

The News Media AND THE LAW

PUBLISHED BY THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS

WINTER 2013



Disclosure of gun
permits leads to
backlash on
access

The News Media & The Law

Winter 2013

CONTENTS

EDITORIAL

Bulk data - whether gun records or anything else - must remain accessible

COVER STORY

In wake of Journal News publishing gun permit holder maps, nation sees push to limit access to gun records

Already, less than a dozen states make gun permit data public

FREEDOM OF INFORMATION

Chart: Gun permit data accessibility in all 50 states

Reporting on gun permit data

Governments continue to come up with new ways to prevent access to records

How FOIA treats personal email messages used to conduct official business

How I got the story: Judy Walton

Times Free Press reporter uses records in investigation of drug task force, district attorney; prompts state investigation

NEWSGATHERING

Could American press ever be subject to a stateside equivalent of the Leveson Inquiry?

REPORTER'S PRIVILEGE

Obama administration plugs up leaks

Kiriakou is first CIA agent jailed for speaking to press

The six federal employees charged under the Espionage Act

Deciding when to publish

Diverting the avalanche of leaks: a (temporary) win for responsible news coverage

REPORTER'S PRIVILEGE

"Central Park Five" subpoena quashed after filmmakers prove their independence

Ken Burns subpoena case provides perspective on how to interpret troubling Chevron case

LIBEL

Hawaii follows in California's footsteps in proposing new anti-paparazzi law

Rocker Steven Tyler leads charge

SECRET COURTS

[For journalists, STOCK Act could lead down troubling path](#)

[Meet the Reporters Committee's new executive director: Bruce Brown](#)

Organization to begin litigation, pursue technology partnerships; magazine to move to tablet format

[Asked & Answered](#)

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

["Open & Shut"](#)

A collection of notable quotations

[Sources and Citations](#)

Published by
The Reporters Committee for
Freedom of the Press

Editors Bruce D. Brown, Gregg P. Leslie

Managing Editor Nicole Lozare

Contributing Editor Mark Caramanica

Contributors Lilly Chapa, Jack Komperda, Aaron Mackey, Rob Tricchinelli

Administration Lois Lloyd, Michele McMahon

Steering Committee

J. Scott Applewhite, The Associated Press

Wolf Blitzer, CNN

David Boardman, Seattle Times

Chip Bok, Creators Syndicate

Erika Bolstad, McClatchy Newspapers

Michael Duffy, Time

Richard S. Dunham, Houston Chronicle

Ashlea Ebeling, Forbes Media

Fred Graham, InSession

John C. Henry, Freelance
Nat Hentoff, Universal Uclick
Dahlia Lithwick, Slate
Jane Mayer, The New Yorker
John McKinnon, The Wall Street Journal
Tony Mauro, National Law Journal
Doyle McManus, The Los Angeles Times
Andrea Mitchell, NBC News
Maggie Mulvihill, New England Center
for Investigative Reporting
Bill Nichols, Politico
Sandra Peddie, Newsday
Bob Schieffer, CBS News
Eric Schmitt, The New York Times
Alicia Shepard, Freelance
Margaret Low Smith, NPR
Paul Steiger, ProPublica
Pierre Thomas, ABC News
Saundra Torrey, USA Today
Judy Woodruff, PBS/The News Hour

*Affiliations appear for purposes of identification.
The Reporters Committee would like to
thank The Associated Press for permission
to use photos from its files.*

© 2013 by the Reporters Committee for Freedom
of the Press. Published four times a year.
Price: \$7.50 per issue. Address correspondence to:
The News Media and The Law, 1101 Wilson Blvd.,
Suite 1100, Arlington, VA 22209
Telephone: (703) 807-2100
Internet: www.rcfp.org, E-mail: magazine@rcfp.org

ISSN: 0149-0737

Bulk data - whether gun records or anything else - must remain accessible

Every time there is a mass shooting, news quickly centers around efforts to regulate guns. But regardless of how the discussion about this very loaded political question goes, it's always access to gun information that pays the price.

As our cover story explores, the shooting of young children in Newtown, Conn., led a newspaper in New York to publish information from the state's gun permit records. Not just some information, but all of the details, down to the addresses of those with guns in their homes.

The backlash was incredible, and will set back public access to important information for a long time. At least 11 states have undertaken efforts to roll back access to gun permit data.

And the most troubling part is that the sentiment that led to closure here is the same one we see time and time again, as legislators decide that "personal" information should be categorically exempt from disclosure, regardless of the fact that this data represents the documentation of exactly what our governments are doing and for whom.

When we let this data be closed, the end result is that governments granting certain privileges to individuals in secret, which runs counter to our country's democratic principles. The process of giving out gun permits is a state licensing scheme; it's not only newsworthy, but journalists can keep tabs on whether the system is working and keeping guns out of dangerous individuals' hands.

It should go without saying that journalists who want to report on particular controversies often need access to government records to tell the full story. But there is also a good argument for access beyond the individual record, to gain access to complete databases to survey the field in a particular area.

Usually, this bulk data is used in an aggregated fashion to get at a big-picture view of a problem. When reporters use these records to figure out, say, whether home invasions, burglaries, or even accidental shootings are higher or lower in areas with a lot of homeowners who have guns, they can tell us meaningful stories.

But bulk data can also be used to make a wide swath of information directly available to the public. And these "data dumps" of raw information have been controversial not just with the general public, but within the journalism community itself.

Many reporters believe that passing on raw data has nothing to do with journalism; journalists are the ones who are supposed to sort through it and give it

meaning beyond mere numbers. And when the release of the collections of raw data leads to a privacy-inspired backlash, everyone suffers, and the blame is fixed on those who released too much.

Regardless of how you come out on this issue, it is obviously essential to fight for the right of access to bulk data and complete databases. The field of computer-assisted reporting is relatively new when examined within the timeline of how long journalists have been collecting government data to report the news, but the field grows by leaps and bounds every year. Statistical analyses of data let journalists compare their communities to neighboring areas in health care, education, crime and much more, or just report how their citizens are being served by government or affected by trends and other factors.

This means that it is essential for reporters to continue to fight for access to bulk records. Governments will always want to restrict this type of access, either making the requesters justify their need for the information or trying to limit what can be done with it. Courts that release bulk data often require the services that provide access to that data to keep it up to date and to delete or update records that have been changed by the courts. Some of these restrictions make sense, but ultimately, it has to be left up to the journalists who want to make use of public information how they will keep it and relay it to the public.

Anything less is simply a decision to vest the power of public knowledge with the government, which may sometimes be truly looking out for the interests of citizens, but often is simply trying to avoid the accountability that comes with meaningful access to records.

In wake of Journal News publishing gun permit holder maps, nation sees push to limit access to gun records

Already, less than a dozen states make gun permit data public

By Aaron Mackey

Perhaps it was no surprise that in the wake of *The Journal News*' publication of gun permit data in New York, the state legislature moved swiftly to cut off public access to the data.

After all, it happened in Indiana in 2009, Virginia in 2007 and Florida in 2006, when lawmakers sought to make confidential gun permit data that was considered to be a public record - often without much fanfare or controversy - only after media outlets published stories using the data.

Yet in some ways, the reaction to *The Journal News*' maps published soon after the Sandy Hook Elementary shooting in nearby Newtown, Conn., is surprising in that it has sparked a rallying cry in state legislatures across the country to make government records about gun owners private, with at least 10 states introducing bills that would restrict access to the records in some form.

If the measures succeed, only a handful of states would continue to make individual gun permit records public. That would mean the impact of *The Journal News*' decision to publish gun permit holder maps in two New York counties may not be limited to New York's decision to temporarily bar the release of gun permit records and allow its permit holders to opt out of disclosing that they have a permit.

Although laws vary widely, a review of public records laws, gun permitting laws, and pending legislation in all 50 states and the District of Columbia shows that 39 states restrict access to gun permit data records in some form, either barring their release entirely, restricting access to personally identifying information or only permitting the release of aggregate data.

Of the 11 states where such data is public, at least nine have legislation introduced to restrict access to the records. And even in states such as Arkansas and



AP Photo by Mike Groll

Gun rights advocates demonstrate outside the Capitol in Albany, N.Y. on Feb. 28. The group rallied against the recently legislated NY SAFE Act and other measures they say infringe on their constitutional right to bear arms.

Virginia — which already restrict access to some gun permit data — legislation is pending that would prohibit access to nearly all such records.

With states moving toward closing off access, reporters and transparency advocates worry that the move would not only prohibit public oversight of gun licensing within states but may also be part of a growing trend where states make certain records off limits in response to news media reports on public records.

“Our fear is that the more exemptions a given legislative body makes to open records, the greater the chance that the next time, which may have nothing to do with guns, it’ll be that much easier for legislators to say, ‘Well, just close those records too,’” said Mike Cavender, executive director of the Radio Television Digital News Association. “Where does it stop?”

New York quickly cuts off access

Despite the fact that when the *Journal News* published the locations of gun owners in Westchester and Rockland counties New York law required such records to be open to the public, the maps sparked an intense national conversation about individual privacy, the propriety of publishing such a map and whether individuals who lawfully owned guns were being subjected to unwarranted scrutiny.

The publisher of *The Journal News* said that the newspaper wanted to provide readers with information about gun ownership in part so that parents could make informed decisions about their children’s safety.

In response, some individuals targeted the *Journal News*’ publisher, editors and reporters by publishing private details about them online, including home phone numbers, addresses and pictures of their homes. The paper’s employees also received several threats, according to media reports.

In addition to barring the release of gun permit data for 120 days after the bill became law, New York’s gun control law allows individuals to opt out of having their personal information disclosed under the state’s Freedom of Information Law, or FOIL. It also created several new state databases for tracking weapons and ammunition sales, though none are subject to FOIL.

Regarding the opt-out provisions, individuals can withhold their records permanently if they are a police officer, a victim of domestic violence, a juror or witness involved in criminal trials, fear for their life and safety or are worried about “unwarranted harassment.”

After the bill became law, the *Journal News* removed the gun maps from its website. In a statement to readers, publisher Janet Hasson said the paper took the maps down because they had been public for nearly a month and because the legislature had decided to close off access to the records for three months. Hasson did not respond to several inquiries for comment for this story.

“When the moratorium concludes, far fewer permit holders will be identifiable, and those who want to know which houses on their block may have guns will not be

able to get that information,” Hasson wrote. “But we are not deaf to voices who have said that new rules should be set for gun permit data.”

Other states seek to restrict data

Legislative action in response to the *Journal News*’ maps was not limited to New York. According to multiple media reports, as lawmakers from Arkansas, California, Iowa, Maine, Michigan, Mississippi, Montana, North Carolina, Tennessee, Virginia and West Virginia looked at their own public records laws regarding gun permits, they feared that similar maps could be made from their states’ public records.

As a result, lawmakers have introduced legislation in those states that would either cut off access to the records or prevent the release of personally identifying information contained in them.

The efforts to restrict access to gun permits vary by state, with some lawmakers introducing competing bills. For example, one bill in Montana (SB 145) would make gun permit records completely confidential while another (SB 37) would exempt almost all information but require that the name and address of the permit owner be public.

In Mississippi, HB 485 would exempt the names, addresses, telephone numbers and other personally identifying information from the state’s public records laws.

And in Maine, HP 250 is being rushed through the legislature to close off access to gun permit data after the *Bangor Daily News* made a public records request for the records. The request drew heavy backlash from legislators and the governor, with several Republican lawmakers holding a press conference to criticize the newspaper’s request.

In a Feb. 15 editor’s note to readers, Anthony Ronzio, the paper’s director of news and new media, said that the *Daily News* rescinded its request for the information after the criticism and said the paper was disappointed with the reaction to the request. Ronzio declined further comment about the incident, directing inquiries to his prepared statements to readers.

In an earlier note to readers on Feb. 14, Ronzio said the paper did not intend to publish personally identifying information from the data but was instead attempting to compare it with other records as part of an ongoing reporting projects on domestic violence, sexual assault and drug abuse. Ronzio also stated that the paper made clear in its request that it would not be publishing personally identifying data.

“We believe the wholesale publication of permit holder information, as was done recently by a newspaper in New York, is irresponsible,” Ronzio wrote. “We intend to use this information about permits, along with other information sets we are gathering, to analyze possible correlations relevant to our reporting projects.”

The legislative reaction in New York and elsewhere is unfortunate, Cavender said, because it confuses two different issues: the right to access gun permit records

and the editorial decisions by media on how to use public records to report the news.

“That’s a professional discussion for the entire community, and we believe it should be vigorously debated,” he said. “What has happened is that the emotion of the moment has become so intertwined with this, that the response is to just close the records.”

Ken Bunting, executive director of the National Freedom of Information Coalition, said the national reaction to shut off access to gun permit records after the *Journal News*’ maps was akin to when states cut off access to death records in response to the publication of race car driver Dale Earnhardt’s autopsy file.

“That type of reaction is not the best way to make policy on access to government records,” he said.

Both Bunting and Cavender acknowledged that the public availability of gun permit data is controversial, as it intersects with several competing values: the right to access government records, individual privacy and the First and Second Amendments.

But Bunting said all of those concerns should be carefully weighed and discussed before closing off access to gun permit data or any other type of record. When lawmakers legislate quickly, they often overreact to protect certain interests at the cost of others. In this case, it means less access to government activities related to issuing and licensing gun owners.

“Legislators should not be dictating reporting on public affairs,” Bunting said.

Transparency made more difficult

A bill recently introduced in Tennessee (HB 9) highlights the concerns between allowing public access to gun permit data while still addressing the stated privacy concerns of gun owners.

Rep. William Lamberth (R-Cottontown) sponsored the bill that would restrict public access to records after seeing the *Journal News*’ maps in New York and being contacted by constituents concerned about having their addresses published in print and online.

A former prosecutor, Lamberth said he introduced the bill to prevent burglaries and other crimes of opportunity against individuals identified in such records.

“Burglars look for guns, pharmaceuticals and electronics,” he said. “We don’t keep public lists of who owns pharmaceuticals and we don’t keep lists of people who own the latest 60-inch TVs.”

In its initial form, the bill would have categorically restricted access to state gun permit records, though Lambert said he plans to introduce an amendment that would address concerns from news organizations and transparency advocates by allowing individuals to confirm whether a person has a gun permit.

Under the amendment, if a member of the public or media had concerns about

whether a particular individual should be able to carry a concealed weapon, they could ask officials to check the database by providing a government document such as a police report or court record that indicates that the person should not have a permit.

“I want to make sure that the extra check on the system remains in place,” Lamberth said. “My problem is having the private information of citizens who have done nothing more than exercise their Second Amendment rights broadcast over the Internet.”

It is not the first time the debate over public access to gun records has occurred in Tennessee. Bills similar to Lamberth’s were proposed after the *Memphis Commercial Appeal* used state gun permit data in 2008 to show gaps in the time between when people with concealed weapons permits were convicted of serious crimes and when their permits were revoked. Those bills never became law.

Kent Flanagan, executive director of the Tennessee Open Government Coalition, said that gun permit records in the state have been public for more than 30 years, as lawmakers sought to bring transparency to a process that previously was corrupt. Officials had been using their discretion to give out gun permits as political favors rather than issuing the permits based on the applicant’s qualifications.

