



SUMMER 2015

The News Media AND THE LAW

THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS

Recovering fees in FOIA cases

**A D.C. Circuit opinion expands the
class of requesters who can recover
fees for suing for access to records.**

The News Media & The Law

Summer 2015

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Shall I compare thee to a newspaper?

DC Circuit provides expansive view of who qualifies as news media in the digital age and when they deserve fee waivers under FOIA

By Adam Marshall

Last week the D.C. Circuit [released its opinion](#) in *Cause of Action v. FTC*, a Freedom of Information Act case that will have far-reaching and beneficial implications for journalists and organizations seeking fee waivers and reductions when making records requests.

The Reporters Committee for Freedom of the Press, joined by eight other news media organizations, filed an *amicus* brief in support of the requester and participated in oral arguments before the court.

At issue in the case was the Federal Trade Commission's determination that Cause of Action, a recently formed non-profit organization, did not qualify for either a fee waiver or a fee reduction as a member of the news media for its FOIA requests sent in the weeks and months after its creation.

While the district court agreed with the FTC, the Court of Appeals did not. Its sweeping opinion makes clear that both the government and the court below failed to take into account statutory changes to FOIA and the changing nature of news dissemination in the digital age.

Although the full opinion is rather lengthy, there are two major aspects that journalists and news organizations should know.

Who is entitled to a public interest fee waiver under FOIA?

The court first clarified the standards that apply when a FOIA requester seeks a public interest fee waiver. If a requester is granted such a waiver then the agency cannot charge them any fees for processing the request or providing the records.

To qualify for such a fee waiver under FOIA, the requested information must:



(1) shed light on the operations or activities of the government; (2) be likely to contribute significantly to public understanding of those operations or activities; and (3) not be primarily in the commercial interest of the requester.

The FTC, like every other federal agency, promulgates regulations interpreting statutes it administers, including FOIA. These regulations are designed to provide additional guidance and procedural rules for processing FOIA requests. However, unlike other statutes agencies are charged with implementing, courts do not give any deference to agency regulations that interpret FOIA.

In COA's case, the FTC regulations in place at the time stated that in order to be granted a fee waiver, the requested documents had to "increase understanding of the public *at large*". This requirement was rejected by the Court of Appeals, noting it imposed a higher burden than the statute specified.

Instead, the Court said that a proper application of the "public understanding" requirement requires an examination of two different dimensions. First, agencies and courts should look to "the degree to which 'understanding' of government activities will be advanced by seeing the information." Second, they must examine the "extent of the 'public' that the information is likely to reach."

On the second dimension, the Court stated that FOIA *does not* require a requester to reach a "wide audience." Rather, the proper question "is whether the requester will disseminate the disclosed records to a reasonably broad audience of persons interested in the subject."

In determining whether a requester has the capacity to disseminate such information, the court stated that there is no requirement, as the district court held, that the requester identify multiple publishing avenues to qualify for a fee waiver. Indeed, recognizing the importance of online publishing, it suggested that merely having a website is a sufficient means of dissemination.

"There is nothing in the statute that specifies the number of outlets a requester must have, and surely a newspaper is not disqualified if it forsakes newsprint for (or never had anything but) a website," the court held.

The court's clarifications are a welcome confirmation that fee waivers should be liberally awarded by agencies to persons and organizations that disseminate such information to the public. Its opinion suggests that as long as the requester seeks information that will significantly help an interested segment of the public understand what the government is doing, and that information is somehow disseminated online, the requester should be given a fee waiver as long as the request is not primarily in their commercial interest.

Who qualifies as a representative of the news media under FOIA?

The second issue addressed by the court concerns the standard that a requester must meet in order to qualify as a "representative of the news media" for fee purposes under FOIA.

If a requester is categorized as a representative of the news media, only duplication fees may be charged by an agency when responding to a FOIA request.

That category, and the corresponding fee provisions, were added to FOIA by Congress in 1986. But Congress did not specify exactly who would qualify as a member of the news media, instead leaving the definition of the term to the Office of Management and Budget.

In 1987, OMB promulgated guidelines that defined a “representative of the news media” as, in part, “any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public.”

In 2007, Congress further amended FOIA to include an express definition of “representative of the news media.” In so doing, it adopted language from an earlier, influential D.C. Circuit opinion that considered whether the National Security Archives, a Washington D.C.-based organization, qualified for that fee categorization.

The 2007 amendments, which remain in force today, state that a “representative of the news media” is defined as “any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.”

They also state that “as methods of news delivery evolve (for example, the adoption of the electronic dissemination of newspapers through telecommunications services), such alternative media shall be considered to be news-media entities.”

