentiality at risk.

The government's use of NSLs to obtain the electronic equivalent of a reporter's contact list or research history would destroy the ability of reporters to, among other things, communicate in confidence with sources through any electronic channel. Indeed, the threat of compelled disclosure of email addresses and URL visits alone limits journalists' ability to gather information and report the news by chilling the exercise of First Amendment rights. ... The chilling effect of compelled disclosure of communications information is all the more concerning where, as here, the types of information that may be obtained by the government remain undefined. The lack of clarity regarding the definition of communications records impedes the ability of individuals — including reporters and their sources — to communicate with one another in confidence.

The Reporters Committee was joined by 21 media organizations in support of Merrill's effort to lift the gag.

# Those who paid the price

## *Jailed journalists gather to tell their stories, advocate for reporter's shield law*

By Kimberly Chow

Going to jail to protect a source, whether for a weekend or several months, comes with a heavy price for journalists — and the unpleasantness of the experience can last for years.

At the largest gathering to date of [journalists jailed](#) in the U.S. for refusing to testify, nine reporters spoke on June 1 at the National Press Club in Washington, D.C., about their experiences and the importance of enacting a [federal shield law](#). The organizer, Brian Karem, the executive editor of the Sentinel Newspapers in Maryland, was himself jailed four times for protecting a confidential source. The other panelists, including former *New York Times* reporter Judith Miller and Texas author Vanessa Leggett, were imprisoned for a variety of journalistic practices, including refusing to turn over information on a jailhouse interview and refusing to testify before a grand jury about interviews with a local official accused of misspending.

The journalists took turns giving sobering accounts of their time behind bars and the actions that had landed them there.

“It was not fun. No one should have to go through what anybody up here went through in order to disseminate information to the public,” Karem said, adding that he hoped they would all serve as examples for young reporters.

The humiliating, dangerous, and life-disrupting experiences they went through, from strip searches to jail fights, truly tested the panelists, they said, undermining claims that journalists who refuse to testify and are imprisoned do it for the glory and to further their careers.

“Jail isn’t a nice place, even when they treat you well. I’m very grateful I stayed



Brian Karem moderates a panel of journalists who have spent time caged by the state for doing their jobs at a National Press Club Freedom of the Press event, June 1, 2015. Panelists from left to right are Josh Wolf, Brad Stone, Lisa Abraham, Vanessa Leggett, Judith Miller (obscured) Brad Stone, Roxana Kopetman and Libby Averyt.



in this profession, but that's a hell of a price to pay," said Libby Averyt, who was jailed for a weekend when she declined to hand over unpublished information on a jailhouse interview.

Brad Stone had to leave the Detroit area because he found it too difficult to do investigative work there following the publicity surrounding his imprisonment. Lisa Abraham continued reporting from jail, but had to mop floors in order to get the pay phone turned on for the day. When the other inmates dawdled, she mopped all the floors herself in order to make a deadline.

Miller spent 85 days in jail in 2005 to protect the identity of her confidential sources in the Valerie Plame affair. During her time in jail, she lost 30 pounds, made lipstick from red M&Ms, and traded a coveted apple for the opportunity to deliver laundry to fellow prisoner Zacarias Moussaoui, whom she wanted to ask about his involvement in the September 11 terrorist attacks. She left jail convinced of the need for a federal media shield law and for more solidarity among all reporters.

"If you walk like a duck, quack like a duck, and write or broadcast like a duck, you're a duck," she quipped, in response to questions of how broadly the privilege should be applied.

The panelists agreed that more should be done to bring journalists together in support of a national shield law that protects all those who gather information to report to the public, so that they do not become tools of law enforcement by having to testify or turn over materials.

"This is a small club, no one asked to be a member, and we don't want any more members," Karem said.



Judith Miller who covers national security issues discusses the 85 days she spent in jail rather than reveal her source.



# The dangers of doxxing

## *What journalists can do to avoid attacks using their personal information*

*By Jenn Henrichsen*

Threatening journalists over their reporting is not a new concept, but the age of electronic media has brought a new method of intimidation and harassment known as doxxing.

Doxxing – named for docs or documents and also called doxing or d0xing – starts with publishing someone’s personal information in an environment that implies or encourages intimidation. Typically done online, the information then is used by others in a campaign of harassment, threats and pranks.

Journalists targeted by doxxing attacks, which are usually based on something they’ve written, find their personal and professional lives disrupted and sometimes turned completely upside down.