Flanagan said his organization is against legislation that would restrict access to gun permit records. He views the bills as attempts to further erode the public’s access to all kinds of government information, not just gun data. The result is an overall weakening of the state’s public records law and the ability of citizens to learn about government activities, he said.

“Since the act was made law in 1957, we have added more than 350 exemptions,” Flanagan said.

Although Flanagan said that some of the exemptions, such as for records involving child welfare and security of government facilities, are warranted, subjecting access to public records to the political whims of the day makes it difficult for citizens and the media to know what government is up to.

“If you can’t see what the government is doing, how can you possibly know how they’re doing it?” he said.

Public oversight of guns weakened

Widespread efforts to restrict public access to gun permit records means that the public loses out on learning about trends, accountability gaps and other potential problems in a state’s gun licensing scheme, said Michael Luo, an investigative reporter with *The New York Times* who has used such records in his past reporting.

In 2011, Luo compared gun permit data in North Carolina with criminal records to show that individuals who had been convicted of violent crimes and in some cases, sentenced to prison, still had valid gun permits.

The story exposed a gap in oversight between local sheriffs — who process,

approve and revoke individual applications — and the criminal courts. In short, the two branches of government were not talking to each other.

Luo said that by preventing people from accessing gun permit records, states are potentially allowing problems with the permitting system to go unchecked.

“Closing off access closes off other attempts to independently monitor how well these programs are being policed and also closes off inquiries into these permit holders and whether or not they are law abiding or whether or not they commit gun related crimes at a higher rate, not just by media, but academics too,” he said.

Luo said that it may be possible to address the privacy concerns voiced by legislatures while still enabling public oversight of the permitting systems, such as by providing de-identified data or by not releasing an individual’s address.

But without access to names of individual permit holders or some other personally identifying information, it becomes difficult to cross-reference data with other sources, such as criminal court records, Luo said. That would make reporting about gun permitting systems less profound.

“Without names, you lose the power in the details,” he said. “I wouldn’t have been able to do a story with all those anecdotes.”

Chart: Gun permit data accessibility in all 50 states

By Aaron Mackey

Public:

Nevada: Issued concealed gun permits and their status are public records but the applications for permits are not.

Presumed Open:

New Hampshire: State law requires local officials to administer a handgun licensing program and to collect personal information from individuals applying for the licenses. Although there is no statutory prohibition on disclosing the data, there are no statutes or court decisions affirming that the records are public.

Access Threatened - Legislation Introduced to Restrict Gun Records:

California: Records of concealed handgun permits are generally public under a 1986 decision by the state's Supreme Court. The legislature, however, has made certain information in the records confidential, such as where and when an individual might be subject to attack and information concerning an applicant's mental health. The legislature has also exempted the home addresses and telephone numbers of judicial and peace officers who apply for the permits. A state Assemblyman introduced a bill in January that would keep the addresses and other personal information of all permit holders private, though the names of permit holders would remain public.

Iowa: No laws specifically prevent the release of gun permit records. State law requires the state commissioner of public safety to maintain a list of all valid permits to carry guns and revocations of permits, though no courts have considered whether the database is subject to the state's open records law. Local sheriffs are in charge of administering the permit process, though they are under no obligation to keep permit records and also have the discretion to return the records to applicants once they have been reviewed. A bill introduced in the state legislature would make the records confidential.

Maine: Permits to carry concealed handgun are public records. However, an emergency bill was introduced in the legislature in February that would make the records confidential.

Michigan: Records of handgun permits granted by local law enforcement officials are public records, as are databases tracking handgun ownership. A measure recently introduced in the state Senate would make those records exempt

from public disclosure. Michigan law already exempts licensed concealed handgun holders data from the state's Freedom of Information Act.

Mississippi: The law currently states that concealed handgun permits are exempt from the Public Records Act for 45 days after they are issued or denied, but become public after that. The state's two legislative chambers have each introduced bills that would exempt such records from disclosure. The House voted to approve its bill on Jan. 28.

Montana: Gun permit records in the state are public. There are two different bills before the state legislature that would limit public access to gun permit records. The first would make the information provided in concealed handgun permit applications completely confidential. The second would require that the name and address of a permit holder be public but would exempt all other information contained in the application.

North Carolina: The state database of concealed handgun permit holders is open to the public, but a bill introduced this year would make it confidential.

Tennessee: Individuals' handgun permits records are public. However, a bill introduced this year would prohibit the release of all information related to handgun permit records maintained by officials.

West Virginia: Although concealed handgun permits in West Virginia are public records, bills have been introduced in the past two legislative sessions to prohibit the release of names, addresses and other personally identifying information of all applicants and licensees. The bill would also require the state to compile statistical data each year on the number of concealed handgun licenses granted.

Limited Access:

Alabama: The annual number of concealed handgun applicants, licenses issued and denied, revenue generated from the permitting, and other statistical information are public records. The names, addresses, and signatures of individuals seeking a concealed handgun permit, however, are confidential.

Arkansas: Records related to the issuance, renewal, expiration, suspension or revocation of a license to carry a concealed handgun, including records related to any criminal or mental health history check performed by officials are private. Upon the request of a state resident, officials will provide the name and zip code of an applicant. Even that information may become exempt, however, as the state senate has approved legislation that would prohibit the release of the name and zip code of permit holders.

Colorado: Each sheriff in the state is required to prepare an annual report specifying the number of applications received, accepted, and denied as well as the number of permits revoked. The report must also contain the reasons for denying or revoking a permit. The law prohibits the sheriff from releasing applicants' names, though it does not explicitly prohibit the release of other identifying

information, such as addresses.

Kansas: Although state law prohibits the disclosure of individually identifying records related to applications for concealed handgun permits and the licenses themselves, records of individuals who have had their licenses suspended or revoked are open to inspection under the state's public records act.

New York: A sweeping gun control bill passed in January also restricted access to gun permit records, which were previously public. The law stated that no gun license data would be available for 120 days after the bill became law. After that, individuals with permits and those applying for new permits can request that their application information be permanently withheld from the public record in certain situations, including if the individual is a police officer, a victim of domestic violence, a juror or witness involved in criminal trials, fearful for their life or worried about unwarranted harassment.

Ohio: Records related to the issuance, renewal, suspension, or revocations of a concealed handgun license are not public records. A journalist, however, may inspect — but not copy — information in the gun permit records if a written request is submitted stating why disclosure of the information sought would be in the public interest. Additionally, aggregate data about gun permits is available as each year the state's peace officer training commission must create a public report detailing the number of concealed handgun permit applications received as well as the number of permits that were issued, renewed, suspended, revoked or denied.

Oregon: A 2012 law prohibits the state from disclosing concealed handgun permit records unless the disclosure is made for a law enforcement purpose, a court orders the disclosure or an individual holding a permit consents to the disclosure in writing. The law permits officials to confirm to the media whether a person convicted of a crime involving a handgun has a concealed license permit.

Rhode Island: State law prohibits the disclosure of the names of individuals who have been granted concealed handgun permits. However, concealed handgun permit applications records, including the name, address and date of birth of individual applicants, are public records. The latter has been the subject of repeated legislative attention, as bills have been introduced in the past several sessions of the state legislature to restrict applicant information from public disclosure.

Texas: State law prohibits the public release of individually identifying records of concealed handgun applications and permits, though records related to individuals who qualify as certified handgun instructors are public so long as the instructors opt in to make their information public. Additionally, the state department of public safety has to provide a statistical report detailing the number of licenses issued, denied, suspended or revoked by the state, including the age, gender, race and zip code of the applicant or license holder.

Virginia: The commonwealth passed a law in 2009 that prohibited the release of

a statewide database of concealed handgun owners. The individual permit applications for gun permits are still publicly available, however, from local courthouses where the permits are issued. Even the local records may no longer be public in the future, though, as a bill passed by both chambers of the commonwealth's legislature restricts access to county-level data as well.

No public access:

The following states prohibit public access to gun permit records, including application data: Alaska, Arizona, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Kentucky, Louisiana, Maryland, Massachusetts, Minnesota, Missouri, Nebraska, New Jersey, New Mexico, North Dakota, Oklahoma, Pennsylvania, South Carolina, South Dakota, Utah, Washington, and Wisconsin.

Vermont and Wyoming do not require individuals to be licensed to either own a handgun or to carry one concealed, and therefore do not maintain gun permit records.

— *Aaron Mackey*

Reporting on gun permit data

By Lilly Chapa

Since the tragic elementary school shooting in Newtown, Conn., news organizations across the country have tried to figure out how to report on the issue of gun control in their communities. Many have turned to gun permit records for their reports.

And when — or if — they get the data, some organizations aren't exactly sure what to do with it. For example, *The Journal News* in White Plains, New York, dumped the data in bulk on its website and received significant backlash, prompting stricter records legislation in the state and leading the newspaper to eventually take the report down.

But a number of journalists have reported on gun issues in the past. The trick, they said, is to report on the trends behind the numbers.

For example, *Journal Gazette* (Fort Wayne, Ind.), reporter Jeff Wiehe's May 2012 article, "Requests for silencers on rise," discussed the increase in requests for permits, silencers and automatic weapons after Indiana restricted what gun permit information was available to the public. Wiehe was able to access the number of permit requests but the details on who was registered were sealed.

Mark Alesia, a reporter with *The Indianapolis Star*, thinks the legislation is in place because of a story he worked on in 2009. Alesia was part of an investigative team that compared gun permit holders to felons in two Indiana counties.

"It was just a hunch," Alesia said. "We looked at Indiana code and all these laws about what gun permit holders were allowed to do, and we wanted to see if the state law was being followed."

The team found that more than 450 felons were illegally granted concealed carry permits by the State Police. Alesia said the story took at least three months to piece together and the team had to deal with many logistical issues.

"A lot of it was computer-assisted reporting," Alesia said. "We had to figure out what gun permit data was out there and how we could cross check that with the crime data to isolate instances where people might have done something that should have prevented them from getting a permit."

Alesia monitored gun owners' websites after the article was published to see



AP Photo by Rick Bowmer
Mathew Chappell, center, carries his Ruger Mini 30, as he speaks with a reporter, right, following a gun bill hearing at the Utah State Capitol, in Salt Lake City.

how they would react to the story and said he was surprised with the response.

“I actually took a little pride in some of the messages that said it was a good, balanced article,” Alesia said. “We took our time; it wasn’t just an anti-gun screed. It was an issue we took the time to explore.”

State legislators also reacted to the article, but not in the way the Alesia had hoped.

“They made it more restrictive to get gun data instead of being concerned about whether their current laws were being followed,” he said.

Both Alesia and Wiehe attribute the success of their articles to reporting carefully and thoroughly on the data.

“We had a real agenda to look at whether gun permits were being issued contrary to Indiana state law,” Alesia said. “We were gathering this information for the purpose of exploring a specific issue. We published a list of examples digitally. We took our time, we took everything to the state police and sat down with them for a long time and discussed specific instances.”

“Most of the conversations I had with my editors was about if there was an actual trend and whether the numbers supported it,” Wiehe said.

The New York Times investigative reporter Michael Luo’s efforts in 2011 to obtain gun permit data in Oregon led legislators in that state to restrict public access to the records. Luo sought to compare licensing practices in Oregon and North Carolina, as they were two states where the data was public.

Luo said North Carolina officials processed his request quickly, providing him with an electronic database a few days after he made the request. Oregon, on the other hand, never provided him with records.

Despite the fact that at the time of Luo’s request, gun permit records were considered public in Oregon, word of his request got back to legislators. And as state officials delayed processing his request, state lawmakers introduced legislation that ultimately became law prohibiting the release of gun permit data, thereby foreclosing the release of the records to Luo.

Luo focused on North Carolina, where he compared the individuals listed in the gun permit database with criminal history records he had obtained from the state’s criminal courts. The result of Luo’s analysis demonstrated that of 240,000 people licensed to carry concealed weapons, roughly 10 percent had been convicted of felonies or misdemeanors and still had licenses to carry concealed weapons. Luo’s reporting also showed that in about half of the felony convictions, officials failed to revoke or suspend the individual’s permit.

“It was a small percentage of concealed handgun permit holders who committed crimes, but it’s a sizable number,” Luo said. “It’s really up to readers to decide whether it’s an alarming number.”

The story also pointed out gaps in the concealed gun permit oversight that

allowed individuals who were publicly convicted and in some cases sent to prison to still retain their permits. Luo said he hoped the story raised awareness about the issue and pushed state officials to tighten up their gun permit revocation policies.

After the story ran, local media followed up on the story and several local sheriffs said that the permit revocation issue was problematic. This was so because although individual sheriffs issue the gun permit licenses, they did not have a centralized way to regularly check to see if licenses should be revoked in the case of a criminal conviction.

Other news organizations have elected to publish gun permit data. For example, in 2007, columnist Christian Trejbal tried to show the importance of public records by posting a database of local concealed handgun permit holders on *The Roanoke Times'* website.

However, less than 24 hours later, the newspaper took down the database because the list contained names that should not have been released due to safety concerns, according to a statement issued by the paper. The database ignited a firestorm of controversy within the community, and the state passed a law making the central database of permit holders confidential. Permit records maintained at the county level, where the permits are issued, remained public.

However, a bill introduced in the state legislature this year would make those records confidential, too.

Governments continue to come up with new ways to prevent access to records

By Aaron Mackey

If the back and forth between public records requesters and government officials can be likened to a game, a series of recent cases involving disputes over whether particular records are public highlights what transparency advocates says is a constant problem: the rules are always changing.

With public officials increasingly using smartphones to communicate, questions often arise over whether officials' use of private email accounts to conduct government business should be subject to open records laws, a question two cases in New Mexico and Texas raise.

Although the cases show that questions about access to private email persist, the rules of the game have been largely settled by a developed body of law. The same cannot be said for other areas of records access law, with a spate of cases showing that officials are trying various ways to either not create records or to thwart access to them in a move that transparency advocates say frustrates the purposes of open government.

For example, New York Gov. Andrew Cuomo uses BlackBerry messages to communicate with his inner circle so as not to create any permanent record of the exchanges, according to news reports. At the federal level, it was revealed that the former head of the Environmental Protection Agency uses a secondary email account to communicate with staffers, raising questions about whether the account is subject to FOIA.

And in Kentucky, officials unsuccessfully tried to prohibit a newspaper from accessing an investigation into a local jail by refusing to take possession of the report, believing that by not physically possessing the document, it would not be subject to the state's public records law.

The various maneuvers by public officials raises questions as to whether officials are committed to transparency, said Jon Fleischaker, a Kentucky-based media lawyer who represented the *The Glasgow (Ken.) Times* when it sought access



AP Photos by Mike Groll, Kevin Wolf
Gov. Andrew Cuomo; Lisa Jackson

to the jail investigation.

“When officials bend over backwards and turn themselves into pretzels to try to avoid the public records law, it’s as if they’re saying that it’s none of your business,” he said.