OMB has not updated its guidelines to reflect the 2007 amendments to FOIA, a phenomenon that is seen throughout the federal government. A [study conducted by the National Security Archives](#) in 2014 found that nearly half of all federal agencies had not updated their FOIA regulations to comply with the 2007 statutory changes.

The FTC regulations at the time COA's FOIA requests were made still included the "organized and operated" language from OMB. Fortunately, the court's opinion in *COA v. FTC* confirmed that this requirement is defunct and should have no impact on how FOIA requesters are treated. This aspect of the opinion has significant implications for many other federal agencies that have yet to update their regulations and still rely on the old OMB guidelines.

Based on the 2007 Congressional amendments, the D.C. Circuit laid out the five elements of the criteria that a requester must satisfy in order to qualify as a representative of the news media. It must: (1) gather information of potential interest (2) to a segment of the public; (3) use its editorial skills to turn the raw materials into a distinct work; and (4) distribute that work (5) to an audience.

Before diving into the specific requirements, however, the court noted that these criteria apply only to the *requester*, *not* the nature of the materials that are requested. For example, the court said, a newspaper reporter “is a representative of the news

media regardless of how much interest there is in the story for which he or she is requesting information.”

The court’s reasoning suggests that once an individual or organization has established itself as a representative of the news media it should *almost always* be accorded such status. In other words, if a requester satisfies the five criteria listed above “as a general matter, it does not matter whether any of the individual FOIA requests does so.”

With regard to the third requirement — that the requester uses its editorial skills to turn the raw materials into a district work — the court noted that this can happen in several different ways that need not necessarily amount to a traditional news article. For example, the requester can issue a “substantive press release” on the records it obtained. They can also provide editorial comment “to other outlets about documents it obtains under FOIA.”

In satisfying this requirement there is no need for the requester to use information from a range of sources. Indeed, the court noted that “nothing in principle prevents a journalist from producing ‘distinct work’ that is based exclusively on documents obtained through FOIA.”

On the fourth and fifth requirements, the court offered some of its most expansive views (and its strongest rebukes to the government) on what constitutes distributing work to an audience in the digital age.

Recognizing the changes in technology and information distribution since its last consideration of these questions, the court held that “posting content to a public website can qualify as a means of distributing it — notwithstanding that readers have to affirmatively access the content, rather than have it delivered to their doorsteps or beamed into their homes unbidden.”

In other words, the meaning of “distribute” does not mean that a representative of the news media has to affirmatively push stories to their audience. As long as they have a means for the public to access the information, including Internet-based access options, that should suffice.

This comports with arguments made by the Reporters Committee, which pointed out that traditional newspapers remain representatives of the news media even when publishing something only on their websites.

In terms of how big the audience has to be that accesses the information, the court simply stated that there must be *an* audience, but “beyond requiring that a person or entity have readers (or listeners or viewers), the statute does not specify what size the audience must be.”

Under the standard set out by the court, new organizations can qualify as a representative of the news media even if they don’t have an established track record of publication. Although a “bare statement of intent” to publish is not enough to get a media categorization, it is sufficient if the person or organization has “firm plans”

to distribute the work to an audience.

This part of the opinion has two important implications for those seeking to establish themselves as a representative of the news media for fee purposes under FOIA. For organizations “with an extensive record” of dissemination, there need only be the barest assertion of their plans for the records. In fact it is possible, as the Court stated, that an established outlet need not disclose *any* plans for the information.

On the other hand, a nascent journalist or organization with no track record should only have to set out concrete plans to disseminate the information in order to qualify. Presumably organizations somewhere in the middle could satisfy the requirements by including examples of both their past activities and future plans.

Cheaper access to public information in the digital age

Because agencies are slow to update their regulations and internal practices, requesters may want to consider citing *Cause of Action v. FTC* when making requests and administrative appeals. With this guidance it is clear that new and emerging organizations, as well as those that primarily exist online, have a much lower burden when seeking recognition as a member of the news media and fee waivers for FOIA requests.

Obtaining government officials' business email should be easier

By Kristin Bergman

This is part of a series of articles written for the Poynter Institute by Reporters Committee attorneys, and first appeared on poynter.org on July 31.

This Spring, Democratic presidential candidate Hillary Clinton came under fire when the State Department [disclosed](#) her exclusive use of a personal email server during her time as Secretary of State.

This raised major [transparency concerns](#) because she used a private account and her email correspondence

was not available for production when the State Department received Freedom of Information Act [requests](#). The State Department is now in the process of reviewing and [producing](#) the roughly 55,000 pages of email Clinton and her staff determined should be turned over to it – and those may even be [incomplete](#).

Clinton is [not alone](#) in using a personal email address for public business: in a survey of 412 high-level government employees conducted by Atlantic Media's Government Executive Media Group, one-third of the employees admitted they use their private email account for government business at least sometimes.