Doxxing is not unique to journalists. It has been a source of controversy for many years, including the well-known [Gamergate](#) debacle, in which several female gamers were [doxxed](#) and still suffer significant, [repeated online harassment and abuse](#).

The concept of doxxing is fluid, but it often starts with a slew of abusive phone calls and text messages from random numbers, sometimes in conjunction with a series of harassing tweets and emails. These can range from relatively benign messages to rape and death threats, such as those received by *Slate* journalist Amanda Hess.

In her January 2014 article for *The Pacific Standard*, "[Why Women Aren’t Welcome on the Internet](#)," Hess described how disoriented and terrified she felt when reading a series of tweets that threatened her with rape and death. Although Hess went to the police, little was done to effectively address the threat, and she still receives threatening messages.

The doxxing leads to attacks on multiple levels, including the old order-pizzas-to-your-house prank.

*Jezebel* journalist Anna Merlan, recounted her experience in a recent [article](#) noting the food delivery was nothing “anyone with functioning taste buds would order.” It included “two large pies, one with triple cheese, triple sausage, triple salami, triple barbecue, hot sauce, half onions and half pineapple, the other with no

cheese and triple sausage, plus a large bottle of Coke.” What spurred the abuse? She had written a blog post earlier that day [calling out a 4Chan group](#) for engaging in a ballot-stuffing effort in a *Time* magazine poll of words to ban – the word “feminist” was leading the poll.

But the pranks get a lot more dangerous, including “Swatting.” Here, doxxers call in a false emergency or threat at your address requiring SWAT team response. Information security journalist Brian Krebs was swatted and the target of a Distributed Denial of Service (DDoS) attack on his website – all within 24 hours. The attacks were apparently in response to an article Krebs wrote about a [service that can be hired to knock websites offline](#) more than six months earlier.

Even media organizations that cover doxxing are not immune from attack. Shortly after *Ars Technica* wrote about the doxxing and the swatting attack against Krebs, it became a [victim](#) of a DDoS attack that used in part the same attack tool and user credentials that were leveraged in the DDoS attack against Krebs.

Some claim that [journalists have committed their own form of “doxxing”](#) by posting personal information about people online. These cases include, among others, *Newsweek’s* [story that revealed](#) the identity of the presumed Bitcoin inventor and the *New York Times* article that [published](#) the street where Darren Wilson, the police officer who shot 18-year-old Michael Brown in Ferguson, Mo., lived.

But the motivation for journalists to reveal investigative information in the public interest is different from the harassment of doxxing and typically faces a more stringent litmus test before publication.

For example, when determining whether to publish personal details, such as an address or a name in a story, editors will likely consider whether the information had been previously reported or is widely available and whether it is important for the public to know. If it is, editors are more likely to publish. The *New York Times* faced these questions before [publishing the names](#) of undercover CIA agents in an April 2015 story on the drone program.

Ongoing online harassment can take a toll on journalists’ lives. Hess records every threatening message so she has evidence of the abuse to show police. She also reportedly lugs her protection order and case files around when she travels to be prepared should something negative happen. Others who have experienced online harassment have [left](#) the profession altogether – a significant and sad victory for those seeking to silence other voices.

Unfortunately, security researchers like Bruce Schneier [predict](#) doxxing will continue to increase, afflicting journalists and others who may express views perceived as controversial. Indeed, online harassment in general appears to be rising. Although hard data is difficult to gather, [onlineharassmentdata.org](#) found that more than one in four Americans has experienced online harassment – and anecdotal accounts continue to pile up.

Without a comprehensive solution involving the technical, political, and legal sectors, what can be done now for journalists to better protect themselves?

The first step is limiting the amount of personally identifying information on the Internet. Obviously, journalists need to keep some information public (work email address, Twitter profile, PGP key, etc.) so sources can contact them, but other information doesn't need to be public.

Here are some simple actions journalists can take to help mitigate their risk of a doxxing attack:

- **Protect your domain WHOIS information.** If you have a personal blog or website, protect your domain [WHOIS](#) information by using a service that obfuscates personal information such as your address, phone number, and email address.
- **Use two-factor authentication and strong passwords.** Add two-factor authentication to your online accounts and [beef up your passwords](#) to limit the likelihood that your accounts will be successfully hacked. Many activists and some journalists now use [Yubikeys](#), which are small devices registered with a service that supports two-factor authentication and only require a simple tap or touch to ensure your login is secure.
- **Set up alerts in your name.** Keep tabs on when your name shows up online. Set up alerts on [Pastebin](#) where a lot of hacked material is published, and also on [Mention](#) or [Google](#).
- **Opt out.** Periodically search your name online and remove personally identifiable information from data aggregators like [Spokeo](#), [Pipl](#), [Intelius](#) and such, or pay a service which will do it for you. Also install services, such as [EFF's Privacy Badger](#), [Ghostery](#) or [Abine](#), which can help to prevent some of the online tracking and data collection in the first place.