FOIA dispute over EPA email messages

Author Chris Horner first discovered that Environmental Protection Agency officials were using secondary email accounts while researching a book about the Obama administration’s transparency record.

In digging through documents produced in response to one of his federal Freedom of Information Act requests, Horner spotted a memo from EPA officials to the Archivist of the United States that a practice in place since the 1990s wherein the agency has provided EPA administrators with secondary, internal email accounts. Horner then sent off a series of FOIA requests seeking the names of secondary email accounts and any email messages within them of former EPA Administrator Lisa Jackson, who left the position in mid-February.

After the EPA did not respond to Horner’s request, he sued the EPA in September for access to the records. As the litigation was unfolding, the EPA’s Office of Inspector General announced it would investigate whether officials were using the secondary accounts to shield certain communications from disclosure under FOIA.

EPA spokeswoman Alisha Johnson, however, said in a statement to the Reporters Committee for Freedom of the Press that both the public and internal email addresses are searched in response to FOIA requests and that the creation and use of the secondary email address is designed to help EPA administrators manage electronic correspondence.

“Given the large volume of emails sent to the public account — more than 1.5 million in fiscal year 2012, for instance — the internal email account is necessary for effective management and communication between the Administrator and agency colleagues,” Johnson wrote.

The EPA’s response to Horner’s request has also drawn scrutiny from members of Congress, who have questioned the extent of the use of secondary email addresses and whether the practice inhibits congressional oversight and the transparency aims of FOIA.

And in early February Sen. David Vitter (R-La.) and Reps. Darrell Issa (R-Calif.) and Lamar Smith (R-Texas) sent the EPA’s Inspector General a letter asking that the office expand its investigation to determine whether, in response to Horner’s request, the agency is misusing FOIA’s privacy exemption to redact the email address, account name, domain address and server used by the secondary account.

The letter argues that because the account is used for government business and the EPA has already stated that such a secondary account exists, the privacy exemption is inapplicable.

“As such, the Administrator has no personal privacy interest in her alias email account,” the congressmen wrote. “Moreover, it is beyond question that she does not have a personal privacy interest in the server she used for her work correspondence.”

Horner said he is not rushing to judgment on whether Jackson used a secondary email account to avoid FOIA’s disclosure requirements, as he understands the agency’s rationale for needing an internal account to conduct business.

But Horner said the practice does raise concerns for individuals using FOIA to obtain officials’ correspondence because it requires requestors to know that an individual might have a secondary email account rather than the one that is publicly known. It also raises concerns regarding whether FOIA processors handling the requests are aware that they should be searching additional email accounts when a request seeks the EPA administrator’s correspondence.

“These tactics, whether or not they’re designed to frustrate transparency, clearly have the impact of frustrating transparency,” he said.

Use of BlackBerry leaves no permanent record

The *New York Daily News* reported over the summer that Cuomo does not communicate with his staff by email, preferring to talk in person, over the phone or by use of the Blackberry Pin-to-Pin messaging system that leaves no electronic trail.

The newspaper learned of Cuomo’s behavior after Kenneth Lovett, the paper’s Albany bureau chief, filed a public records request for all email sent and received by Cuomo since the beginning of 2012. The state responded that they could find no records of any email sent or received by the governor.

As Lovett reported, although email messages can be recovered from a data server, Blackberry Pin-to-Pin messages cannot be recovered once they are deleted from a mobile phone because the messages are transmitted directly to the phone rather than going through a server.

And although New York’s Freedom of Information Law may deem some internal communication between the governor and his aides private, meaning that they may not be disclosed under the state’s public records law anyway, the lack of backup copies of correspondence could make it harder for investigators to document misconduct, Lovett said.

“If there is an investigation into the governor or his administration, there’s not a paper trail to go after,” he said.

Lovett said his story was meant to illustrate how Cuomo runs his administration and the potential problems that could come up if there is any question about the governor’s administration.

“In no way was it meant to imply that there is anything untoward going on in Cuomo’s administration,” Lovett said. “But you never know what can come up and this just makes it that much harder to follow a trail.”

Kentucky officials try to withhold record

Instead of trying to withhold records detailing an investigation into a local jail facility, Kentucky officials tried to avoid the issue entirely by arguing — ultimately unsuccessfully — that the record was not in their possession and therefore could not be disclosed.

The fight for the records began in May 2012 when members of the Barren County Fiscal Court, the equivalent of a board of supervisors, contracted with an outside investigator to follow up on allegations of misconduct at the Barren County Detention Center.

After the investigation was completed, the contractor presented a summary of his findings to the board. The board, however, voted to not take possession of the full report and to instead pass it along to the FBI. According to court filings, the independent investigator did not want to turn the report over and make it subject to the public records law because it would expose the individuals who cooperated with him during the investigation.

When the *Glasgow Daily Times* filed a public records request for the report, officials on the fiscal court said that because it did not possess or control the documents, it could not be considered a public record.

Essentially, officials were arguing for a very narrow and technical definition of the law as a way to avoid disclosing the records, Fleischaker said.

“This is just the latest effort by public agencies to try avoid open records responsibilities by either saying they don’t have it by letting somebody else keep it,” he said.

The council’s position was in many ways similar to the position taken by the NCAA in 2009, when it unsuccessfully argued that documents related to a student-athlete cheating scandal at Florida State University were not subject to the state’s public records law because the NCAA stored the records on a secure website. The NCAA argued that because university officials could only view the records and could not save or print them, they were not state records.

But a Florida court ruled that the records, which included documents related to cheating allegations against more than 60 student athletes, were subject to the state’s public records law, reasoning that because the university was public, the documents created about the university were subject to the state’s public records law.

In the Kentucky case, the paper was similarly able to argue successfully to a trial court that, although the record was not in the physical possession of the public body, it was a public record. The court ordered the release of the records in early February.

Fleischaker credited the trial court for embracing the purpose of Kentucky’s open records law, which is to increase public access to government, rather than getting bogged down in fine legal technicalities.

“Kentucky courts historically have always taken the position that they are there to fairly and adequately apply not just the letter of the law but the spirit of the law,” he said.

Private email as public record issue continues

Although many state courts and legislatures have already wrestled with determining when a public official’s use of a private email account to conduct government business becomes a public record, the question remains unaddressed by the highest courts in New Mexico and Texas.

In New Mexico, the *Santa Fe Reporter* brought the issue to the forefront when it requested email from the private accounts of Gov. Susana Martinez and two of her aides after it became public that her office was using private email accounts to conduct public business.

Although Martinez has since issued an order requiring all state employees to use public email to conduct public business, the office has only released one email message. According to the *Santa Fe Reporter*, other messages exist, as it has obtained leaked email messages that were not included in the release.

The paper filed a complaint with the state’s Attorney General’s Office, which in February wrote a letter to the governor asking her to release the requested records or provide a valid reason for withholding them, according to the newspaper’s published reports.

“If email is used to conduct public business, the email is a public record, without regard to whether the email is created or maintained on a public or private email account,” the letter stated. As of press time, the governor’s office had not responded to the letter.

And in Texas, a local elected official has vowed to fight all the way to the state’s Supreme Court before he releases email messages from his personal account in response to a public records request by the *San Antonio Express-News*.

The dispute began when the *Express-News* sought email messages between Bexar County Commissioner Tommy Adkisson and a toll-road critic from both Adkisson’s government and personal accounts. The paper sought the email messages from Adkisson, who also heads the region’s planning organization, to learn more about his relationship with the critic.

A trial court ruled in April that the records must be disclosed, finding that the email messages were subject to the state’s public records law. Adkisson appealed, arguing that private email is not included within the definition of what constitutes “public information” under the state’s public records act.

“Emails within private accounts of public servants are not assembled, collected, or maintained by a governmental body because individual public servants are not governmental bodies as defined by the Act and therefore the information they possess is not subject to compelled public disclosure by the Act,” Adkisson’s

appellate brief states.

Ravi Sitwala, an in-house attorney for Hearst Newspapers, which owns the *Express-News*, said that there is little doubt that email messages qualify as public records.

The Texas Public Information Act contains two definitions of what constitutes “public information.” Under the first definition, a record is public information if it is created by a government body. Under the second definition, a record qualifies if it is created for a government body and the body owns the information or has a right to access it.

Adkisson’s email messages concerning government business would therefore be subject to disclosure under either definition of the statute, Sitwala said. First, because the email was created by a government official, it was created by a government body and therefore must be disclosed. Second, local ordinances applicable to Adkisson’s work as an official state that the government owns information created by workers, which means that email messages conducting official business would qualify as records created for a government body that both owns it and has the right to access it.

Additionally, Sitwala said that the broader policy of Texas Public Information Act also counts in favor of disclosing the records, as the law was designed to prevent officials from picking and choosing what records can be made public. The text of the statute states that the public does not “give their public servants the right to decide what is good for the people to know and what is not good for them to know.”

As a result, Sitwala said he hopes the court will reject Adkisson’s narrow interpretation of the statute.

“If the email is transacting government business, it shouldn’t matter what email address is being used because that just opens the door to rampant abuse,” he said.

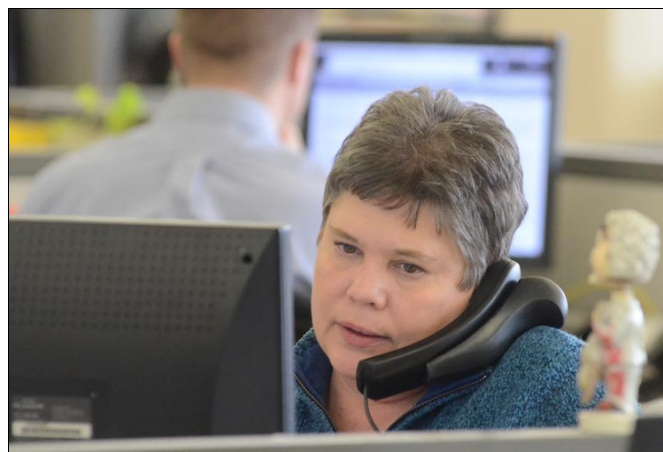
How FOIA treats personal email messages used to conduct official business

Unlike some state public records laws, the federal Freedom of Information Act does not define whether personal email messages are public records. Whether a record is subject to disclosure under FOIA turns on whether the federal agency created or obtained the record or whether the agency controls the record. In determining whether personal documents are subject to disclosure under FOIA, courts have developed a test that looks at what role the personal documents play in the agency's official business. The more a personal email message was used by the agency for official business, the more likely courts are to consider it to be subject to FOIA.

How I got the story: Judy Walton

Times Free Press reporter uses records in investigation of drug task force, district attorney; prompts state investigation

Reporter Judy Walton made her first open records request in 1985. The local district attorney bragged how tough he was on drug crimes as he was getting ready for re-election. Walton, then a reporter for the *The Sentinel-Echo* in London, Ky., sought the records of about 1,400 drug cases and found that only a small number actually got jail time. The district attorney was furious and held a news conference to slam the young reporter. He did, however, announce at that briefing that he would no longer allow plea bargains in any drug cases. Today, however, Walton would recommend journalists making their first records request to maybe “start out small,” she says with a laugh.



Chattanooga Times Free Press photo
Judy Walton amassed a large collection of records for her report on irregularities with a local drug task force.

Walton is now a reporter and editor at the *Chattanooga Times Free Press* in Chattanooga, Tenn. In August, the newspaper published a weeklong series on alleged financial and professional misconduct by the district attorney and the local drug task force in the state’s 10th Judicial District — the fallout of which the four counties that make up the district are still feeling today. Lawmakers looked into possible reforms. The Tennessee Bureau of Investigation and the Tennessee Comptroller of the Treasury continue to investigate the allegations raised in the series. Just like she did back when she was a rookie, Walton relied on the records — hundreds and hundreds of them, including three years worth of government credit card statements and gas cards receipts for all the members of the drug task force. Managing editor Nicole Lozare spoke with Walton about how she used the records to get the story and what tips she has for other reporters. To read Walton’s series, go to www.timesfreepress.com/justice.

Let’s start from the beginning. Walk me through how your investigation started.

It grew out of another project, which was a much smaller project looking at

issues in the police department. Someone came forward and said, “you think that’s bad, you should look at this.” Because we were dealing with the district attorney’s office, no one wanted to go on the record because they were afraid of retaliation. So the entire investigation had to be records based. The district attorney’s office is also in charge of the drug task force. This local drug task force is interesting in that it got no state funding — it operated solely on forfeitures on Interstate 75. So I started looking at the drug task force and pattern of its forfeitures and what it did with the money. Another involved allegations that the district attorney was misusing the power of his office to protect his friends and retaliate against people who opposed him.

Did you have any idea how big this was going to be when you first started?

It just grew. For instance, I asked for records on vehicles that were seized and I ended up with records on 300 vehicles. Then I looked at the pattern of spending by the agents on the task force, who each had a gas card. So I looked at three years worth of gas cards. The top five agents had a credit card and I looked at three years worth of statements. There was one instance when I looked at the civil forfeiture cases. There were cases where they seized large amounts of money but never charged anyone. One of those was a \$250,000 seizure. I took a random list of names and I asked each of the courthouses to see if they charged anyone criminally. I took about 80 names and had them check through each courthouse. Some of them fell through the cracks. Some had different names. But I ended up with only 17 records (of forfeitures resulting in charges). They seized the money. They were out there on the highway making money to support their operation. They didn’t care if they got drugs or making criminal cases. They were there to make money to support themselves. At one point they had \$5 million in seizures in one year. They got very good at picking out what vehicles may be involved in drug trafficking. There were also allegations that they were racially profiling.

Did your newsroom have to budget how much it would cost?

Roughly, \$1200. It was piecemeal. For example, it cost about \$300 for the vehicle records. I got a lot of copies of court cases and those were 50 cents a page.

What did the records tell you?

They spent a lot of money on travel — more than a million dollars. They were traveling all over the country. One of the ledes in my stories said ‘It’s hard to know how they could be enforcing the drug laws in Tennessee because they were always traveling’ to places for training, law enforcement conferences. But closer to home, they were buying things that technically did not further the mission. They bought exercise equipment, furniture, flowers and they had a very big bill for scented candles. And then the drug task force chief was using his task force credit cards to rent motel rooms for himself and another agent — a woman agent — with whom he was having an affair. There were some other allegations as well. I basically looked

at credit cards records to see how they were spending their money and that's what turned up. A lot of hotel stays, a lot of planes, a lot of restaurant spending and these little quiet motels around the district.

How do you connect two and two? For example, with the drug task force chief using the credit card at the motel, how were you able to connect it to the female agent?

When they were using it for conferences it was pretty obvious. Places like Palm Beach or Gatlinburg. But he was spending it on little hotels right there in the district. There was no reason for him to be spending the night at a hotel in the same town that he lived. Now some of those he was renting rooms for confidential informants, and it was marked on the receipt. But there were also occasions where they used his credit card, signed the register in her name or signed it in her handwriting in his name. It was pretty obvious. It was so blatant.

We talked a little bit about the budget. You mentioned that it cost about \$1,200 for the records. Was there ever resistance in your newsroom about budget and the time it was taking to get all these records?

