

## Subpoena threats and their impact on local journalists trying to protect confidential sources

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### Press Freedoms in the United States 2021

#### Subpoena threats and their impact on local journalists trying to protect confidential sources

By Editorial Manager Chris Young • May 17, 2022

For many journalists, confidential sources serve as a gateway to important stories that can't otherwise be told, especially stories that reveal government wrongdoing. Reporters go to great lengths to protect these sources because they're aware of the potential fallout if they don't.

After all, when confidential sources fear retaliation for sharing government secrets with journalists, they stop doing it. And when journalists' sources go dark, so does the public's access to important information about what the government is up to.

That's why subpoenas and other legal orders forcing journalists to testify or to disclose sources and information pose such a serious threat to your right to know. Over the past five years, the [U.S. Press Freedom Tracker](#) has documented [130](#) subpoenas or other legal demands for testimony or records from journalists and news outlets.

That tally includes [three high-profile cases](#) at the end of the Trump administration in which federal prosecutors authorized the seizure of journalists' communications records as part of the government's hunt to identify confidential sources.

The Justice Department announced a [historic new policy](#) last year strengthening protections for journalists so that such intrusions into the newsgathering process would not happen again. These changes, and the Reporter's Committee's [successful advocacy efforts](#), have left journalists much safer in the Biden administration.

As the incidents documented by the Tracker show, however, demands for journalists' records are often made by state and local prosecutors, as well as private parties in legal disputes. And they are sometimes directed not at national security reporters at major news outlets, but at independent freelancers and small-town reporters who cover crime, protests and other local stories — journalists whose newsrooms, if they are even connected to one, may not have the legal muscle to fight them.

## **'On principle we want to fight this, but I'm not sure we can afford it.'**

As of the writing of this newsletter, the Tracker has documented more than [two-dozen](#) subpoenas and other legal orders in 2021. That's down from [35](#) the previous year, when journalists reported the highest number of such demands since the Tracker began documenting these and other press freedom violations back in 2017. Of course, subpoenas often go unreported, so it's difficult to know exactly how many are served to reporters.

In fewer than [half of the cases](#) documented by the Tracker last year, journalists were subpoenaed for their testimony in court. The rest of the cases concerned journalists' communications or reporting materials.

In Charlottesville, Virginia, a defendant in a defamation lawsuit served [several local journalists](#) and [news outlets](#) with subpoenas compelling them to testify last year as part of a case stemming from the 2017 "Unite the Right" rally. In addition to seeking testimony, the subpoenas demanded that the journalists turn over a wide range of records, including videos, photos and communications, which an attorney representing the journalists and news outlets called "extremely overbroad and unduly burdensome."

A judge ultimately sided with the journalists, quashing the subpoenas last July.

According to the Tracker, fewer than half of the subpoenas and other legal demands served to journalists in 2021 were either [quashed](#) or [dropped](#).

Last September, a California judge [quashed a subpoena](#) seeking testimony and reporting materials from freelance reporter and podcast host Chris Lambert concerning the murder of a California Polytechnic State University student. Lambert had produced a 10-part investigative podcast series about the student's disappearance, which led attorneys for one of the suspects to serve Lambert with a demand for his testimony, as well as materials he used to report the podcast series.

In quashing the subpoena, a judge in San Luis Obispo County, California, cited protections under the First Amendment and the state's "[shield law](#)."

Nearly every state and the District of Columbia has either a shield law or other legal protections for journalists' sources and newsgathering materials. (Despite many attempts over the years, Congress has yet to pass a federal shield bill, though the House Judiciary Committee [recently advanced](#) another such proposal on a bipartisan basis.)

In Wisconsin, an attorney representing [three local journalists](#) argued the state's [shield law](#) protects them from having to comply with a district attorney's demand for their testimony at the trial of two women charged with assaulting a state senator during a Black Lives Matter protest in 2020. But a judge ultimately sided with prosecutors and ordered the reporters to comply with the subpoenas.

After receiving the judge's order, Dylan Brogan, senior reporter at the digital outlet Isthmus, [told the Tracker](#) that his "small little reboot of a paper" was considering an appeal. But "it's very expensive," he said. "On principle we want to fight this, but I'm not sure we can afford it."

## **'Thank you for helping me fight this, @rcfp.'**

The truth is, lots of journalists — local or not — can't afford to defend themselves against demands for their testimony, confidential sources or reporting materials. That's why the Reporters Committee has long provided free legal support to journalists in need of subpoena defense — and why we have recently expanded our capacity to handle this and other kinds of work at the local level, where RCFP's free legal services are needed most.

Last spring, Reporters Committee attorneys helped Fenit Nirappil push back against a [subpoena for his sources and work materials](#) related to a nine-year-old investigative project the journalist reported as a college student, which raised serious questions about a 1997 murder case.

In response, RCFP attorneys [wrote a letter](#) to the Chicago-based law firm that issued the demand, arguing that a First Amendment privilege for journalists' sources and work product, as well as federal court rules, protect Nirappil from being required to comply with the subpoena.

As of April 18, 2022, Nirappil said the law firm has yet to respond to the letter.

In Kansas, Reporters Committee attorneys helped snuff out a subpoena before it was even served to Justin Wingerter. The journalist contacted the Reporters Committee's legal hotline last July after he learned that the Kansas attorney general's office was planning to demand all of his notes, recordings and research related to an investigative newspaper series and book he had published about a wrongful conviction in Oskaloosa, Kansas.

As we [reported in a blog post](#) last year, Sarah Matthews, then a senior staff attorney for the Reporters Committee, quickly worked with Wingerter to craft a legal strategy to fend off the subpoena and commented publicly in local news stories about the government's plans to force the journalist to turn over his records. Shortly after the stories appeared in the news, the Kansas attorney general withdrew the subpoena notice.

Thanks to the [Local Legal Initiative](#), the Reporters Committee is better equipped than ever before to defend journalists like Wingerter against subpoenas and other legal orders. The [two-year-old program](#) provides free, on-the-ground legal services to local journalists in Colorado, Oklahoma, Oregon, Pennsylvania and Tennessee. In addition to helping journalists and news organizations sue government agencies for access to public records and meetings, our attorneys in these five states are available to provide free legal defense against demands for confidential sources and reporting materials.

Earlier this month, independent journalist Hanna Merzbach turned to the Local Legal Initiative for support after a district attorney in Oregon [served her with a subpoena](#) forcing her to testify about one of her sources. Ellen Osoinach, our

Local Legal Initiative attorney in Oregon, quickly came to the reporter's defense, contacting the district attorney to remind him of the strong journalist protections included in the state's [shield law](#).

The next day, the district attorney acknowledged misreading the statute and rescinded the subpoena.

**In the fourth and final installment of this newsletter series**, we'll take a look at a particularly chilling statement against a reporter and the light his case sheds on continuing threats to data journalism.

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Chris Young is the editorial manager at the Reporters Committee for Freedom of the Press.

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