These are just a few steps that journalists can take to help protect their information and mitigate the threat of doxxing.

Additional resources to help prevent or mitigate doxxing include: gamer Zoe Quinn's anti-online hate task force, [Crash Override Network](#); a [three-part series](#) by Ken Gagne of Computerworld; and reporting by *Ars Technica* staff editor Nathan Mattise about [his experiences and suggestions](#) to mitigate exposure to doxxing.

Doxxing isn't a fad that is likely to burn out soon. It invokes serious intimidation, harassment and threats against journalists that could interfere with their reporting, place them in real danger and, ultimately, drive them from the work they love. By educating themselves about the practice and taking steps to mitigate doxxing attacks, however, journalists can stand up against those who seek to shut down a free press.

*This is part of a series of articles written for the Poynter Institute by Reporters*

*Committee staff members, and first appeared on poynter.org on May 19.*

# Cybersecurity legislation raises concerns for journalists

*By Kristin Bergman*

President Obama's 2015 [State of the Union](#) address urged Congress to pass legislation to address cyber threats: “If we don’t act, we’ll leave our nation and our economy vulnerable.”

After years of proposed, but ultimately unsuccessful, legislation, the “[year of the data breach](#)” and executive pressure have pushed Congress closer to passing federal cybersecurity legislation. Though focused on the balance between information sharing and privacy in order to address national security — a goal that seems to primarily affect consumers, data holders, and the government — these bills have great implications for journalists and their sources.

This year’s predominant cybersecurity bills take three forms: the Senate’s Cybersecurity Information Sharing Act ([CISA](#)), the House Intelligence Committee’s Protecting Cyber Networks Act ([PCNA](#)), and the House Homeland Security Committee’s National Cybersecurity Protection Advancement Act ([NCPAA](#)). Each includes provisions that reduce transparency and accountability, while providing tools to prosecutors to investigate suspected leakers and those who print their stories.

## Cybersecurity legislation and transparency

The proposed legislation creates exceptions to public access for information shared under the cybersecurity acts.

CISA calls for a new exemption from the Freedom of Information Act, adding a tenth exemption for “information shared with or provided to the Federal Government pursuant to the Cybersecurity Information Sharing Act of 2015.” This broad exemption would encompass all information covered by the Act, disregarding existing FOIA exemptions and setting a precedent to limit transparency in other security areas.

In a March [letter](#) to the Senate Select Committee on Intelligence, a group of 11 organizations, including OpenTheGovernment.org, the American Civil Liberties Union, the Society of Professional Journalists, and the Sunlight Foundation, called this “the most far-reaching substantive broadening of the [FOIA] Act’s exemptions — thus broadly weakening FOIA as a whole — since 1986.”

Since then, the Senate committee produced a [report](#) in mid-April wherein

Senators Martin Heinrich, D-N.M., and Mazie Hirono, D-Hawaii, recommended the removal of this new, tenth exemption.

The Senators declared: “Government transparency is critical in order for citizens to hold their elected officials and bureaucrats accountable; however, the bill's inclusion of a new FOIA exemption is overbroad and unnecessary as the types of information shared with the government through this bill would already be exempt from unnecessary public release under current FOIA exemptions.” As they state, much of the information that would be shared by the government from the private sector would already be covered under the existing Exemption 4 as confidential commercial information.

Ultimately, skepticism about the necessity of a new FOIA exemption on the part of some senators, combined with the non-existence of such a tenth exemption from the bills passed in the House, make it unlikely that the final bill will retain this broad exemption. However, another FOIA exemption remains in every version.

All three bills call for “cyber threat indicators and defensive measures” to be exempt “without discretion” from FOIA under Section 552(b)(3), as well as state freedom of information statutes, with no time limitations on the exemption from access. Defined broadly, cyber threat indicators include information identifying a method of defeating a security control or exploiting a security vulnerability, as well as information simply identifying vulnerabilities. Critics of the legislation express concern over the mandatory and duplicative nature of this exemption.

A coalition of 34 pro-access groups criticized the discretionless withholding in a [letter](#) opposing PCNA, recommending drafters delete the modifier “without discretion.” As PCNA already states that the cyber threat information will have been shared voluntarily, the information would be covered by FOIA's existing Exemption 4 for confidential information. PCNA reframes this by codifying a legal presumption against disclosure.