I never got that. I started looking at the project in December 2011 and I first wanted to publish in April 2012. We decided we needed to do more investigating and we published in August 2012. And every time it was because there was some new avenue to pursue, another fact to check, another lead to follow. I never got any pressure to hurry up or get it out of the way.

How long would it take you to do the record requests?

A lot of the records I looked at were court records and things like that. I did that for many days. Tennessee has an odd public records law in that it is very broad except when it isn't. The premise is that all records created by government should be public but then there are specific exceptions that are crafted into law and it's difficult to know what is public and what is not. It's almost on a case by case basis in certain areas. For instance a closed file of a local police department is public but a closed file by the Tennessee Bureau of investigation isn't. So there's a lot of back and forth.

Have you made any mistakes in making requests that set you back?

This is a completely different subject, but I was doing a story on a snake fancier who got bitten by a copperhead and died. There was a fellow who was a friend of his who had lot of snakes and they arrested the guy for violating Tennessee's wildlife laws. So I went and got copies of the entire database of Tennessee residents who had permits to handle various types of reptiles. And I thought that would be really interesting, but we never did anything with it and the records just sat there. That was a few hundred dollars worth of records. Make sure you have a story first, and you're just looking for evidence.

Do you ever get nervous about misinterpreting the data?

Yes, you have to be extremely careful. The records themselves are helpful and useful. But you still have to go out and interview. You still have to check your assumptions with people who know the situation. I'll ask them, "my interpretation is this... am I interpreting this correctly?"

When the series ran what kind of feedback did it get?

Well, it sort of rocked the state actually. Our normal top hits on our website will be 800-1200 a day. We had 6500 hits the first day of the series. And that kept up throughout the entire series. My phone rang constantly the entire week. I got deluged with emails, phone calls, letters... people wanting me to come investigate their case and telling me new angles. I've written several stories out of new angles that came out of the initial series. One piece in the series involved talking to lawmakers about reforms and how the drug task force operates. They filed some legislation and I think ended up with a study committee. And there is also talk of impeachment with the district attorney. Ten days after the series ran the state attorney general ordered an investigation. That investigation was completed in December and the state attorney general is reviewing the file right now. I don't know what will become of it. It's still ongoing.

Definitely a success?

Made a lot of noise, I know that.

Tips from Walton

If someone in your newsroom has filed an open records request, ask for guidance. "Let yourself be mentored," Walton said.

Get started. Start something relatively small. Make a records request and figure out the rhythm of how it works. You'll gain confidence and next time you can do something bigger.

Be familiar with your newsroom's policy in paying for records. Know how far they are willing to press if you get a denial. "You don't want to find yourself in the position of threatening a lawsuit and then finding out your company won't back you up," Walton said. "Because it permanently reduces your credibility with the people you are trying to find out about."

Could American press ever be subject to a stateside equivalent of the Leveson Inquiry?

By Rob Tricchinelli

The world watched the British press face the Leveson Inquiry, but could investigators' prying eyes fall on American media anytime soon?

November's Leveson Report not only demonstrates the stark differences between the British and American press, but also lays bare the implications that a rapidly changing media has on attempts to regulate it.

A similar full inquiry in America is unlikely, considering First Amendment press freedoms and other rights, both statutory and at common law.

"I think Leveson is peculiarly British, growing out of a long history of press regulation, myriad class issues and the special and outsized position of media proprietors in Britain," *Guardian* columnist Michael Wolff said. "I don't see it being applicable or even comprehensible in the American context."

Despite this, some features of the Leveson Report offer lessons on the legal challenges facing the shifting American media.

The Leveson Report

The British government launched a lengthy investigation into national journalistic practices after evidence of phone hacking by tabloids rocked the media landscape.

The investigation culminated in the Leveson Report, which recommended that the British parliament create a new framework of press regulation and that the newspaper industry engage in more stringent self-policing.

Journalists from *News of the World* and other British tabloids were accused of hacking into voicemails of royals, celebrities and politicians. When these accusations were revealed in 2011, Prime Minister David Cameron announced a public inquiry to investigate the matter.

The Leveson Inquiry, named for its chairman, Lord Justice Leveson, "examined the culture, practices and ethics of the press and, in particular, the relationship of the



AP Photo by Kirsty Wigglesworth

Rebekah Brooks, the former News International chief executive, leaves a London court where she faced charges linked to alleged bribery of public officials.

press with the public, police and politicians.”

This examination led to the first Leveson Report, a nearly 2,000-page tome recapping months of testimony and proposing changes to British law. The second Leveson Report has not yet begun but will focus on the specific culpability of News International, the Rupert Murdoch-owned business that published *News of the World* and the other newspapers implicated in the phone hacking.

The report recommended a new, independent regulatory body to oversee the British press, one with investigative and sanctioning powers.

It proposed this body be created by statute, which would be the first British legislation imposing a legal duty on the government with regard to the freedom of the press.

The report made subsidiary conclusions, including a desire for increased source transparency, a whistleblower hotline and greater privacy for individuals.

Differences between British and American press

After the report was published, British politicians were publicly divided on whether and how seriously to implement its recommendations. Prime Minister Cameron opposed the idea of regulatory legislation, but Deputy Prime Minister Nick Clegg, a high-ranking official in Cameron’s coalition government, and Labour Party leader Ed Miliband supported the Report’s proposals.

That further regulation of the British media is seriously being considered illuminates a significant difference between the American and British press.

“In the U.S. it’s unthinkable: Press regulation of any sort would inevitably trample sacred freedoms and unleash state apparatchiks to badger and stifle the media,” wrote Edward Wasserman, dean of the Berkeley Graduate School of Journalism, in *The Huffington Post*. “But in Britain the notion that news media need grownup supervision is widely held and periodically attempted.”

Wolff, who also authored “The Man Who Owns the News”, a Rupert Murdoch biography, takes an even more blunt view of the American press.

“A free press means an unregulated one — no rules, no standards, not even the presumption that in an ideal, perfectly balanced, better-nature world, there should be a higher morality,” he said. “Here’s the American view of democracy and scurrilousness: a free press means tough luck. It exists, deal.”

Wolff frames the difference as either having a truly free press or subjecting the press to ever-changing, murky, conflict-laden laws and regulations.

“There is a free press, which (at least in America) is as near to an absolute status as its defenders can make it, whose downside we accept or endure because we believe in its upside — that is, the importance of another independent voice (no matter how raucous or inconvenient) in the great democratic debate,” he said.

“Or, there is a broader and infinitely more complicated sense of ritual and propriety which necessitates, among other problems, a constant battle over the logic

of the standards themselves and the internal contradiction of nodding toward free while regulating it . . . not to mention the inherent problems of the press being regulated by the people who are most often its targets.”

Effects on the U.S.: Tabloids and the Internet

Despite these differences, might the fallout from these unethical practices outlined in the Leveson Report otherwise reach the United States?

Celebrities who are often the target of tabloid journalists certainly have the incentive to protect themselves from unethical tactics like phone hacking.

Harry Potter author J.K. Rowling testified at an inquiry hearing that the British tabloid press hounded her, including one journalist who secretly placed a note inside her daughter’s backpack. When Cameron expressed hesitance at the report’s proposals, Rowling wrote an op-ed in *The Guardian* saying she felt “duped and angry.”

Tabloid tactics have drawn the attention of American celebrities, too.

“If they were doing that over there, you have every reason to believe that they were doing that here as well,” actor Alec Baldwin told British magazine *Spectator Life*. “There is no market that is bigger for media outlets in terms of the tabloids and generating trash than the U.S. . . . It’s a reasonable question to ask if they were doing that [in America] and to look into it.”

The Leveson Report spans four hefty volumes, but what might be most relevant to American media is what it said about the Internet — or more tellingly, what it did not.

In slightly more than one page, the report addressed “the relevance of the internet” and the role new media plays in the press.

Taking a somewhat combative tone, this section begins, “Many editors and commentators have argued that the burgeoning of the internet is likely to render irrelevant much of the work of the Inquiry even assuming that it has not already done so.”

The Report attacks this assumption on two grounds. First, it distinguishes the Internet from the press by saying “the internet does not claim to operate by any particular ethical standards, still less high ones. . . . The internet does not claim to operate by express ethical standards, so that bloggers and others may, if they choose, act with impunity.”

Second, it says there is “a qualitative difference” between content online and “on the front page of a newspaper.” Because of this, “people will not assume that what they read on the internet is trustworthy or that it carries any particular assurance or accuracy; it need be no more than one person’s view.”

The report attempts to neatly divide print media from online journalism. Paul Bradshaw, a professor of online journalism at City University London, told *The Guardian* that this division was “naïve, but not uncommon.”

Naïve or not, the distinction was explained in a mere page out of 2,000. Other commentators see this sparse treatment as evidence that the legal landscape is ill-equipped to handle the thorny questions that arise as traditional print media continually cedes influence to varied forms of new media.

The report appropriately scolds News International's tactics but barely scratches the surface of bigger questions.

"Leveson deals with the nefarious ways of publishing personal information; it deals with the fallout of incestuous relationships run from the heart of government; and it deals with the personal cost of people crushed by journalism-as-showbusiness," said Emily Bell, director of Columbia's Tow Center for Digital Journalism, in the *Guardian*. "What it cannot deal with is the regulation of the press in the 21st century.

"What is the solution? To put 'the internet' within the scope of Leveson would be as daft as it would be futile, and to regulate the press further, without having a broader definition of who 'the press' might be, is a recipe for irrelevance."

This consequence of the Report concerns Jeff Jarvis, a journalism professor at the City University of New York and former critic and columnist. Jarvis told Britain's SkyNews that any new laws intended to regulate traditional print media could easily encompass bloggers and new media reporters.

"I have a blog. I publish. Is this going to call for regulation of me? Is this going to call for regulation of people across borders?" Jarvis said. "To use this hysteria to now justify regulation of the press . . . is, I think, a very dangerous thing for speech as a whole."

If American laws are to properly account for the influence of new media, they must consider how American news media has evolved to this point, argues Wasserman, the Berkeley dean.

"The roots of so-called press responsibility in this country lay not just in the fractured market but in the rampant spread of local newspaper monopolies over the last 50 years," he said. "Newspapers — where the culture of today's news business was incubated — no longer viewed themselves as needing to outgun rivals for market dominance.

"Instead, they focused on building legitimacy as civic benefactors, sought to keep readers and advertisers loyal and content, and placed a greater premium on restraint than on the aggressiveness that had marked the previous, competitive era."

If new media becomes significantly unlike traditional media, something akin to Leveson might be appropriate in the United States, Wasserman said. "The question now is whether in the digital age, marked by real-time news scrambling, the media are moving toward a new hypercompetitive epoch, and a corresponding impatience with patience and accuracy. If so, self-regulation [may become] a prospect to be addressed on our side of the Atlantic as well."

And this relevance could affect not just the legal landscape but the very culture within media as well.

“If newspapers have got any sense they will realise that the party is over. The old arrogant, closed culture is no longer going to win them the trust and attention of the public that will make them valued,” blogged Charlie Beckett, head of the media and communications department at the London School of Economics.

“So in that sense Leveson really matters. Not because of what the judge says in particular. But because this is a wake-up call, an historic moment when newspapers can [choose] to live in the past or remake themselves and the way they do their vital work of journalism for the future.”

A government-sanctioned inquiry into the American press may never happen, but certain qualities of the Leveson Report might well illuminate the path forward. American courts are increasingly considering just how broadly to define the term “journalist.” Do bloggers qualify? What about independent individuals running their own sites?

Summing it up aptly in both form and substance was Jarvis, who tweeted shortly after the Leveson Report’s release: “Our first amendment bars legislation over the press. Leveson creates precisely that. No matter how well-meaning the law and venal its objects, this is a sad day for speech. I still worry about where the lines are drawn. Who is the press? Aren’t we all?”

Obama administration plugs up leaks

Kiriakou is first CIA agent jailed for speaking to press

By Lilly Chapa

In 2009, President Obama promised to create a more transparent, whistleblower-friendly government.

But the reality is that federal employees who have given government secrets to news media organizations in recent years have ended up being prosecuted as leakers.

Former CIA agent John Kiriakou was recently sentenced to 2 1/2 years in prison, becoming the first CIA agent ever to be jailed for sharing government secrets with the press under the Obama Administration's efforts to prosecute leakers.

"I regret giving out the name," Kiriakou said in an interview days before he was sentenced to prison. "It was a momentary lapse in judgment. But I don't regret whistleblowing on waterboarding."

In December 2007, Kiriakou spoke to ABC news about the U.S. practice of waterboarding war criminals. Later, he gave a *New York Times* reporter the name of an agent involved in the illegal interrogation technique.

In April, Kiriakou was charged with one count of violating the Intelligence Identities Protection Act, three counts of violating the Espionage Act and one count of making false statements. He pleaded guilty to violating the Intelligence Identities Protection Act and was sentenced to prison, which he began serving at the end of February.

Kiriakou is one of six government officials charged under the 1917 Espionage Act during the Obama administration — that's more people charged than during all previous administrations combined. Before 2009, the act was used three times against government officials.

Jesselyn Radack, the national security and human rights director of the Government Accountability Project, said the "selective and vindictive" prosecutions are disappointing after the president pledged to usher in a new era of open government when he took office in 2009.



AP Photo by Jacquelyn Martin

Former CIA officer John Kiriakou leaves federal court in Alexandria, Va.

“He was elected on a platform of transparency and openness and a platform in which he praised whistleblowers,” said Radack. “Not only has he not carried through on whistleblower promises, but he’s gone one step further and is prosecuting.”

The Obama administration says it supports lawful whistleblowers and recently passed the Whistleblower Protection Enhancement Act, which gives federal workers a way to report government wrongdoing internally and without repercussions. However, the bill does not provide protection to those that work in national security or anyone who speaks to journalists.

Radack, who represented Kiriakou, said the effort against whistleblowers is certainly chilling interactions between journalists and federal employees.

“This is the backdoor way of going after journalists,” Radack said. “I don’t think the administration has been very transparent about their real motives. They’re just making examples of these people and deterring future leaks that aren’t authorized.”

Controversial legislation

The Espionage Act was passed in 1917 and has been amended several times. It was first used to punish those who didn’t support World War I and made it a crime to leak information with intent to harm U.S. armed forces.

Recently, the Obama administration has charged six government employees with violating the act by speaking to journalists about classified information. However, all of the defendants whose cases have seen the inside of a courtroom have had the charges against them reduced or dropped.

“They use [the Espionage Act] as a hammer to beat you down with, knowing that this case is going to fall apart,” Kiriakou said. “They use it as a threat, a bargaining chip against you.”

Last summer, lawmakers called for tougher laws and investigations into classified leaks after *The New York Times* reported on Obama’s terrorist “kill list” and the Stuxnet program, an American government created computer virus that ran cyberattacks against Iran’s nuclear program.

Sen. Dianne Feinstein, chairman of the Senate Intelligence Committee, claimed that leaks were coming from the White House. Attorney General Eric H. Holder Jr. directed U.S. attorneys in Maryland and Washington, D.C., to investigate senior government officials’ involvement in the leaks, and Director of National Intelligence James Clapper put in place measures to crack down on leaks within federal ranks.