At the federal level, relatively recent regulations and legislation control government employees' obligations to preserve email in personal accounts. In 2009, the National Archives and Records Administration (NARA) issued [revised regulations](#) on records management, requiring that agencies make sure federal records sent or received on an employee's personal email account are preserved.

After additional bulletins and directives issued by the President, NARA, and the OMB, the [Presidential and Federal Records Act Amendments of 2014](#) tightened this expectation; now, use of personal email accounts for public business is prohibited unless messages are transferred to the government's system within 20 days. If followed, this requirement, combined with the federal government's traditional seven-year retention policy, will help preserve *all* government officials' work-



AP Photo

Hillary Clinton has come under fire for keeping email on a private server.

related email, thereby preventing individuals using private accounts to avoid FOIA and public scrutiny.

The relationship between email management and freedom of information can be even more complicated at the state level, where open records laws rarely specify email retention requirements, and other laws or regulations often give too much discretion to individual employees. Without clear email retention and management policies that address both official and personal accounts, state public access laws can be effectively nullified with respect to these records.

One recent case in Pennsylvania – *PG Publishing v. Governor’s Office of Administration* – [illustrates](#) how state policies that allow for employee discretion to determine what email should be retained undermine open records statutes.

Under Pennsylvania’s [Right-to-Know Law](#) (RTKL), the *Pittsburgh Post-Gazette* challenged the email retention policy established by the Governor’s Office of Administration. Under this policy, each agency employee is afforded discretion to determine whether an email he or she sends or receives constitutes a “public record” that needs to be preserved or a “transitory” non-record that may be deleted. Individual government employees are tasked with making such determinations based on the state records manual and some training, and there is little to no oversight. In addition, just five days after an individual employee determines that an email need not be saved as a public record and deletes it, the email is permanently deleted from the agency server and cannot be recovered. As a result of this system, the *Post-Gazette* received only five email records in response to a RTKL request it submitted. Earlier this month, a panel of Commonwealth Court judges [dismissed](#) the suit, upholding this policy and practice, a decision the paper intends to fight on appeal.

The *Post-Gazette* lawsuit demonstrates how the combination of a short record retention period and employee discretion in recordkeeping threatens the efficacy of state open records laws and their goal of government transparency. With little to no oversight, an individual employee has the ability to hand select which records may reach the public. Such discretion may be easily manipulated to hide information from the public. News organizations and journalists can draw attention to this problem and place pressure on government employees to be forthcoming by recognizing public record use in stories, mentioning when information came from a public records request as well as when emails could not be obtained despite submitted requests.

Pennsylvania offers just one example of how troublesome email management and retention policies may thwart access to public records. Other states with policies and practices that can obstruct public access to government email include, but are not limited to:

- New York: While Governor Cuomo’s 90-day retention policy and

accompanying records purge have received much [criticism](#), one of the most concerning aspects of New York's email management regime is its [guidelines](#) for implementation. With over 100 pages of complex rules explaining what email must be retained, it is hard to believe the policy has been implemented effectively. In addition, while there are exceptions that can "pause" the deletion window and trigger record retention beyond 90 days – for example, for records relating to filed freedom of information requests or pending litigation – these exceptions are only useful if the subject of the request or lawsuit comes to light within the three month time period.

- Maryland: Like Pennsylvania, Maryland's email retention [guidelines](#) task government employees with determining whether their email constitutes a public record, and if so, whether they have permanent value. Personal and non-record email may be immediately deleted, while permanent email are transferred to the archives. Non-permanent email with "temporary importance" is subject to various retention schedules. In addition, some employees [use](#) personal accounts and individually determine which correspondence is government-related and thus should be retained. As many retention schedules only require records to be retained for 30 days before deletion, Maryland's [Public Information Act](#) effectively allows for a non-permanent email exemption by permitting custodians to take 30 days to reply to requests.
- Florida: Though email retention periods in Florida [vary](#) greatly based on the content and nature of the record, Governor Rick Scott introduced [Project Sunburst](#) in 2012 for the stated purpose of increasing transparency in his office and other executive branch agencies. This unique program gives the public digital [access](#) to the Governor's email, as well as those of the executive staff, within one week of receipt or creation. Though there are some exemptions, this material may be requested through traditional public records requests. [In practice](#), however, the Governor began to use an unofficial account (and failed to forward messages to his public government one) and correspondence from some others in his office is unavailable.

Public record laws can be effective news gathering tools and help increase government accountability, but only when government records are properly preserved and maintained. When employees have too much discretion over their own email accounts and determine what to delete and what to retain, and when retention policies include short windows for preservation, these public records laws are severely undermined.