Senate Intelligence Committee Chairman Richard Burr’s office defends these FOIA exemptions as key to promoting more information sharing by reducing risk, a necessary balance to protect private information.

Comparing CISA to a neighborhood watch program, Sen. Burr, R-N.C., [has promoted](#) the act and its scrubbing requirements as “a solution that can minimize the threats to your own personal information, keep the economy strong, and help secure the nation.”

Chairman of the U.S. House Committee on Homeland Security Michael McCaul, R-Texas, expressed concern for the under-reporting of cyber attacks and the importance of incentivizing information sharing.

Rep. McCaul [supports](#) protections in the bill that encourage the exchange of information in order to overcome companies’ fear that sharing “could put their customers’ privacy at risk, expose sensitive business information, or even violate



federal law and the duty they have to their shareholders.”

## **Information sharing and prosecutions**

CISA and PCNA authorize the use of cyber threat information provided to the government for cybersecurity purposes and for “preventing, investigating, disrupting, or prosecuting” violations of the Espionage Act, among other federal crimes.

Gabe Rottman, legislative counsel and policy advisor in the ACLU’s Washington Legislative Office, explained that this provision creates two issues for journalists and their sources. First, the standard for scrubbing personally identifiable information from documents before it goes from the private sector to the government is not very robust. Rottman asserts that the legislation provides broad liability protections that create an incentive to overshare this information.

In addition, the bills authorize investigation of cybersecurity threats. Not only will leakers like Snowden and Manning qualify as such threats, but likely anyone suspected of talking to the press on security issues as well as many security journalists themselves.

Rottman warns of the use of these provisions in “future unauthorized disclosure cases as an investigative tool for prosecutors” – especially when considering the difficulty of the public holding the government accountable in light of the proposed FOIA exemptions. For example, these bills enable investigators in leak cases to circumvent warrant and due process requirements by going to third party communicators to request the voluntary disclosure of information that it deems relates to a cybersecurity threat.

The Sunshine in Government Initiative (SGI) also voiced concerns about classification when faced with a similar provision in CISA’s predecessor.

“CISA as proposed would grant the federal government virtually unlimited authority to thwart newsgathering and the use of confidential sources by removing meaningful judicial oversight and placing the balancing of vital democratic interests in the hands of the executive branch and private industry,” SGI wrote in a June 2014 [letter](#) to the Senate Select Committee on Intelligence.

This cybersecurity legislation is just one piece in a larger debate over security, privacy, accountability, and freedom of the press. From the prosecution of Barrett Brown under the Computer Fraud and Abuse Act and the use of targeted DMCA takedown notices against journalists to the monitoring of James Rosen and subpoenaing of James Risen, reporting on important security issues is not without significant risk.

As CISA and PCNA’s critics fear that the enactment of an authorized use provision would encourage prosecution under the Espionage Act and create a chilling effect on newsgathering and reporting, their concerns are reminiscent of Quinn Norton’s [farewell](#) to security journalism following Brown's sentencing

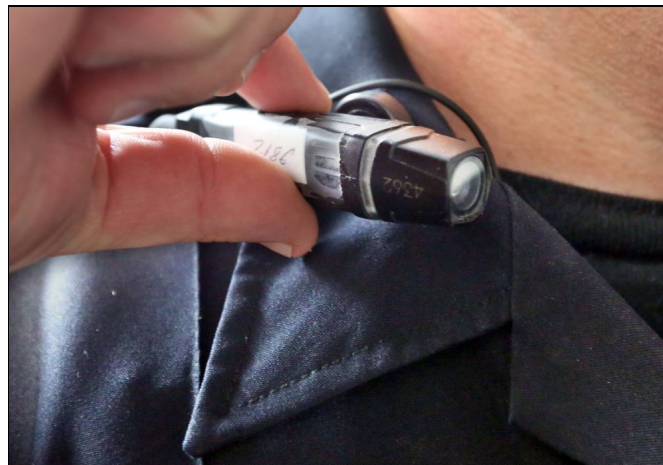
earlier this year: “I may be incarcerated for doing my job.”

# Bodycams: seeing, but not being seen

## *Reporters face challenges in obtaining police body camera videos*

By Adam Marshall

Police departments across the nation are implementing body-worn cameras (also called BWCs, or bodycams) in an effort to improve community relations and create a more objective record of officers' activities. As [recent news events have proved](#), these videos can provide crucial information about what transpired in a situation. Gaining access to bodycam videos, however, is proving to be a challenging endeavor for journalists.