The concern about leaks spurred legislators to pass the Whistleblower Protection Enhancement Act in November. The act provides federal employees a safe way to report classified concerns internally without going to the press or dealing with possible backlash. However, the act does not apply to national security and intelligence employees.

Project on Government Oversight spokesman Joe Newman said his organization has been trying for 13 years to get the act passed.

“We were very pleased with the Whistleblower Protection Enhancement Act,” he said. “It was passed and we didn’t get everything we wanted, but it still made some significant progress to protect whistleblowers.”

Radack said the act is a step in the right direction but falls short of protecting an important sector of the government. It also does not provide protection for anyone who speaks to the press.

“It’s done a number of good things, but in terms of actually protecting the whistleblowers who I’d argue need it the most, like my clients and the people being prosecuted, they’re specifically excluded,” Radack said. “Their disclosures would be the most severe and meaningful, and they’re not protected at all.”

Despite the passage of the Whistleblower Protection Enhancement Act, the Senate Intelligence Committee wanted to address the issue of internal leaks more directly. In what Newman called an overreaction to the rising number of leaks, the committee proposed measures that would require reporters to only speak to designated public affairs officials and would prevent off-the-record talks between journalists and government employees. Sen. Ron Wyden was the only senator to place a public hold on the 2013 Intelligence Authorization Bill in opposition to the legislation.

Ultimately, Wyden’s hold on the bill led to negotiations that resulted in the removal of the controversial provisions and the passage of the bill in December.

A Culture of Secrecy

The Obama administration has done a lot to open the government in the last four years, but when it comes to prosecuting whistleblowers, there’s room for concern, said Newman, the Project on Government Oversight spokesman.

“The government is going after the messenger when they should be concerned about what these people are saying,” he said. “The overreaction to WikiLeaks has influenced what we’ve seen in the past four years under the Obama administration, which has been a little heavy-handed in the use of the Espionage Act.”

After Army private Bradley Manning allegedly provided hundreds of thousands of classified documents to WikiLeaks, a file-sharing website that publishes classified information, the Obama administration began prosecuting loose-lipped government employees. Manning was charged under the Espionage Act and is awaiting trial.

Newman said part of the reason there has been an uptick in leaks is due to the culture of secrecy within the government.

“A lot of times, whistleblowers are following the chain of command but are still getting rebuffed,” Newman said. “And then the prosecutions are very heavy-handed and intimidating. That’s scary. Do you want to come forward and face possible

prosecution? Those things have a strong chilling effect.”

Kiriakou said the atmosphere within the CIA was very aggressive and coming forward with concerns was not encouraged.

“It was so militant,” he said. “If you weren’t part of the solution you were part of the problem. It was unspoken but clearly out there.”

Radack said that a lot more information is being kept secret than is necessary, and government workers are rebelling against that.

“They see war crimes, crimes against humanity, illegal domestic surveillance of Americans, and it’s all being protected under the guise of secrecy and classification when, in reality, that stuff should totally be in the public domain,” Radack said.

Matthew Miller, former director of the Justice Department Office of Public Affairs, argued in an article he wrote for *The Daily Beast* that people who label those being prosecuted as whistleblowers ignore the harm they have caused.

“Sometimes the difference between blowing the whistle on wrongdoing and exposing a legitimate national security program is in the eye of the beholder,” Miller wrote. “But some things are secret for a reason, and when government employees violate the law to disclose information that undermines our national security, there must be consequences. It may not be popular, but the administration is right to enforce these laws.”

But the information whistleblowers have shared with the media has not inflicted harm upon the country, Radack said.

“In all these cases the government has claimed that the U.S. has been harmed in some way, though they never articulated how,” Radack said. “It’s purely a lot of fear mongering that we see in these cases. No identifiable harm has ever been claimed by the government as a result of these men’s disclosures.”

Whistleblowers versus leakers

Newman said whistleblowers like Kiriakou are punished because the government has such a narrow definition of what constitutes a whistleblower versus a leaker.

“All whistleblowers might be considered leakers, but all leakers aren’t whistleblowers,” Newman said. “Prosecutors will label someone a leaker to frame them in a bad light when in fact that person should be considered a whistleblower and deserves protection under the law.”

The Department of Justice released a statement last year insisting that it does not target whistleblowers, which it defines as any federal employee that reports government wrongdoing through “well-established mechanisms” within the government.

“An individual in authorized possession of classified information has no authority or right to unilaterally determine that classified information should be made public or disclosed to those not entitled to it,” the statement said. “The leaker

is not the owner of such information and only the owner can declassify such information.”

Many recent leaks that have been reported by the media are authorized leaks from the White House, according to Radack. For example, details on the raid of Osama bin Laden’s compound were widely shared by Obama aides, despite the fact that the information was classified.

In his article for *The Daily Beast*, Miller wrote that he thinks the difference between leakers and whistleblowers depends on what is being exposed.

“Leaks of classified information can endanger American soldiers and intelligence officers and expose sensitive national security programs to our enemies,” he wrote. “Whistleblowers expose violations of law, abuse of authority, or a substantial and specific threat to public health or safety.”

Although the Justice Department defines a whistleblower based on how he or she disseminates classified information, Newman said the motivations of the individual should be considered.

“What is their motivation for bringing this information forward?” Newman said. “We believe whistleblowers are motivated by the public interest and are trying to expose waste, fraud and corruption.”

Newman said the government’s definition of a whistleblower can be widened through new legislation that would give more protection to people within the intelligence and national security community.

“It’s a new Congress and the things we didn’t get in the last whistleblower bill are things that we’ll look for in the future,” Newman said.

Meanwhile, six government employees are being prosecuted for trying to make the United States a better country, Radack said.

“At the end of the day, John (Kiriakou) is going to jail,” she said. And it’s especially repugnant because he is the only CIA operative to go to jail in connection with this torture program, and he didn’t torture anyone. He just blew the whistle on it.”

The six federal employees charged under the Espionage Act

By Lilly Chapa

The Obama Administration has indicted six government employees under the 1917 Espionage Act for sharing classified information with the press — more than all previous administrations combined. However, all of the employees whose cases have seen the inside of the courtroom have had all or part of the Espionage Act charges against them dropped.



AP Photo by Timothy Jacobsen

April 2010 - National Security Agency official Thomas Drake was indicted for communicating with a Baltimore *Sun* reporter about the NSA's Trailblazer project, a domestic surveillance program. In 2011, Drake pleaded guilty to a misdemeanor unrelated to the Espionage Act and avoided a 35-year prison sentence. Drake was instead sentenced to probation and community service.

May 2010 - FBI translator Shamai Leibowitz pleaded guilty to sharing classified information about FBI wiretaps with a blogger and was sentenced to 20 months in prison.

June 2010 - Army private Bradley Manning was arrested for allegedly leaking a quarter-million classified documents to whistleblower website WikiLeaks and was indicted under the act in 2012. In February, Manning pleaded guilty to lesser charges but entered not guilty pleas to charges under the Espionage Act. His case is ongoing.

Aug. 2010 - Stephen Kim, a State Department contractor, was indicted for giving classified information about North Korea to Fox News. His case is still pending.

Dec. 2010 - Former CIA officer Jeffrey Sterling was indicted for talking to a *New York Times* reporter about a CIA program targeting Iran's nuclear program in the 1990s and was arrested in January 2011. The *Times* reporter, James Risen, was subpoenaed to testify in Sterling's trial. A federal appellate court is considering whether to require Risen to testify, and Sterling's case is still pending.

Jan. 2012 - Former CIA officer John Kiriakou was indicted for giving a reporter the name of an undercover agent and speaking to ABC News about the CIA's practice of waterboarding interrogations. Kiriakou pleaded guilty to a charge

unrelated to the Espionage Act and is serving 2 1/2 years in prison.

Deciding when to publish

By Lilly Chapa

The Obama Administration's prosecution of loose-lipped government employees has created a chilling effect on communication between officials and journalists. However, sources are still coming forward with classified information to give to the press, and journalists need to know how to handle those situations, said George Freeman, an attorney at Jenner and Block.

Journalists should consult their editors, other government officials and media lawyers if presented with classified information, said Freeman, who previously worked as in-house counsel at *The New York Times* for more than 30 years. Consider the pros and cons of publishing the information and whether the public's right to know outweighs any possible harm to people or programs the information could cause.

"That's what the major mainstream media has done now for decades, and in general it's come out to a very good balance," Freeman said. "It's worked out in ways that have informed the public without causing jeopardy with national security."

The government has a few options on how to deal with published leaks, Freeman said. Before publication they can seek prior restraint, which requires a very high standard and is rarely pursued. After publication, they can prosecute the journalist under the Espionage Act, but Freeman said the government almost never does this because prosecuting the press doesn't look good.

The most common response would be for the government to subpoena the reporter to find out who their source was, and this is often difficult for the media to avoid, Freeman said.

"Ultimately, the information is a leak and if, after it's published, the government decides they aren't happy with the leak, it won't matter much," Freeman said.

Journalists need to remember that they're not the only ones who need to cover their tracks while working with classified information. According to *The Wall Street Journal*, the FBI runs software that identifies phrases in e-mail and phone records



AP Photo by Dennis Cook

George Freeman, a former New York Times attorney, confers with journalist Judith Miller in 2005 prior to her testifying in favor of reporters' privilege legislation on Capitol Hill.

that can link government officials to journalists. The FBI can search government-owned electronics, and if they find evidence of contact between journalists and officials, they can obtain a warrant to search the officials' private e-mail messages and phone records.

Diverting the avalanche of leaks: a (temporary) win for responsible news coverage

By Rick Blum

Last year, media groups fought hard to defend the flow of news on national security and foreign affairs. The Senate Intelligence Committee tried and ultimately dropped an effort to redraw the line on unauthorized disclosures, but the underlying concerns persist. It amounted to the biggest challenge in a decade to the delicate if sometimes tense relationship between the government and journalists on “leaks.” And the next time it may be worse.

Western governments spoiled a plot to set off a bomb in an airliner headed for the U.S. The U.S. and Israel were behind a computer virus targeting Iran’s nuclear program. The president keeps a “short leash” when the U.S. conducts drone strikes, personally approving targets.

Those stories and others made headlines last year. And they triggered the strongest push in a decade to rewrite the line between secrecy and news reporting on national security and foreign affairs matters. While those pushing to keep secrets better in the name of national security dropped their efforts in the face of strong headwinds, the underlying tensions persist and the new Congress may contemplate moving the line even more against transparency.

When the reports came out last spring, they were particularly startling to Dianne Feinstein (D-Calif.), chairman of the Senate Select Committee on Intelligence. Decrying an “avalanche of leaks,” she made a public vow to end it.

In early June 2012, Feinstein held a rare joint press conference with ranking Republican Sen. Saxby Chambliss (R-Ga.) and the Republican and Democratic leaders of the House Permanent Select Committee on Intelligence, Chairman Mike Rogers (R-Mich.) and C.A. “Dutch” Ruppertsberger (D-Md.). All four spoke of the serious nature of recent leaks and the importance of congressional action. They vowed to work together to discuss legislation. That press conference started an



AP Photo by J. Scott Applewhite

Sen. Dianne Feinstein, D-Calif., center, chair of the Senate Intelligence Committee, is flanked by Sen. Saxby Chambliss, R-Ga., right, and, House Intelligence Committee Chairman Mike Rogers, R-Mich., left, as they face reporters on Capitol Hill after a meeting on national security leaks in Washington, D.C.

effort that, if successful, would have remade in a short few weeks how the intelligence community interacts with the press on national security and foreign affairs topics.

Media groups in the Sunshine in Government Initiative (SGI), along with other media organizations, actively engaged the congressional intelligence committees and others on Capitol Hill. In a letter to the intelligence committees and in follow up meetings, we urged that any changes affecting the flow of news to the public on national security and foreign affairs matters should first go through public hearings and be carefully drawn. The complexities involved in updating the Espionage Statutes, for example, should require careful consideration with legal scholars, security experts, media practitioners and others. We urged Congress to proceed cautiously.

On July 24, 2012, the Senate Intelligence Committee approved a dozen “anti-leaks” proposals as part of Title V of the S. 3454, the Intelligence Authorization Act for 2013, without releasing the text to the public ahead of its vote. The package especially targeted background briefings and routine conversations between expert commentators and sources within government.

Two sections in particular would have the biggest impact on newsgathering. Section 505 would have banned former government employees who held top-secret clearances at any time in the previous three years from “entering into a contract or other binding agreement” with “the media” for a year after leaving the government’s payroll to help provide expert “analysis or commentary on matters concerning the classified intelligence activities” of the United States.

Media groups in SGI wrote in a letter to the Senate Intelligence Committee that the provisions focused on restricting “analysis and commentary” on matters that concerned classified activities, even if the expert analyst never revealed classified information or even had possession of classified information. In addition, SGI noted the cost of such restrictions. Analysts provide timely context to current international events, and this provision would have a dramatic chilling impact on the flow of news to the public.

Perhaps even worse for newsgathering than a vague, overbroad ban on commentary and analysis about anything “concerning” classified government activities was Section 506, which banned all background briefings to reporters “regarding intelligence activities” except for an agency director, deputy director, or designated public affairs official. This would have ended a common practice initiated by government agencies and news media to have unclassified conversations with intelligence experts to help the public understand current trends and events, and help inform a journalist’s reporting.

From a media perspective, these and the other proposals simply went too far across a line that the nation’s founders drew between the government’s

responsibility to keep secrets as it protects national security and the public's right to know what the government is doing. At the same time, there was a bright side: the proposals avoided dealing with the Espionage Statutes, a recognition perhaps of the difficulty of the task in the short timeframe the committee had before it.

Backers of the anti-leaks provisions had a lot going for them. Democrats and Republicans shared concerns about leaks and forged bipartisanship on the committee. Feinstein's committee was about to start debating the Intelligence Authorization Act for Fiscal 2013, so it had a legislative vehicle for passing its reforms. Feinstein could point to precedent for using the authorization bill to address leaks. In 2000, President Clinton vetoed the intelligence authorization bill for Fiscal 2001 due to a provision that would have criminalized any disclosure of classified information, a major shift in the delicate balance the founders struck between the government's right to keep secrets in the name of national security and the public's right to be informed of what government is up to. (The spending bill was later enacted without that provision.)

Editorial boards spoke out against the provisions, and SGI groups met with many offices on Capitol Hill to express our concerns.

In the end, the proposals ran into strong opposition from influential senators, including Senator Ron Wyden (D-Ore.), who publicly placed a hold on the bill. Senate Judiciary Committee Chairman Patrick Leahy (D-Vt.) made known his objections and concerns as chairman of the Senate Judiciary Committee, and Senate Majority Leader Harry Reid (D-Nev.) insisted the controversy over the provisions in Title V be addressed before he would allow the bill to come up for a vote by the full Senate. As time ran out on passing legislation, the controversial anti-leaks provisions were dropped to allow passage of the intelligence authorization bill. At the time, Senator Feinstein reiterated her concern that damaging leaks would continue unless something was done.