Do not let this inhibit freedom information requests, though. If anything, file early and file frequently. While requests may not be answered with as much substantive material as may have been sought or anticipated, making the inquiry and showing an interest in these materials is still important. Ultimately, sunshine laws

are only as strong as the underlying records management policies and practices, and spreading awareness helps to fight this limitation.

Closed Doors

Finding other entrances in pursuit of access

By John Christie

Usually, lobbyists stay as far away as possible from investigative reporters. But this lobbyist was so fed up, he made an exception. His problem was also unexpected for a lobbyist: being denied access at the Maine Statehouse.

His job was to look out for the interests of Maine's municipal governments, especially during budget season when the state legislature decides, among other things, how much aid to send to cities and towns.

"I think you ought to look into this," he said. "Someone has to call them on this."

It's not a reporter's job to help lobbyists do their jobs, but this lobbyist thought he had discovered a problem that went beyond his interests: no one – lobbyists, reporters and, especially, the public – was able to get into key meetings of the appropriations committee. That's the committee whose name is usually preceded on first reference by the journalistic cliché, "all powerful."

And if he was right, it would be the kind of story I like to do – exposing the subversion of the democratic process.

The lobbyist explained that the committee would post the time and place of its meetings, as required by the state's open meeting law, but then quickly find a way to close the meeting. One way was to announce the committee was "going off mic,"



Photo courtesy of Pine Tree Watchdog

John Christie

meaning it would go into a private room where there was no microphone to pick up the discussion, which otherwise would be transmitted on the legislature's public access channel. The second way was to break up into party caucuses, a scrum of Democrats or Republicans in the hallway, the corner of the meeting room or behind a closed door in a separate room.

My layman's reading of the state's Freedom of Access Act (FOAA), aka the open meeting law, suggested this might be illegal. The law states, "It is the intent of the Legislature ... that their deliberations be conducted openly." Although there are some exceptions -- such as contract negotiations -- allowing for closed meetings, the exceptions section of the law specially states that it "does not apply to discussion of a budget or budget proposals."

The lobbyist seemed to have a point. I decided to find out for certain by heading to the next posted meeting of the appropriations committee to see for myself if this was happening, and, if it was, to challenge the committee members on their reasoning for closing the meeting to the public. But decades of experience covering local and state government taught me to never go unarmed to a potential secret meeting -- my weapon of choice was the 29-page Subchapter 1 of Chapter 13, the Maine Freedom of Access Act, as amended in 2011.

On May 28, the printed calendar posted outside the chamber said the meeting of the Appropriations and Financial Affairs Committee would start at 1 p.m., but the more up-to-date electronic calendar in the lobby said the meeting would begin at 1:30.

At 1 and at 1:30 the chamber was empty except for a gaggle of middle school students who were getting a lecture on how their state government works. Just after 1:30, they filed out, but no committee members filed in.

The government the students had come to see in action wasn't late for the meeting. Its key members were, in fact, meeting — just not where the civics class or any member of the public could see them.

Instead, appropriations committee members were bypassing the public chamber in which their meetings are traditionally held and going through a private door that leads to a suite of smaller rooms.

One member, state Sen. Roger Katz, emerged from the back rooms that day and explained that a select subgroup of the committee was meeting there: He called it a "chairs and leads" meeting. In statehouse-speak, that's a bipartisan subcommittee made of the two chairpersons of a committee and other leading members.

I told him I'd like to cover the meeting, and I intended to go through the door where he had come out. He told me that door was locked, inaccessible except for legislators and staff. But I found another way in: In the back of the committee's public meeting room there is a door marked "Legislators and Staff Only." That door is not locked. I went through it to the hallway and heard voices coming from

one of the rooms.

I knocked on the door and a voice said, “Come in.”

Gathered around a desk were five of the 13 members of the appropriations committee — “chairs and leads.”

I quoted portions of the Freedom of Access Act to the legislators, including one that states the public’s business, which includes deliberation by committees of more than three, is to “be conducted openly.”

I asked them how their private meeting was legal given the wording of the FOAA.

“You wouldn’t negotiate a labor contract in public, would you,” replied one of the committee “leads,” Rep. Tom Winsor.

I asked him if they were talking about a labor contract, not the state budget, which was the posted topic of the meeting.

“No, we’re not,” he said, “but this stuff is sensitive, too.”

The House chair of the committee, Rep. Peggy Rotundo, said the committee members were not talking about the substance of the budget, but the “process” the committee would follow to finish its work.

She said the reason the chairs and leads meet in private is because “sometimes it’s difficult to get people to talk about the process publicly.”

She invited me to stay at the meeting and said that sometimes reporters have sat in on these meetings when they are aware of them, but she said the meeting would remain in the private back room where the public could not attend.