Bodycam videos are, at least presumptively, public records subject to disclosure under most states' open records laws. The definition of what constitutes a public record is incredibly broad in most states. For example, Colorado [defines](#) public records to include all “documentary materials, regardless of physical form or characteristics” that are made, maintained, or kept by state or local agencies.

BWC videos are created as part of the official operations of police departments, are under their control, and relate to the public's business. As such, there should be little argument that public records laws apply. But whether those laws result in release of the videos in practice is another question.

Some police departments are handling requests for videos much as they would any other public record. Jack Gillum, a reporter with the Associated Press, submitted a public records request to an Arizona police department for video of an incident and received a CD in the mail shortly thereafter. He was charged \$5, which included postage.

But other police departments are adopting bodycams before creating policies or procedures for compliance with open records laws, leading to erratic disclosure between jurisdictions and cases.

In Denver, Brian Maass, a reporter with a local CBS station, has had some success in requesting bodycam videos under Colorado's open records law. Recently,

a local police officer was suspended after using excessive force during an arrest — an incident that was captured on a fellow officer’s BWC. Maass was able to obtain the [video](#), which was of incredible value to the public because it contradicted the suspended officer’s statements and showed precisely why he was suspended.

But in other instances, Maass hasn’t been so successful. Different requests for BWC videos to the Denver Police Department have been denied. He says that release of the videos is inconsistent, and when they are released, it’s in cases where they were part of an internal affairs proceeding that has been completed. According to Maass, that’s “the only time I have been able to successfully obtain these videos.”

## The technology behind redacting videos

Even when a police department releases video, they may want to redact certain portions of it in accordance with the provisions of the applicable public records law.

Redacting exempt images from a video before it is released is possible, despite what some agencies might argue. There are several affordable video editing programs that can blur or pixilate faces and other information from whatever part of the video needs to be redacted. Some programs even have [intelligent features](#) that can automatically track faces, substantially reducing a department’s administrative burden.



AP Photo/Jim Mone

A Duluth, Minn., police officer wears a body camera on the front of his uniform during a car stop.

Third-party vendors are also springing up to handle the demand for video editing services. One Florida-based [company](#) is already contracting with police departments in several states to redact videos for public records requests. In response to an inquiry by the Reporters Committee, the company estimates that it can redact an hour of video in less than 3.75 hours. That timeframe largely mirrors the conclusions of a [report](#) issued by a City of Baltimore working group tasked with researching body cameras.

The Seattle Police Department has taken a different approach to redactions. It proactively posts bodycam videos that are [completely and heavily blurred](#) and then invites the public to submit requests for specific segments. The department then employs more targeted redactions and releases the rest of the video.

Whether Seattle’s system is useful for journalists remains to be seen. The proactively posted videos have no sound and are blurred so much that they are difficult to analyze. And even when a reporter requests a specific segment to be

released, it may take a long time for the police to comply. Eileen Sullivan, a reporter with the Associated Press, said that the Seattle PD estimated it would take up to seven weeks to comply with a request she made for bodycam videos. Such a delay means that while the videos might be valuable for long-term investigative reporting, journalists might not want to count on them for breaking news.

## **Exemptions to disclosure**

Recent discussions over the implementation of body cameras have shown that privacy is a substantial concern. Civil liberties groups have [noted](#) that because the cameras go wherever the police do, it is quite possible that sensitive material will be recorded. Depending on the situation, this might include the identity of a sexual abuse victim, a young child, or simply the interior of a home.

Almost every state has a privacy exemption that would allow this type of information to be withheld. For example, the [freedom of information law in Washington, D.C.](#), allows an agency to withhold information “of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy.”

A [bodycam video published](#) by the Metropolitan Police Department in Washington, D.C., shows how this might work in practice. The video, which depicts a traffic stop, has certain elements pixelated or blurred, including the face of the person that was stopped, her identifying documents and license plate, and the officer’s computer screen. Certain segments of the audio are also muted.

A video released by the police in Flagstaff, Ariz., takes a slightly different approach. The [video](#), which shows the last few minutes before an officer was shot and killed, includes a minute of footage inside a private residence. While that minute is blurred, the rest of the video, which takes place outside the home, is shown in its entirety.