Bipartisan Concern about Leaks

Their efforts represented a new challenge for media groups. For years, freedom of the press advocates have argued that journalists who regularly cover national security and foreign affairs are careful to mitigate possible harms from disclosure of certain details in stories. Best practices include listening carefully when the government claims a harm will result from publishing certain information in a story. In many cases the reporter can leave out a specific detail and still report the story. Such conversations are routine. And their success depends on communication between the journalist and the government official.

But Feinstein noted this process is flawed.

"People don't know the whole story. And they inadvertently release something that appears to be harmless, that, in their judgment, is harmless, but I don't know, puts them in the know or something like that. And you can piece it together and you

can figure out where the individual is or who that individual is or where that individual works,” Feinstein said in an interview with CNN.

Feinstein may have had in mind the way news broke about the foiled bomb plot. According to news reports, The Associated Press learned that the U.S. and allied intelligence agencies disrupted a plot to blow up an airplane. In response to government concerns that disclosure would interrupt an ongoing operation, AP held the story for several days. Once assured the possible harm from disclosure no longer existed, AP was asked to hold the story until an official announcement from the White House the following day. AP refused, negotiations over the timing of the release stalled, and AP broke the story on May 7, 2012. (The Associated Press is a member of the Sunshine in Government Initiative.)

As news spread, John Brennan, a top White House national security advisor, gave a briefing to a small number of expert commentators during which he indicated that U.S. allies had “inside control” and the plot never endangered the public.

The incident became a topic of questioning when Brennan appeared before the Senate Judiciary Committee on Feb. 8 to be confirmed as the next director of the Central Intelligence Agency. Brennan insisted the conversation was appropriate and did not reveal classified information.

“We had inside control of the plot, which means any number of things in terms of environmentally, working with partners, whatever else. It did not reveal any classified information or reveal a source inside the operation,” Brennan said.

Brennan also explained these types of briefings, often held on background, were often relied upon to give context to events in a public format.

“Senator, frequently if there is some type of event — if there’s a disrupted terrorist attack, whether it’s some, you know, underwear bomber or a disrupted [improvised explosive device] or (inaudible) bomb or whatever else, we will engage with the American public. We’ll engage with the press. We’ll engage with individuals who are experienced professional counterterrorism experts who will go out and talk to the American public,” he said.

“We want to make sure that is not misrepresentations, in fact, of the facts, but at the same time do it in a way that we’re able to maintain control over classified material.”

Last year several bills were introduced in Congress to “modernize” the espionage statutes. One committee held a hearing on it. This year we have already seen Congress press the administration for more information about its counterterrorism strategy, including the use of drones. In his February State of the Union speech, President Obama vowed, “I will continue to engage Congress to ensure not only that our targeting, detention and prosecution of terrorists remains consistent with our laws and system of checks and balances, but that our efforts are

even more transparent to the American people and to the world.” We are likely to see more debate about where to draw the line between secrecy and transparency on national security matters.

Media groups will have to work harder to preserve the flow of news to the public. We heard from journalists around the country throughout the debate about anti-leaks package last year. What became clear is that getting this right affects more than national security reporters in the nation’s capitol, but local reporters in state capitols and county seats covering homeland security challenges in their communities. Maintaining and strengthening the delicate and sometimes tense relationship between the media and government on national security and foreign affairs coverage affects every media market, every media outlet, and every member of our communities.

Rick Blum is the director of the Sunshine in Government Initiative, a coalition of media groups promoting open government policies and practices, of which the Reporters Committee for Freedom of the Press is a member.

"Central Park Five" subpoena quashed after filmmakers prove their independence

Ken Burns subpoena case provides perspective on how to interpret troubling Chevron case

By Jack Komperda

Sarah Burns considers herself a journalist.

The daughter of famed documentary filmmaker Ken Burns certainly employed many of the tools of the trade, spending years along with her father and their production company, Florentine Films, researching the story of five men wrongfully convicted of the rape of a Central Park jogger.

But to listen to New York City officials tell the story of the genesis of "The Central Park Five," the documentary film released last fall was

a biased project about a controversial moment in the city's history produced to force the settlement of a \$250 million civil rights lawsuit filed by the five men.

The City's Law Department subpoenaed Florentine Films last fall seeking raw footage of interviews of the now-exonerated former suspects of the case. In the process, they argued that the filmmakers could not establish the independence necessary to evoke the protections of the reporter's privilege laws against compelled disclosure of such information.

"Notably, given Florentine Films' expressed desire for the City to resolve this litigation, it is surprising that Florentine Films would attempt to withhold evidence that could impact the litigation," New York City Law Department Senior Counsel Elizabeth Daitz wrote in a letter to Florentine Films attorney John Siegel last fall.

A federal magistrate court judge, however, disagreed with that position, ruling this month that Florentine Films was entitled to invoke the protections of reporter privilege laws.

In doing so, the decision may help to define the contours of a recent Second Circuit case that raised concerns among filmmakers and other independent



AP Photo by Francois Mori

From left, co-directors Ken Burns, Sarah Burns and David McMahon debut their documentary in Cannes, France in May.

journalists. In *Chevron Corp. v. Berlinger* in 2011, the U.S. Court of Appeals in New York City affirmed a federal district court decision requiring a documentary filmmaker to turn over all of his unused footage chronicling a lawsuit filed by Ecuadorians against oil company Texaco, claiming the now wholly owned subsidiary of Chevron Corp. was responsible for polluting their country's rainforest. The court found that the filmmaker had worked too closely with the attorneys suing Texaco.

While the appellate court's opinion in *Berlinger* recognized a qualified reporter's privilege, the court determined that such a privilege would only be upheld "where the purpose to disseminate the information motivated the gathering" as opposed to "where the information was gathered for other reasons and the intent to publish arose only later."

Berlinger inserts independence requirement

In doing so, the Second Circuit suggested that the reporter's privilege applies with full force only to reporters acting independently of the subjects of their journalism.

"The most important part about this decision [concerning the film "The Central Park Five"] is that Magistrate Judge [Ronald Ellis] did a craftsman's job of following the holding in *Berlinger*," Siegel said. "This case provides instructions to other courts called upon to determine the meaning of that case."

In 2010, Chevron subpoenaed filmmaker Joe Berlinger to obtain 600 hours of raw footage, claiming it was needed as evidence in three ongoing legal matters regarding the company's oil drilling in Lago Agrio, Ecuador. Berlinger claimed the outtakes should be protected by a journalist's privilege, which the Second Circuit has long recognized.

The court found Berlinger was not covered by the privilege because he failed to prove "he collected information for the purpose of independent reporting and commentary." The court emphasized that it was not deciding that he was not an independent journalist, but was instead just upholding the lower court's determination that he had failed to prove that he was.

The lower court had ruled that Berlinger was "solicited" by Stephen Donziger, the legal adviser to the plaintiffs, to produce the film to serve the objectives of the litigants. The district court ruling also noted that Berlinger removed at least one scene from the film at the request of the subjects of the film.

The appellate court clarified that a journalist solicited to investigate and publish a story supporting the viewpoint of his or her employer can still be protected under the privilege by establishing journalistic independence through evidence of editorial and financial independence.

It found, however, that while the oil company had made a showing that Berlinger was not independent, he had failed to counter that in a manner convincing to the trial

judge. The appellate court also found that the trial court “was not obliged to credit [Berlinger’s] self-serving testimony” about his own independence as a filmmaker.

Florentine Films establishes independence

“The Central Park Five” follows the lives of five men — Antron McCray, Yusef Salaam, Kharey Wise, Raymond Santana and Kevin Richardson — who were convicted and later exonerated of the April 19, 1989 assault and rape of jogger Trisha Meili.

The case garnered national attention and highlighted racial tensions in the city at the time. The men, who were teenagers at the time of the attack, confessed to the crime and later retracted their statements but were still charged with the crime. The men served their full jail sentences before finally being exonerated after a serial rapist, Matias Reyes, later confessed to the crime. Reyes’ DNA matched the DNA found at the crime scene, and the five men were exonerated.

In 2002, the men filed a lawsuit against the city, each seeking \$50 million in damages.

Last September, New York City attorneys served a subpoena seeking all copies of audio, video and written materials with everyone appearing in the film. The city then withdrew its subpoena and issued a narrower one seeking the outtakes of interviews of the wrongfully convicted men, as well as anyone who had represented them, including attorneys and family members.

In his opinion granting the motion from Florentine Films to quash the subpoena, Ellis concluded that the documentarians had demonstrated the requisite independence to be considered journalists under the reporter’s privilege.

Ellis rejected arguments by the city that Florentine Films and its filmmakers — Ken Burns, daughter Sarah Burns and son-in-law David McMahon — were not independent journalists entitled to reporter’s privilege.

New York City officials argued, relying on the Second Circuit decision in *Berlinger*, that Florentine Films could not rely on any reporter’s privilege claims, in part, because the filmmakers had a “longstanding sympathetic relationship” with their subjects and because of public statements made by Burns that suggested the purpose in making the film was to force a settlement of the civil litigation.

However, Ellis said the city was “misleading” in its retelling of Burns’ statements.

“Burns does not indicate what the film’s ‘purpose’ is, and the quoted portion by [city attorneys] mischaracterizes the quote and Ken Burns’ position,” Ellis wrote. He also noted that statements made which were sympathetic to the film’s subjects will not necessarily erode a journalist’s independence.

“In *Berlinger*, the Court made clear that consistency of point of view does not show a lack of independence where, for example, a filmmaker has editorial and financial independence over the newsgathering process,” Ellis wrote. “Indeed, it

seems likely that a filmmaker would have a point of view going into a project. Thus, even assuming that the relationship Defendants cite between the filmmakers and Plaintiffs somehow demonstrates that the filmmakers had a point of view in favor of the Plaintiffs' case before producing the film, this fact, standing alone, does not resolve the question of whether the actual newsgathering process in the making of the film remained independent."

Ellis also shot down claims that Sarah Burns compromised her journalistic independence because of work she had done as a paralegal for the firm of one of the attorneys representing the men, stating that the material sought by the subpoena was all gathered after she left the firm.

Ellis also found that New York City officials were not able to overcome the privilege by showing that the information they sought involved a significant issue in this case that was unavailable by other means.

"In sum, [New York City has] failed to present this Court with a 'concern so compelling as to override the precious rights of freedom of speech and the press' the reporter's privilege seeks to ensure," Ellis wrote.

The Reporters Committee for Freedom of the Press, joined in a friend-of-the-court brief by the Associated Press, Dow Jones Co., Gannett Co., Inc. and The New York Times Co., urged the judge to quash the subpoena because the city disregarded the well-established qualified reporter's privilege shielding both confidential and non-confidential information from compelled disclosure.

Siegel, the Florentine Films attorney, said he expects the opinion by Ellis will "rein in" the *Berlinger* decision "to the particular facts of the case."

"Unless a reporter or a filmmaker is both solicited and recruited to work on a story by a source, and undertakes steps that don't entail independence from the source, the decision in *Berlinger* cannot be interpreted as a broad license to subpoena," Siegel said.

Hawaii follows in California's footsteps in proposing new anti-paparazzi law

Rocker Steven Tyler leads charge

By Jack Komperda

Steven Tyler is certainly not camera shy. The aging Aerosmith frontman and former “American Idol” judge memorably stripped to his underwear on the set of that talent show before plopping into a pool of water.

About a year ago, a British newspaper published unflattering photos of the 64-year-old Tyler walking the beaches of Maui not far from his recently purchased home in nothing but camouflage Speedos and some beaded jewelry while holding a pair of snorkeling flippers.

But not all photo ops are created equal, apparently.

Tyler is the force behind the new anti-paparazzi bill being pushed in the Hawaii Legislature. State senators plan to model the bill — Senate Bill 465, dubbed “the Steven Tyler Act” — on similar legislation enacted in California. The proposed privacy law would give celebrities the right to sue photographers for taking unwanted photographs.

The proposed anti-paparazzi law is the latest legislation seeking to limit how, when and where photographers snap images of celebrities. Many of those laws have been centered in California, where in 1999 the state first passed an invasion of privacy statute directed specifically at paparazzi activity. The new Hawaii bill comes in the wake of several high-profile confrontations involving musicians Justin Bieber and Chris Brown and just as a California appellate court prepares to evaluate the constitutionality of a recently written photography law in the state’s vehicle code.

Earlier this month, a state Senate judiciary committee approved an amended version of the Hawaii bill.

As written, the proposed legislation gives celebrities broad leeway to seek both monetary damages and injunctions against publication. State senators have promised



Photo by Pacific Coast News

Steven Tyler, seen here in Maui, wants to be able to sue photographers for taking unwanted pictures.

to reign in the bill's broad reach, which has evoked objections from both local and national media organizations, the Motion Picture Association of America and Hawaiian Attorney General David Louie.

"We think this is a terrible piece of legislation," said Frank Bridgewater, a vice president and editor of the *Honolulu Star-Advertiser*, the state's largest paper by circulation. "The biggest problem we see is that it's way too vague and broad. If Steven Tyler comes to a courthouse after a hearing, can we not take a picture of him for a legitimate news reason?"

Both local and national publications have written editorials calling on state politicians to rethink their support of the bill.

Lee Imada, managing editor of *The Maui News*, said that while reports of paparazzi pursuing notable island-goers do occasionally occur, such incidents are not as commonplace as in California.

"Historically, the residents of Maui have left celebrities alone," Imada wrote in an e-mail interview. "In fact, they are treated as regular folk. . . . Some celebrities have even sent their children to the public school in Hana (on the eastern edge of Maui) and been active members of the community."

However, in a more egregious example, Imada noted that overzealous photographers were responsible for forcing Sarah Palin and her family to move out of a local hotel a few years back.

Star-struck legislators?

Despite criticism of the bill, nearly two-thirds of the state's senators have signed onto the legislation. The original six-page draft was sponsored by state Sen. J. Kalani English of Maui and largely written by Tyler's attorney, Dina LaPolt.

The first paragraph of the bill makes clear its aim is protecting the privacy of celebrities: "Although their celebrity status may justify a lower expectation of privacy, the legislature finds that sometimes the paparazzi go too far to disturb the peace and tranquility afforded celebrities who escape to Hawai'i for a quiet life.

"The purpose of this Act is to encourage celebrities to visit and reside in our State by creating a civil cause of action for the constructive invasion of privacy."

The proposed legislation gives celebrities the right to sue to collect general, special and punitive damages from photographers who take either visual or sound recordings "in a manner that is offensive to a reasonable person" or while the subjects are "engaging in personal or familial activity with a reasonable expectation of privacy."

An element of the bill which is drawing vocal objections is a provision that allows the subjects of unwanted photographs to ask the court for "equitable relief, including but not limited to an injunction and restraining order against further violation of this section."

Hawaii media law attorney Jeffrey Portnoy says many of the privacy protections

sought by Tyler are already afforded by present state law. Further, the vague wording of the new legislation could have unintended consequences for tourists, for instance, hoping to snap a quick photo of a celebrity taking the family out onto one of the state's public beaches.