I declined the offer because the point was not whether reporters were being denied access to the meeting. We do not have — nor should we have — any privilege to attend a private meeting the law says should be public. Unless the committee wanted to move back to the public meeting room, I was not going to accept that invitation.

So, I did what reporter’s are supposed to do — left the meeting, interviewed experts on FOAA and [wrote a story using that example](#) to expose a pattern of closed meetings in this year’s session that appeared to violate the spirit and perhaps the letter of the open meeting law.

From my earlier days as a newspaper reporter, I was trained in these laws, often by the newspaper’s lawyers, who would put on a once-a-year seminar on public access, records and libel. We would be given a card summarizing the open meeting law to put in our wallets and trained to stand up any time a city council, for example, began the process of going into executive session. We demanded that the council cite a specific —and legal — reason for a private session, that it take a roll call vote to go into the executive session and take any further votes only after it came back into a public session — all typical requirements of these laws.

That was in the early 1970s and a lot — nearly everything — has changed in our

profession since then. But standing up for the public's right to know, even making ourselves part of the story — something as a rule we shouldn't do — may be our best course of action when they try to close the door in our face.

You may even have to do what I did — find another door. And then go through it.

John Christie is the co-founder and editor-in-chief of the Maine Center for Public Interest Reporting, pinetreewatchdog.org.

Thwarting Walker's wishes

Gov. Scott Walker's attempt to gut Wisconsin's open-records law fails

By Kelly Swanson

Wisconsin Governor Scott Walker again found himself on the opposite side of transparency advocates after [admitting](#) to an attempt to sneak in language to a late night [omnibus motion](#) to substantially limit the Wisconsin open-records law.

As many prepared to celebrate the upcoming 4th of July holiday, Walker and the Republican members of the Joint Finance Committee [voted](#) to include a measure that would exempt nearly all communications between elected officials from the public record and close the door on transparency between citizens and the government.

“They did this right before independence day, which was so undemocratic,” said Christa Westerberg, of the [Wisconsin Freedom of Information Council](#). “All the stuff that gets dumped into the budget at the last minute doesn’t go through the normal process for legislation,” she added.

Despite a previously published [draft](#) of the budget bill and several open discussions both with no inclusion of changes to the open-records law, the Joint Finance Committee passed the motion in a 12-4 party-line vote in a session closed to the public.

“I think they were hoping that nobody would notice because of the timing,” said



AP Photo

Gov. Walker's attempts to significantly limit the open records act failed.

Westerberg, who said she was surprised to see such a drastic policy change take form at 9pm the night before a federal holiday.

The draft included language that would have redefined open records under Wisconsin Law. Specifically, it would have created a “deliberative materials” exemption which would exclude, “opinions, analyses, briefings, background information, recommendations, suggestions, drafts, correspondence about drafts, and notes,” from the public record.

Despite the rushed timing and festivities of the holiday weekend, roars of criticism came from both Republicans and Democrats.

"Transparency is the cornerstone of democracy and the provisions in the Budget Bill limiting access to public records move Wisconsin in the wrong direction," Republican Attorney General Brad Schimel said in a statement. Schimel is the lead government official responsible for open records issues in Wisconsin.

With criticism mounting, Walker, joined by State Senate Majority Leader Scott Fitzgerald (R), Assembly Speaker Robin Vos (R) and the co-chairs of the state's joint budget committee, reversed course and released a [statement](#) removing their proposal entirely.

And despite the initial proposal being described by Westerberg as “obstructing transparency in an extremely broad way,” the joint [statement](#) released by Walker, Fitzgerald, and Vos stated that they “never intended to inhibit transparency in government in any way.”

However, while Walker removed the changes to the open-records law from the budget, he still refuses to release records that he deems to be part of his office's internal deliberations — exact what he was attempting to sneak into the budget.

“Walker has been acting as if this deliberative process exemption already exists in Wisconsin law. At least as far back as May, his office has been denying public records requests based on this claim ‘deliberative process’ exemption,” Brendan Fischer, general counsel for the [Center for Media and Democracy](#) said.

“Clearly the deliberative process issue has been on the governor's radar and his administration's radar for the past couple of months,” Westerberg added. “It seems to me that there is a cause and effect relationship with them trying to insert this deliberative process privilege in litigation as a defense to an open records lawsuit and then putting it into the budget.”

The lawsuit Westerberg is referring to is [Center for Media and Democracy v. Walker](#). In February, Walker denied the release of records connected to his proposal to delete the Wisconsin Idea from state law.

[The Wisconsin Idea](#), which was created in 1904, is the mission statement for the University of Wisconsin, which states that the university system should strive to “extend knowledge and its application beyond the boundaries of its campuses and to serve and stimulate society.”