In some situations, it is entirely possible that the public would want and need to see a bodycam video that would otherwise be exempt for privacy reasons. For example, an excessive use of force incident might take place inside a private home. Some states balance privacy exemptions with the public interest, which may allow these videos to be released. Research [your state’s law](#) to understand privacy concerns that may arise in bodycam videos and what you might do to encourage their release.

A second exemption that may apply to bodycam videos concerns investigatory records. Many state open records laws exempt records that are part of an ongoing police investigation, which could include video from bodycams. However, as with privacy exemptions, many states require a balancing test between the possible impairment of an investigation and the public interest. When making a request, be sure to include the best possible argument as to why the information needs to be available to the public.

Another common exemption police departments may assert when facing a request for BWC video relates to personnel files and/or disciplinary records. It is not uncommon for states to withhold certain types of information about employees, whether it relates to sensitive data (such as Social Security numbers and home addresses) or performance evaluations. Generally, however, these exemptions do not allow agencies to withhold records that indicate employee wrongdoing, which is important to note when requesting access to videos that may show police misconduct. [In Oklahoma](#), bodycam videos that show law enforcement personnel under investigation may be temporarily redacted to obscure their identity, unless the investigation lasts for an unreasonable amount of time.

### **Charging fees for videos**

As with traditional public records, agencies may charge high fees for processing requests, creating a barrier to disclosure. Many state laws allow for the requester to be charged for the time it takes to locate, review, and produce records, which can add up quickly when it comes to BWC videos. In Florida, for example, one town [issued a bill for \\$18,000](#) in response to a request for 84 hours of video.

The city of Chesapeake, Va., not only denies most requests for BWC video, but also appears to be [issuing bills](#) to anyone who asks. They charge for the time it takes them to respond, regardless of whether the video exists or is disclosed. The city has billed requesters [over \\$2,000](#) in the last 15 months.

Journalists requesting videos can try to avoid these costs by researching agencies' practices ahead of time, requesting as little video as needed, and requesting a fee waiver.

### **New state legislation on bodycams and public records laws**

Although it would seem that most existing open records laws adequately balance privacy, law enforcement, and transparency, many state legislatures are considering new exemptions for bodycam videos, and some have already been enacted.

In North Dakota, a [bill](#) was recently signed by the governor that exempts all images "taken in a private place" from disclosure. [Florida](#) passed a similar law in late May that exempts videos taken inside private residences, healthcare facilities, and places "that a reasonable person would expect to be private." Other states, including, [Michigan](#) and [Texas](#), have introduced similar measures to deal with videos in private places.

Oklahoma passed a [law](#) in 2014 that requires police departments to release bodycam videos but to redact any portions that depict the death of a person, a dead body, any person who is nude, or minors under 16 years of age.

Other states are considering more drastic exemptions. Bills have been introduced in [Louisiana](#), [Massachusetts](#), [New Hampshire](#), and [Virginia](#) that would completely exempt bodycam videos from public records laws. Some of these bills,



along with those proposed in [other states](#), would allow individuals who are captured by the cameras and other involved parties to request the videos.

The Reporters Committee has [argued](#) that most existing privacy exemptions are [more than sufficient](#) to address privacy concerns presented by public access to BWC footage, and no additional legislation is necessary.

## **Challenges and opportunities for cooperation**

Aside from passed or pending legislation, some police departments are simply refusing to release any body camera videos. The Los Angeles Police Department, for example, has [stated](#) that it considers all such videos to be “evidence” and therefore completely exempt under the California Public Records Act.

In Washington, D.C., the Metropolitan Police Department has [refused to release any body camera videos](#), claiming it cannot make the necessary redactions. The Reporters Committee has submitted several public record requests for various types of bodycam videos, and has been denied each time. Administrative appeals of those denials have been [upheld](#) by the mayor.

As the use of bodycams expands, journalists and news organizations should be aware of these issues and any legislation that might affect their ability to access these video records. But police departments, reporters, and the public can also work together to find creative solutions to the issues raised by these videos.

Despite the shortcomings of Seattle’s current approach, they have made an unparalleled effort to engage the community on these issues. The police department [recently hosted](#) a public “hackathon” to gather ideas on how to best redact video in order to comply with records requests. And since then they have been developing tools that will automatically redact videos, at least to some extent. In a blog post, the department said that they will [freely share](#) the resulting software with other police departments as it is refined.

Bringing communities together to work towards transparency is good for law enforcement, good for reporters, and good for the public – the ultimate intended beneficiary of this new technology.

*This is part of a series of articles written for the Poynter Institute by Reporters Committee staff members, and first appeared on [poynter.org](http://poynter.org) on April 15.*