"As drafted, this bill applies equally to a tourist as it does to a paparazzi," Portnoy said. "And it could significantly impede the right of journalists to do their jobs. This is nothing to me but a celebrity suck-up bill. Just read the preamble. It's a joke."

Celebrities lending their names

Yet despite the criticisms of the bill, the state Senate Committee on Judiciary and Labor took a major first step on Feb. 8 in passing the anti-paparazzi bill, setting up a vote before the full Senate.

More than a dozen celebrities, including Britney Spears, Neil Diamond and Avril Lavigne submitted written testimony with identical language supporting the bill. And in a packed committee hearing, Tyler — joined by Fleetwood Mac drummer Mick Fleetwood — explained to state senators that the motivation for the bill came in part because his children no longer want to go out in public with him because of the constant threat of photographers.

"This Christmas was the first time I got them all together in my house," Tyler told committee members. "It meant so much to me and they don't want to go out. I had enough of it."

Yet despite the seemingly broad support by state legislators, both local and national media organizations also voiced their concerns over what they are calling a vague and ill-conceived measure.

The proposed bill "imposes civil penalties of alarming breadth and burdens substantially more speech than is necessary to advance a compelling government interest," wrote Mickey Osterreicher, general counsel of the National Press Photographers Association in a letter opposing the bill that was also joined by 14 media organizations including the Reporters Committee for Freedom of the Press, the Society of Professional Journalists and the American Society of News Editors. "While we recognize the right of privacy, we oppose a broadening of those protections by abridging the clearly established tenets of First Amendment jurisprudence."

Joining the media coalition was the Motion Picture Association of America, which argued that the bill violated both the First Amendment of the U.S. Constitution and the state's own constitution, and would hurt the ability of the trade group's membership to produce news and entertainment programming. The trade group also noted the lack of any exception in the privacy bill to monitoring police activities.

"We are concerned that, if this bill is enacted, legitimate investigations and law

enforcement activities will be jeopardized,” according to the MPAA statement.

California law to be a model

Prior to passing the draft legislation, state senate committee members voted to limit the broad scope of the proposed legislation by limiting the activities protected by the new bill to those taking place on property owned or leased by the photo subject.

The committee also agreed to scrap any reference to fines, include exceptions in the bill for law enforcement, better define terms such as “personal and familial activities” and rewrite most of the bill with language similar to California’s anti-paparazzi legislation.

In 1999, California enacted an invasion of privacy statute directed specifically at paparazzi activity. The anti-paparazzi statute, Cal. Civ. Code Section 1708.8, has a broader reach in the activity that it targets than other state’s privacy laws.

The statute prohibits trespass onto another’s property “with the intent to capture any type of visual image, sound recording, or other physical impression of the plaintiff engaging in a personal or familial activity” where it would be “offensive to a reasonable person.” The California standard is stricter than the traditional standard in privacy law, which protects individuals from actions that are “*highly* offensive to a reasonable person.”

The law also creates the right to sue for “constructive invasion of privacy,” or for engaging in the same activity described above under the statute, but without physically trespassing. Constructive invasion of privacy occurs when a defendant uses technology to capture images or sounds that would not have been otherwise accessible to them without trespassing.

Also under the statute, photographers can be held liable for committing an assault or false imprisonment for surrounding a celebrity and preventing them from moving while trying to capture images or recordings.

In addition, any “person who directs, solicits, actually induces, or actually causes another person” to engage in the activity prohibited by the paparazzi statute can also be held liable. The paparazzi statute imposes stiff penalties on violators — for example, after the court calculates a monetary award for the harm caused by the infringing activity, the court may then impose a judgment of up to three times that amount on a violator of the statute.

California’s vehicle code was also recently amended to include penalties for anyone who interferes with the driver of a vehicle, follows too closely or drives recklessly “with the intent to capture any type of visual image, sound recording or other physical impressions of another person for a commercial purpose.” California Vehicle Code Section 40008 allows longer jail sentences of up to six months, and steeper fines of up to \$2,500, for reckless driving.

Recent developments in California anti-paparazzi laws

Hawaii's state legislature did not discuss whether it would specifically incorporate California's vehicle code amendments into its new anti-paparazzi legislation.

However, the constitutionality of that legislation is central to two recent California state court decisions. Following a 2012 car chase involving pop singer Justin Bieber and a paparazzo, a Los Angeles prosecutor invoked the statute for the first time against photographer Paul Raef.

Authorities accused Raef of pursuing Bieber in a high-speed chase to snap his photos. The trial judge ruled that the 2010 law was overly broad and violated the First Amendment.

In January, a three-judge California appellate court panel asked Superior Court Judge Thomas Robinson to reconsider his decision to dismiss two charges against Raef under California's anti-paparazzi law.

The appellate court panel indicated in a Jan. 28 filing that the California law was constitutional. Judge Robinson, however, declined to reconsider his ruling dismissing the charges, according to media reports, which will likely trigger a review before the full appeals court.

The California court rulings come in the wake of two high-profile incidents involving paparazzi. In February, singer Chris Brown totaled his Porsche after attempting to evade paparazzi in two vehicles that were chasing him.

Bieber has been particularly vocal in urging lawmakers and police to crack down on overzealous celebrity photographers. Last July, Bieber was also involved in a high-speed chase involving paparazzi that ended after a California Highway Patrol officer stopped Bieber and cited him for speeding. And in January, photographer Chris Guerra was killed in traffic after taking pictures of Bieber's Ferrari.

Nevertheless, media advocacy organizations hope the legislation in Hawaii is significantly pared back or dropped altogether.

"The First Amendment has permitted restrictions on a few historic categories of speech, including obscenity, defamation, fraud, incitement, and speech integral to criminal conduct," Osterreicher, the National Press Photographer's Association attorney, wrote in the letter.

"Visual images, sound recordings, or other physical impressions of another person who is out in public where there is no reasonable expectation of privacy should not be added to that list."

For journalists, STOCK Act could lead down troubling path

By Rob Tricchinelli

A recent law banning insider trading by members of Congress and other government employees could affect journalists in a roundabout way.

Signed into law in April 2012, the STOCK Act bans such trading and prohibits those individuals from using nonpublic information for their personal gain.

The law has drawn public support after its overwhelming bipartisan passage, but journalists might get swept up if the law grows to regulate “political intelligence.”

Loosely, political intelligence refers to knowledge and information about government action that is passed along to investment firms and hedge funds, a practice that is legal in most instances.

Investors, especially hedge funds, mutual funds and pension funds, pay significant amounts of money to gather information about government policy and then use that information to make investment decisions.

Under the STOCK Act, the Government Accountability Office is researching investor reliance on political intelligence; how much information being sold would be considered “nonpublic;” and the benefits, legal issues and practical considerations raised by imposing disclosure requirements on political intelligence gatherers. A report is due in April.

This provision of the law, merely requiring a study, was weakened from a version that passed the Senate.

The Senate version initially required political intelligence purveyors to register with the government, including the disclosure of their clients’ identities, what they charge for their research and what issues they gather political intelligence on.

This disclosure requirement was stripped from the House version of the bill by Rep. Eric Cantor (Va.), the second-ranking Republican in the House. The Senate eventually passed the House’s version of the bill, which was then signed into law.

The language of the earlier version was put into the bill by Sen. Chuck Grassley



AP Photo by J. Scott Applewhite

Iowa Sen. Charles Grassley

(R-Iowa). His provision required “registration for lobbyists who seek information from Congress in order to trade on that information,” he said.

Cantor said Grassley’s amendment was too sweeping. Through a spokesman, he said the amendment could impose restrictions on diverse groups ranging from “local rotaries to national media conglomerates.”

Grassley intended his amendment to apply narrowly. In a floor speech, he said “journalists won’t need to register,” and the amendment included an exception for “disseminating news and information to the public.”

The registration requirement did not pass, and, ironically, now that the study proceeds, there is renewed concern over the line between a purveyor of political intelligence and a journalist, which is not so clearly drawn.

“We are reaching out to media organizations,” said Chuck Young, a GAO spokesman, although he declined to identify “which specific ones.”

The GAO contacted POLITICO Pro, calling the publication a “subscription-based media outlet” and asking the statutorily suggested questions about how it handles political intelligence. POLITICO Pro declined to respond to the GAO’s requests.

If the GAO, without a congressionally mandated exception for journalists, categorizes an organization like POLITICO as a seller of political intelligence, a possible next step is for the government to regulate it, through registration requirements or something potentially more serious.

It is also possible that the study will languish and have no real effect on journalism.

“It’s only a report,” said Melanie Sloan, executive director of Citizens for Responsibility and Ethics in Washington, who has studied the STOCK Act. “It doesn’t actually do anything.”

“I don’t think there’s any danger,” Sloan said. “I think that’s what political intelligence people tried to say in order to kill the [Grassley] amendment. I think it was mostly just an effort to make sure there was no regulation of political intelligence.”

Effects of GAO Study

To cooperate with the GAO study, a journalistic entity may disclose reporting techniques or internal policies, with an attendant danger that their proprietary techniques might become the basis for regulations on journalism.

Such regulations might also require a news organization to bog down its news content with disclaimers. Or worse yet, government sources would be hesitant or unwilling to speak to journalists for fear of punishment for talking to someone trafficking in “political intelligence.”

If regulations do infringe on the media, then they run up against Supreme Court precedent holding that government action punishing the publication of truthful

information seldom satisfies constitutional standards.

Journalists can also argue that even though POLITICO Pro is a subscription service — and many other news organizations have paywalls — once it publishes information, that information becomes public.

Supreme Court cases have protected bona fide publications from securities regulation, because they are engaged in the publishing business and therefore not dealing with “nonpublic” information.

Journalists also report on securities dealings, and courts have been sympathetic to individuals in securities cases whose actions have brought fraud to light.

The results of the GAO’s study are due this April, and the potential for journalists to get swept up in the regulation of political intelligence awaits resolution.

Meet the Reporters Committee's new executive director: Bruce Brown

Organization to begin litigation, pursue technology partnerships; magazine to move to tablet format

The Reporters Committee announced in August that Washington, D.C., media lawyer and former journalist Bruce Brown would be the organization's new executive director. He is the fourth executive director in the RCFP's 43 years, replacing Lucy Dalglish who is now the dean of the Philip Merrill College of Journalism at the University of Maryland. Managing editor Nicole Lozare talked with Brown about his new position, why he pursued it and where he wants to take the nonprofit.



News Media and the Law Photo

I understand that you've had your eye on this job for quite some time now. Can you tell me a little about that? Was this a career goal for you?

I think for anyone who's interested in journalism and interested in media law, working over here is extremely attractive because you're able to straddle two worlds. You're close to the journalism world and you stay close to the legal world. And in that sense I think it offers a combination of opportunities, it's almost unparalleled in our world.

What attracted you to media law in the first place? Did you ever have plans of staying in journalism?

When I graduated from law school I did work as a reporter for a couple of years. I thought that I might stay on that track, but then I went to a law firm. I probably went to the law firm not thinking that I'd stay on that track for as long as I did but I always had an idea that I'd get back into a job that was closer to journalism and therefore the Reporters Committee opportunity was very appealing and attractive for that reason.

If you stayed in journalism, because you actually worked in journalism for a while, and a number of our readers are journalists, where do you think you would be right now?

Well, if I had been lucky I think maybe working on an editorial board or having a column, that was always kind of the style of journalism that I was attracted to and thought would be the best fit for me. I don't know if I ever would have been, for example, a great investigative reporter, although as a lawyer I was always interested in understanding how the law supported that part of journalism.

What have you done in your media law career that you're most proud of?

I would say the civil rights case we worked on for *El Nuevo Dia* in San Juan (Puerto Rico), that was incredible experience. That was when I was a younger lawyer in my career at Baker Hostetler. That was an incredible case to have the opportunity to represent a newspaper that had found itself in the cross hairs of an angry governor, a governor who was retributive and seeking to retaliate against the newspaper for political coverage. That really felt like it put you in exactly the spot where the First Amendment and First Amendment lawyers could play the most important role in protecting journalism. That was an incredible experience.

You've been on the job for five to six months now, is it what you thought it would be like and what's the biggest surprise so far?

I would say the pace. When we're putting out three or four briefs a week the pace is very quick and that's very different from practicing in a law firm where you might just have a handful of matters you're working on and the deadlines are often widely spread out. And then you come over to a place like this where in any given week there are briefs to be done, reports to do, grants to apply for and the pace is very fast and in some cases we're working at a clip that I think is unusual. And I think there's more of an opportunity here to really do some long term thinking about legal policy to support journalism and to come up with projects that tie journalism to foundation granters who are looking for projects that really would assist journalists throughout the whole industry. And when you're a lawyer in private practice you're really focused on your individual clients and it's not as often you have the opportunity to conceive of projects or strategic goals that are industry wide.

What are some of the things you want to get done in your first year as executive director?

I think there are four things. There is our own technological overhaul here. Putting our guides and magazines into tablet format and working to improve our FOIA services. Two, making a push into the technology and blogging worlds where media law will be increasingly made, and building upon the RCFP's reputation in this area for being an advocacy organization for journalism and journalists. Three would be more engagement in the courts where we would actually litigate or defend cases for clients as opposed to just doing amicus work, and start to build a basis for doing that, whether it's FOIA work or access work. And then the fourth area would be on the public policy front, not just being engaged in the issues we've traditionally

had involvement in, but also looking for opportunities where we can have a voice in new set of policy initiatives to support journalism in transition into an online world and those issues will still involve newsgathering and subpoena defense and all those things we've always done.

You mentioned a push into tablet format. What does that mean for the magazine?

I anticipate this magazine in the near future being published in a tablet or e-pub format just as our legal guides will be published in the same format as well. This would enable readers to be able to access all that content on a tablet, on a smartphone in a way that they can easily kind of thumb through the materials that are there and bring it with them.

If you enter litigation, would it be the first time for the Reporters Committee to do something like that?

We had brought some FOIA cases in the 70s, so in a way it's going back to some of the early roots of the organization. We've developed this special role for the industry where we are writing a lot of amicus briefs during the year for different cases but we had previously played this other role where we would occasionally bring cases on our own. I think that's something we need to return to because I feel that there is a desire for us to play that role strategically where we look for opportunities that again focus on the overall needs of the industry, not just taking any case we can find like a clearinghouse or a clinic. I think we're well situated to do it and I think it's fun as well and I think our senior attorneys and our fellows would enjoy those opportunities.

What are some of the challenges you are facing as the new executive director?

I think that finding a way to work cooperatively and to find common ground with the tech community is huge because those companies are playing such a major role in journalism today. The Reporters Committee should be a connection point between old and new media and it is a natural connection point. I think that figuring out where to intervene and legally how to find cases for us that make the most sense for the industry will be a challenge. I think figuring out how to make best use of our publications to engage reporters with that part of what we do - the journalism part of what we do as opposed to the legal part of what we do - is a challenge and I think that certainly an organization like ours which has been traditionally funded by media companies and media related foundations also needs to find new communities of support to tap into, whether it's the transparency community, the technology community, those are natural places to look and we need to be doing that.

Speaking of funding, a lot of nonprofits are really struggling nowadays. How's the Reporters Committee doing?