“The Wisconsin Idea is something that is a legacy of the progressive era in Wisconsin in respect to the idea that the university system is supposed to play a role in the state outside of the walls of the university, so that’s everything from helping the agriculture industry to influencing policy,” Fischer explains.

Once public documents revealed that Walker’s staff was responsible for striking out several lines about public service in the state budget’s description of the public university and replacing them with mentions of economic development, criticism and questions for his motives behind the changes ensued.

When asked why he believed Walker proposed the changes to the Wisconsin Idea, Fischer said, “That’s what we would like to know and that’s what a lot of people in Wisconsin would like to know and that’s why we [The Center for Media and Democracy] filed the lawsuit.”

“Generally speaking I have suspicions as to what their motives might have been,” Fischer said. “One would be working the university away from having a public role in the state’s broader political infrastructure. It appears that they do not like the idea of an academic public institution having an influence on public policy.”

And again, after a proposed policy change by Walker was [criticized](#) he removed the changes and claimed that he never intended to meaningfully change the Wisconsin Idea.

“The Wisconsin Idea will continue to thrive. The final version of budget will fix drafting error -- Mission statement will include WI Idea,” Walker [posted on his twitter](#) account on Feb. 4, 2015, calling the changes to the Wisconsin Idea a “drafting error”.

Fischer pointed out the similarities in the Wisconsin Idea case and the controversy over the Fourth of July weekend with the attempts to change the open-records law. He said both instances point to Walker’s overall rocky relationship with the idea of government transparency.

“That has certainly been a pattern throughout his career. Looking back at this — the attempt of the elimination of the Wisconsin Idea — part of the reason that that resulted in such a political firestorm was because the strong Wisconsin public records law revealed that Walker was misleading in his public statements about the records.”

Although Walker actually admitted this time to drafting the changes to the open-records law, the fight over its future is not over. The joint [statement](#) removing the changes to the public records law in the budget left the door open for future changes.

“In order to allow for further debate on this issue outside of budget process, the Legislature will form a Legislative Council committee to more appropriately study it and allow for public discussion and input,” the statement concluded.

Openness advocates are not happy with that statement.

“Nobody is calling for changes to the public records law except elected officials who want their operations secret,” Fischer said. “I think it is very concerning that elected officials are trying to narrow public access to documents which the public has a right to see.”

Westerberg said that Wisconsin politicians want to tighten the public records laws in order to protect political constituents. However, she does not believe that changes are necessary in a records law that has remained unchanged since 1981.

“We have survived in this state for many years without this exemption and people have been able to figure it out, so that [deliberative materials exemption] just seems silly to me and it just protects finding out what the real reasons for the changes to these policies might be,” Westerberg said.

Both Fischer and Westerberg hoped the media would continue their coverage of the issue in order to continue to protect the Wisconsin open-records law.

“We [Wisconsin] have a strong tradition of openness and transparency and we shouldn’t change that just because the governor is running for president,” Fischer said.

Charges against reporters in Ferguson highlight continuing problems

By Gregg Leslie

This article first appeared on the blog of the [American Constitution Society](#)

The unrest in Ferguson, Mo., concerns civil rights issues of the most fundamental nature. And the concerns of journalists who get arrested covering that unrest seem to pale in comparison to the issues underlying the protests. But when we see things like [this week's](#)

[decision to bring charges](#) against journalists who were arrested last year, it's important to remember that the right to cover these controversies is as important to the public as the right to protest in the first place. Without news accounts – be they by established “mainstream” media or independent bloggers – the controversy could not be fully understood by those who want to know what happened and what needs to change.

The decision to prosecute – which apparently affects nearly everyone arrested last summer, not just the journalists whose cases have been publicized this week – seems odd, and tied more to the looming statute of limitations deadline than the renewed protests there. It also seems that prosecutors may be pursuing this only because the county still fears that those arrested for exercising their rights will bring civil rights suits; an offer to drop criminal charges can make those suits settle quickly.

Each arrest has a unique set of facts, but many of the journalists arrested last year were simply gathering news. The two reporters whose arrests got much of the attention, The Washington Post's Wesley Lowery and the Huffington Post's Ryan Reilly, weren't even involved in a contentious encounter. They were instead sitting in a McDonald's, recharging their phones. The reporters were ordered to leave a public restaurant, and while they were leaving, they asked questions and videotaped the officers. This is perfectly lawful and appropriate behavior; they weren't refusing to leave, just daring to ask questions while they were being forced out of a public place. Their newsgathering does not justify the officers' decision to arrest them for



AP Photo/The Washington Post, Wesley Lowery
A police officer confronts Wesley Lowery in Ferguson, Mo., in 2014.

“disobeying” an order, and certainly cannot justify a trespassing charge in a restaurant open to the public.