I think the opportunity a new executive director has to come in, to reshape and rethink the funding, is a special and unique time when you're new and you're figuring that out. I think the fruits of your efforts in those areas, you'll see not even in a year but probably in two or three years down the road. And I hope at that point that within the next few years our funding will be diversified. I think the challenge for all organizations in our space is to show funders in areas that seem naturally related — transparency, technology — that organizations like the Reporters Committee, even though founded and coming out of traditional media, very much carry a vital role to these other communities as well.

So where do you see the Reporters Committee in five to 10 years from now?

I think that to be successful we will need to be handling our own cases, I think we will need to be working in tandem with organizations other than media organizations that care about journalism. I think if we have our own in house technologist in five or 10 years that would be a good sign because I think that for any organization in the publishing realm that it's just such an incredibly important significant and vital part of understanding how to make your way in the world. So I think for five to 10 years down the road, it would be terrific that in addition to having our FOIA person and our legal defense person who knows all the substance of the First Amendment law, that we would also benefit from having personnel on board who would come out of that world of understanding and marshaling the use of technology to support free expression for journalism.

So how will you know you're successful as the executive director of the Reporters Committee? How do you personally define success for you?

I would like to win some cases in court. I would like to be able to establish a new fellowship in key programming areas, whether we have a litigation fellowship or technology fellowship. A sign of success I think would be if we were in the future writing briefs where our participants included key participants in technology. I would like to look for opportunities to sign briefs that are important to those companies, I think the more cross fertilization you see between the RCFP and technology is a sign of success.

I would like to see the RCFP putting out more op-eds, more opportunity for us to comment on cases and policy challenges facing the industry. When the Federal Trade Commission and the FCC were holding their workshops at the future of journalism we were not represented then, and I think those opportunities when they come are natural places for us. I want officials and policy makers to think of us as an organization that does that kind of policy, that does thinking about the future of journalism but from a legal perspective. So those are the new areas of interest but I think success means partially building and maintaining success in key areas that we've always been a leader in, whether it's FOIA or reporters privilege or defending the journalism that grows out of national security disclosures. Every few

months there's a cycle of hand wringing over whether the press is reporting too much in national security and the RCFP is always taking a leading role in defending that kind of journalism. And I hope we continue to do that.

Asked & Answered

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

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

Q:Can I be liable for defamation for publishing a critical review or commentary?

A:Since a review is generally an author's opinion of the virtues of anything from a theater performance to a music album to a newly released smartphone app, many courts will likely find such speech cannot be "false" and therefore cannot be subject to a libel suit. The right to speak includes the right to voice opinions, criticize others, and comment on matters of public interest. It certainly includes the right of an author to publish his or her impressions.

But critics should be mindful of the standards the U.S. Supreme Court has set for how courts should determine what constitutes an opinion. In *Milkovich v. Lorain Journal Co.*, the Court ruled that there is no such thing as an "opinion privilege," but because factual truth is a defense to a libel claim, a statement or opinion with no "provably false factual connotation" is still protected.

The *Milkovich* Court described two broad categories of opinion protected by the First Amendment. The first involves statements that cannot be proved true or false by a core of objective evidence. This category of opinion also involves a statement of subjective belief based on disclosed true facts. The *Milkovich* Court offered the following example of a statement of non-provable opinion: "In my opinion Mayor Jones shows his abysmal ignorance by accepting the teachings of Marx and Lenin."

The second category described by the *Milkovich* Court involves statements that "cannot reasonably [be] interpreted as stating actual facts," meaning "loose, figurative, or hyperbolic language which would negate the impression that the writer was seriously maintaining" an actual fact, or where the "general tenor of the article" negates the impression that actual facts are being asserted.

As a result of this decision, courts will typically look at both the entire written piece of work and the publication or medium in which the statements occurred in evaluating a defamation claim in its proper context. Courts will examine statements of opinion to see if they are based on or presume underlying facts and will evaluate

whether such statements are false.

If there are no facts given to support the opinion, or these facts are false, the “opinion” statements will not be protected. For example, stating that “in my opinion, the actors in this show did not conduct even a single rehearsal prior to opening day” may not be considered an opinion because the underlying facts are readily verifiable and could be proved false.

The Internet poses particularly difficult challenges for courts evaluating the defamatory nature of statements. For instance, a New York appellate court recently stated in *Sandals Resorts v. Google* that allegedly defamatory comments published on anonymous blogs or in widely distributed e-mail messages like the one the court was considering lack the level of credibility readers would give similar remarks made in other contexts.

In August, a California appeals court upheld the dismissal of a libel suit brought by the head of a small startup tech firm company against the Internet blogging company Gawker Media in response to an commentary piece on the company’s business practices. The judge, in an unpublished opinion, concluded that the blog posting, considered in context — with its casual tone, numerous links to source material forming the basis for their piece and “qualifying language” — “constituted protected opinion and cannot provide the basis for a successful libel suit.”

Ultimately, the safest course of action for any opinion writer would be to include factual assertions to justify any opinions made in such a piece and to make sure that any factual assertions can be verified as true statements.

Q:I made a federal Freedom of Information Act request for records on an individual I am investigating and the government responded by saying I needed the subject’s written consent before the agency will give me the records. Can it do that?

A:Requesting records about a third party often creates tension between the disclosure requirements of FOIA and the Privacy Act of 1974, which was passed in part to protect certain individually identifying records maintained by the federal government. Generally speaking, without submitting proof that the individual consents to having his or her records disclosed or that the individual is deceased, it is hard to obtain such records.

When Congress passed the Privacy Act, it intended to restrict the disclosure of personally identifiable records that government agencies maintain about citizens. It allows individuals to bring lawsuits against government agencies when they improperly disclose records subject to Privacy Act protection.

As a result, federal agencies will often deny FOIA requests for records about third parties on the grounds that such disclosure would violate the Privacy Act and subject the agency to potential liability. Requesters have a few options for overcoming a potential agency denial for such records.

The easiest way to gain access to agency records about another living individual is to get that individual's consent in writing and attach the consent to the FOIA request. Federal agencies have created different consent forms that can accompany requests. The two most common forms are those from the Department of Justice, known as Certification of Identity, Form 361, and the Department of Homeland Security, known as Form 6-639, Freedom of Information/Privacy Act Request. Copies of these forms can be found on the DOJ's and DHS's websites.

If the subject of the FOIA request does not consent to the release of his or her records, obtaining the records may prove difficult. The Privacy Act, however, does not always bar release of individual identifying records under FOIA and it is sometimes possible to make an argument that the records should be released, notwithstanding the lack of the subject's consent.

Accessing the records without the individual's consent is possible because an exception to the Privacy Act permits disclosure of personally identifying information when disclosure is *required* by FOIA. In essence, if a record must be disclosed under FOIA, no liability is created under the Privacy Act for disclosing personal information about an individual.

In determining whether to release records under FOIA where one or more privacy exemptions have been claimed, courts will weigh the public interest in disclosing the record against the purported privacy harm.

To successfully overcome agency claims that the Privacy Act prohibits disclosure, a FOIA requester seeking records about an individual must make arguments for why the privacy interest is minimal or nonexistent and why the public interest in disclosure is high. Courts have interpreted the public interest requirement narrowly, defining it as information that would shed light on government activities or operations.

Additionally, if a requester is seeking records about an individual who is deceased under FOIA, agencies usually require the requester to prove that the subject of the request is dead. For the most part, agencies do not maintain a list of deceased individuals and some, such as the FBI, assume that a person is living 100 years after his or her birth date. A requester can establish that an individual is deceased in a number of ways, including attaching to the FOIA request a copy of an obituary, death certificate or other news clip indicating the individual is deceased.

For more information on overcoming privacy denials and the Privacy Act, see our Federal FOIA Appeals Guide, which can be accessed for free online through our homepage.

Q:Can I film inside government buildings?

A:It depends on the type of building and the type of newsgathering. Many courtrooms and courthouses can be opened to cameras, but press access to certain public institutions is restricted.

Cameras are prohibited in all federal criminal proceedings, but some federal courts have allowed their judges the discretion to permit cameras in civil cases under a pilot program authorized by the Judicial Conference, the body that regulates federal courts. All 50 states allow cameras in the courtroom in some proceedings, but these vary significantly.

Both houses of Congress have established their own rules for media coverage in their press galleries, which issue credentials to media through press associations. Some state constitutions require their legislative sessions be open to the public, but other states offer a limited right of public access, subject to special sessions and other circumstances requiring secrecy.

Some administrative proceedings are open to the public. Fact-finding proceedings typically have stronger public access rights than ones that are judicial in nature, but specific statutes can override these presumptions and govern certain situations.

Other buildings, such as government offices and facilities, are considered “nonpublic” because they have not been traditionally opened to the public. These buildings might have specific guidelines for how filming may take place on the grounds, if at all. A film crew typically may not enter a government office without permission.

Certain categories of nongovernment public buildings are commonly reported on, including schools, hospitals and prisons.

Access to public school buildings differs by state. Generally, public school property is treated as nonpublic, and regulations that restrict access but minimize interference with normal school activities are common. No state laws prohibit media from school grounds, but individual school districts may adopt regulations limiting access to school property. Occasionally, reporters covering events on school property have been arrested for trespassing.

The media have a right of access to report on prisons, but prison officials may restrict these rights if they believe their ability to effectively run the prison will be hindered. While reporters do not have an unqualified right to film specific inmates of their choosing, they cannot be denied access that is granted to the general public.

Private property owners may allow or bar filming at their discretion.

The shrewdest course of action is to determine beforehand what type of government facility you are attempting to enter and what restrictions apply. If restrictions do apply, determine how to obtain permission from the appropriate authorities to enter and report.

"Open & Shut"

A collection of notable quotations

"You can libel public figures at will so long as somebody told you something, some reliable person told you the lie that you then publicized to the whole world — that's what *New York Times v. Sullivan* says."

- *Supreme Court Justice Antonin Scalia said in a December interview on "Charlie Rose" about the landmark 1964 Supreme Court decision in New York Times v. Sullivan.*

"I think video games is a bigger problem than guns, because video games affect people. But the First Amendment limits what we can do about video games and the Second Amendment to the Constitution limits what we can do about guns."

- *Rep. Lamar Alexander (R-Tenn.) speaking about the constitutional limits to dealing with both gun control and video game violence.*

"Anyone who says 'video games are more dangerous than guns' is the stupidest, dumbest, most inane, gasbag, dirty, rotten, money-grubbing, jackass vermin who has ever lived. ... They are profiting off of the Second Amendment at the cost of the First Amendment."

- *Las Vegas Review-Journal entertainment and video game columnist Doug Elfman, responding to comments made by Rep. Lamar Alexander (R-Tenn.) suggesting that video games are a more dangerous societal problem than guns.*

"The First Amendment prevailed today. And you know, as unpopular as my speech is at times, it's necessary. It's necessary for me, it's necessary for you guys. You guys right here that are covering me right now, if this would have gone through, there would have been a slippery slope."

- *Radio personality Todd Alan Clem, a.k.a. "Bubba the Love Sponge," speaking to reporters after winning a defamation suit against radio rival Todd "MJ Kelli" Schnitt in Tampa.*

"Referring to someone as 'a real tool' falls into the category of pure opinion because the term 'real tool' cannot be reasonably interpreted as stating a fact and it cannot be proven true or false."

- *Minnesota Supreme Court Justice Alan Page, in his written opinion on whether a man's negative online reviews could be considered defamation.*

"My position is simple: I have a right to be disliked, but I also have a right to take pictures."

- *Celebrity photographer Steve Sands to The New York Times on making The New*

York Press' annual blacklist of the 50 Most Loathsome New Yorkers.

“We avow the First Amendment. We stand with that and say that people have a right to have a gun to protect themselves in their homes and their jobs, where, and that they -- and the workplace and that they, for recreation and hunting and the rest. So we're not questioning their right to do that.”

-House Minority Leader Nancy Pelosi (D-Cali.) confuses the First Amendment and the Second Amendment in an interview on Fox News Sunday.

Sources and Citations

Cases

Adkisson v. Abbott, No. 10-002120 (200th Dist. Ct. Aug. 8, 2012), appeal pending, No. 03-12-0053

Barren County Fiscal Court v. Glasgow Daily Times, No. 12-CI-00441 (Ky. Cir. Ct. Feb. 7, 2013)

Chevron Corp. v. Berlinger, 629 F.3d 297 (2d Cir. 2011)

Competitive Enterprise Institute v. EPA, No. 12-1617 (D.D.C. Feb. 8, 2013)

In re McCray, No. 03 Civ. 9685(DAB)(RLE), 2013 WL 604455 (S.D.N.Y. Feb. 19, 2013)

Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990)

National Collegiate Athletic Ass’n v. Associated Press, 18 So.3d 1201 (Fla. Dist. Ct. App. 2009)

Pell v. Procunier, 417 U.S. 817 (1974)

Redmond v. Gawker Media, LLC, No. A132785, 2012 WL 3243507 (Cal. Ct. App. Aug. 10, 2012)

Sandals Resorts Int’l. Ltd. v. Google, Inc., 925 N.Y.S.2d 407 (App.Div. 2011)

Bills, Statutes and Other Sources

Cal. Civ. Code § 1708.8 (2012)

Cal. Veh. Code § 40008 (2012)

Espionage Act of 1917, 18 U.S.C.A. §§ 792-799 (West 2013)

Freedom of Information Act, 5 U.S.C. § 552 (2012)

Freedom of Information Law, N.Y. Pub. Off. Law §§ 84-90 (2012)

H.B. 9, 108th Leg., Reg. Sess. (Tenn. 2013)

H.B. 485, 128th Leg., Reg. Sess. (Miss. 2013)

H.P. 250, 126th Leg., Reg. Sess. (Me. 2013)

Intelligence Authorization Act for Fiscal Year 2013, Pub. L. No. 112-277 (2012)

Intelligence Identities Protection Act of 1982, 50 U.S.C.A. §§ 421–426 (West 2013)

Judicial Conference of the United States, Judicial Conference Committee on Court Administration and Case Management Guidelines for the Cameras Pilot Project in the District Courts (2010)

Kentucky Open Records Act, KRS 61.870 et seq. (2012)

Lord Justice Leveson, An Inquiry into the Culture, Practices and Ethics of the Press (2012)

New York Secure Ammunition and Firearms Enforcement Act of 2013

Privacy Act of 1974, 5 U.S.C. § 552a (2010)

S.B. 145, 63rd Leg., Reg. Sess. (Mont. 2013)

S.B. 37, 63rd Leg., Reg. Sess. (Mont. 2013)

S.B. No. 465 S.D. 1, 27th State Leg., Reg. Sess. (HI 2013)

Stop Trading on Congressional Knowledge Act, Pub. L. No. 112-105, 126 Stat. 291
(2012)

Tennessee Open Records Act, Tenn. Code Ann. §§ 10-7-501 - 10-7-516 (West 2013)

Texas Public Information Act, Tex. Gov't Code § 552 et seq. (2012)

Whistleblower Protection Enhancement Act of 2012, 5 U.S.C.A. §§ 2302-2306 (West
2013)