After these two reporters were released, “it seemed reasonable to assume that police had figured out how foolish they would be to come down on two legitimate journalists peacefully covering a major news story,” as [The Washington Post recently said in an editorial](#). But these charges now show that Ferguson officials have no qualms about their efforts to contain a controversial story by interfering with those who would report on it.

The other reporters who were arrested during the summer were likewise only covering an important story. There have been no credible allegations, much less documented proof, that they were interfering with police, disturbing the peace, failing to obey lawful orders, or in any way contributing to the chaos on the streets at that time. Even in the few instances where a reporter was on the wrong side of a police line or did not move off of a sidewalk quickly enough, there needs to be enough flexibility by police and prosecutors to recognize that those who are trying to inform the public are not the source of the problem, and should not be restricted in this way. Charging reporters with crimes for covering a story sends a clear signal that police do not want their actions documented, and thus makes the situation worse.

Most importantly, while police have to make snap decisions in the heat of the moment, prosecutors who later determine whether charges will be brought do not have the same handicap. With a full year to review the situation – a year in which the actions of Ferguson officials have been exposed as highly questionable in other ways – and decide what actions constitute a crime, prosecutors have no excuse for making poor judgment calls that do not respect First Amendment rights.

Last year, after hearing that reporters were being arrested in Ferguson, then-U.S. Attorney General Eric Holder, Jr. [said in a statement](#) that “journalists must not be harassed or prevented from covering a story that needs to be told.” That statement should not have to be made. But in Ferguson, it needs to be made again.

Taking the Fifth to protect a source

Court upholds a reporter's Fifth Amendment right when a criminal act is alleged

By Kimberly Chow

A former *Detroit Free Press* reporter has finally won an eleven-year fight with a former federal prosecutor over the identity of an anonymous source, and his use of the Fifth Amendment to protect his newsgathering may have repercussions for other journalists protecting their confidential sources.

The U.S. Court of Appeals for the Sixth Circuit [ruled](#) that David Ashenfelter can claim Fifth Amendment protection against having to reveal the name of an anonymous source. Former assistant U.S. Attorney Richard Convertino had demanded the identity of Ashenfelter's source for a 2004 article as part of a Privacy Act suit against the Department of Justice.

Convertino had been the subject of an internal inquiry and criminal prosecution for obstruction of justice as part of a [controversial and contentious terrorism investigation](#) he led of a reputed terrorist "sleeper cell" in Detroit, which was the first terrorism trial conducted after the acts of September 11. Convertino was acquitted of the charges against him, and he claimed that the inquiry and prosecution, and the leak to Ashenfelter that started them, were made by Justice officials to retaliate for his criticism of the department's prosecution strategy against terrorists.

Convertino served subpoenas both on Ashenfelter and Gannett, the owner of the *Detroit Free Press*, demanding the identity of the source for his 2004 article on the



AP Photo

Convertino, shown here in 2005, fought for years to force reporter Richard Ashenfelter to reveal his sources on a Justice Department investigation.

internal investigation of Convertino. When a federal district court judge ruled in 2008 that Ashenfelter could not use the First Amendment to avoid testifying, the reporter took his cue from Convertino's allegations that Ashenfelter, in refusing to give up his sources, was aiding the crime committed by those who illegally leaked the information in the first place. Citing that threat, Ashenfelter invoked his Fifth Amendment right against making self-incriminating statements.

The district court held in February 2010 that the Fifth Amendment protected Ashenfelter. Convertino unsuccessfully objected to that holding, and then renewed his objection in 2013, after then-Attorney General Eric Holder made a statement in an unrelated matter that, as long as he was attorney general, "no reporter who is doing his job is going to go to jail." Convertino argued that this statement showed that Ashenfelter would not be prosecuted for his alleged role in violating the Privacy Act, and thus could not use the Fifth Amendment defense. The judge disagreed, and Convertino later appealed.

The Sixth Circuit upheld the Fifth Amendment argument, finding that if Convertino proved certain facts in his suit against the Justice Department, including that federal officials illegally gave Ashenfelter confidential documents, the reporter would be implicated in the commission of crimes.

The Fifth Amendment does not turn on the probability or likelihood of prosecution but on the possibility, the court found.

"The former Attorney General's statement did not constitute a grant of immunity to journalists, and his assurances might not outlast his own, now completed, tenure," the Sixth Circuit panel added. "Even if Holder's statement reflected a policy internally enforced by the DOJ, Ashenfelter could not invoke that policy to bar a criminal prosecution."

Herschel Fink, the attorney for the Detroit Free Press, said he thought the language in the Sixth Circuit opinion established strong protections for journalists under the Fifth Amendment, a key "weapon in the arsenal of their defenses" when the First Amendment did not protect them from having to testify about confidential sources.

"I think that it really provides an alternate argument of privilege, albeit under the Fifth Amendment, for reporters, particularly those who are involved in governmental leak cases or national security cases," he said.

Unreasonable restriction

A gag order imposed on Reason.com reveals government overreach on Internet speech

By Kimberly Chow

A [subpoena](#) issued to Reason.com in June for the identities of six of its commenters raised eyebrows when it was revealed that the U.S. Attorney's Office followed the subpoena with a highly restrictive [gag order](#) on the news organization.

While no authorization from the Attorney General is required under the Attorney General's media subpoena guidelines when seeking information from the media on public comments and posts on websites, some are questioning whether the media was given enough deference in the matter of the gag order.

The subpoena, issued by the U.S. Attorney's Office for the Southern District of New York on June 2, ordered Reason to turn over identifying



AP Photo/Elizabeth Williams

Threats against U.S. District Judge Katherine B. Forrest by commenters on the Reason.com web site led to a subpoena and a gag order about the investigation.

information for six anonymous commenters who had posted negative comments about the judge who imposed a harsh sentence on Silk Road founder Ross Ulbricht. The subpoena was accompanied by a letter from Assistant U.S. Attorney Niketh Velamoor, requesting that Reason voluntarily refrain from disclosing the existence of the subpoena to any third party. Gayle Sproul, Reason's attorney, informed Velamoor that Reason planned to notify the six commenters of the subpoena so that they would have the opportunity to defend their First Amendment rights to comment. After they had been informed, Velamoor delivered a gag order that forbade Reason from notifying third parties about the subpoena. But since the subpoena had already had a limited release, other news organizations were able to report on its existence, with the result that, on June 19, a judge lifted the gag order.

Under the recently revised Attorney General media subpoena guidelines, found at 28 C.F.R. § 50.10, there is an exception to the requirement that the Attorney General authorize a subpoena to the media when the subpoena seeks “information related to public comments, messages, or postings by readers, viewers, customers, or subscribers, over which the member of the news media does not exercise editorial control prior to publication.”

The Reporters Committee led a coalition of over 50 media organizations in working with the Justice Department to revise its media subpoena guidelines following the controversies in 2013 over the seizure of the Associated Press phone records and a search warrant for a Fox News reporter’s email. Working with Justice throughout 2013 and 2014, the coalition had many of its concerns addressed, and revisions to the guidelines were issued in February 2014 and January 2015. Under the resulting guidelines, there are more reminders to U.S. Attorneys to respect the freedom of the press and think twice before issuing subpoenas to members of the media.

While the third-party subpoena was exempt from the regulations, there are still questions about whether the guidelines should have protected Reason from the gag order.

Sproul, Reason’s attorney and a partner at Levine Sullivan Koch & Schulz, LLP, said she saw the gag order as a violation of the spirit of the guidelines. The initial letter had not required Reason to refrain from disclosure, just asked them to do so voluntarily, and the Assistant U.S. Attorney’s unwillingness to discuss either narrowing the subpoena or allowing disclosure to the targeted parties was especially galling.

“The spirit of the guidelines is that there’s sensitivity to obtaining information from the press and putting pressure on the media,” Sproul said. “In the spirit of all sorts of goodwill, generally speaking, prosecutors, like any other lawyer, will listen to you if you have something to say.”

Sproul pointed out that the fact that the Assistant U.S. Attorney had not sought a non-disclosure order to be delivered simultaneously with the subpoena suggests that it is unlikely that disclosure would significantly harm the investigation or other interests. Since the initial letter technically left the door open for Reason to disclose the subpoena, the magazine was well within its rights to do so before it received the gag order, she said.

The U.S. Attorney’s Office declined an invitation to comment on the case or the decision to seek a gag order.

Paul Alan Levy, an attorney with Public Citizen, said there should be some check on an individual Assistant U.S. Attorney’s ability to simply request and receive a gag order on media organizations. After news of the gag order broke, Levy contacted Velamoor and asked that his office’s application for a gag order be unsealed. After

Velamoor sent him the application, it was apparent that the gag order was granted simply on the basis of the general claim that there was an ongoing criminal investigation, and without a gag order, the targets might flee. There was no requirement of any additional specific showing of need, Levy said, and no internal guidelines preventing gag orders from being abused.

“I think you can impose some level of approval above the assistant U.S. attorney,” Levy said. “Whether it ought to be the U.S. Attorney him or herself, who’s a confirmed appointee, or whether it ought to be someone at a higher level in the Justice Department, that seems to me to make sense.”

These safeguards are necessary because of “the important value being contravened by the entrance of such a gag order,” he said.

And while some members of the news media may not see important interest at stake in shielding anonymous commenters from a legitimate investigation, being ordered to stay silent is a much more serious concern.