



Perils of Confidential Sources:

Your confidential sources can prove to be mixed blessings

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KEY TIP

Granting anonymity to an information source has its rewards, but it also presents inherent risks.

Courts have recognized this promise of confidentiality as legally binding like a contract.

As a result, breaking that promise opens the door to a potential lawsuit brought by the source. Before agreeing to confidentiality, the journalist should understand the legal landscape and consider how far he or she will go to keep that source's identity a secret.

At its core, the promise of confidentiality is important and rewarding for a variety of reasons:

- **It's important to journalists:** The ability to promise confidentiality, then keep that promise, allows journalists to gain status and build trust among their peers and those they work with.
- **It's important for institutions:** Keeping confidentiality helps journalists tell stories and expose wrongdoing. To this day, *The Washington Post's* Bob Woodward and Carl Bernstein can say they did not reveal the identity of "Deep Throat," the confidential source whose information was essential to *Post's* coverage of the Watergate scandal, which led to the resignation of President Richard Nixon. (Deep Throat — former FBI assistant director Mark Felt — told the world himself, decades later, before his death.)
- **It's important to the profession:** As a newsgathering tool, the promise shows that journalists are autonomous from institutions or the state. Journalists are not part of law enforcement. They are independent fact gatherers — and therefore must be able to make and keep their promises.
- **It's important to citizens of the republic:** One of the foundations of U.S. democracy is the ability for journalists to report news and information necessary to an informed citizenry. At times, journalists must grant confidentiality to sources if that is the only way important information will be communicated.



However, the use of confidential sources can raise credibility issues because it prevents readers, viewers, or listeners from knowing where the information came from and being able to make their own judgment about the validity.



Before granting confidentiality, consider factors such as:

- **Is the source in a position to know about what he or she is revealing?**
For instance, if this is an exposé of a government agency, does the source even work for the agency or has the source had the chance to see the agency up close?
- **Does the source have a personal agenda or motive for revealing the information?**
Journalists need to know whether a source coming forward is altruistic or simply acting in his or her best interest. Is the source a whistleblower for bad acts or potentially complicit and seeking a “get out of jail free” card?
- **Can any of the information from the source be corroborated by other sources of information, including public records or other people?** Having supporting sources will bolster the credibility of information from an unnamed source.
- **Is the source reliable because he or she has provided reliable information in the past?**
- **Is the claim the source is providing inherently credible?**

Journalists should calibrate any promise of confidentiality to the importance of the source’s information for the particular story or investigation. They should not promise confidentiality — and a willingness to go to jail to protect the source — if the story is not worthy of such a promise or if some lesser agreement can be reached with the source.

Making a claim that a journalist breached this promise varies from state to state based on how the courts have interpreted this legal concept, but a confidential source typically must prove:



- There was a promise of confidentiality,
- The promise was clear or unambiguous,
- The confidential source reasonably relied on the promise,
- The confidential source’s reliance on the promise was to his or her detriment (he or she was harmed by relying on the promise).

There is often an element of preventing injustice: The courts will be asked to enforce the promise to prevent an unjust act.

How this may play out is extremely fact-specific, and typically relies on confidential conversations with no witnesses. Typically, the promise is not in writing and may have been made on the fly.



Journalists should be aware that granting confidentiality to a source can, in a worst-case scenario, lead to a subpoena seeking to disclose the confidential source's name. If the journalist is sued for libel based on information provided by a confidential source, they may be forced to choose between honoring their promise and not having support for the information they published (unless they have other non-confidential sources).

Journalists should consider how they would respond.

They should think through the full scope of the promise — is the promise only to not name the person as part of the reporting process? Does the journalist intend or expect the promise to extend to confidentiality even in the face of a subpoena? Ideally, the source would agree that the name may be released if there is a subpoena or if a lawsuit is filed (after reasonable efforts to avoid disclosure). If so, the journalist should get that concession in writing.

Despite how important a tool granting confidentiality is to journalists today, for much of American history the law showed little interest in this aspect of the reporter-source relationship.

Before 1987, courts approached the subject of confidentiality as an ancillary issue resulting from third-party efforts to compel disclosure of confidential information, typically in the context of national security or defamation.

That changed with the U.S. Supreme Court case, *Cohen vs. Cowles Media Co.*, in 1987. There, the U.S. Supreme Court held that First Amendment protections of a "free press" do not prohibit a plaintiff (the confidential source) from suing a journalist for damages under the legal theory of promissory estoppel for breaking a promise of confidentiality.



Cases decided after Cohen show that the specific facts and circumstances will dictate whether the journalist may be liable.

- **Journalist may be liable:** In a Minnesota case, *Ruzicka vs. Conde Nast Publications*, the U.S. Court of Appeals for the Eighth Circuit found a promise that the subject not be "identified or identifiable" in an article to be a matter for a jury to decide. (The journalist claimed that she vaguely promised only to do some masking of the identity.) The journalist changed the woman's name, but included other details that the plaintiff said made her identifiable. The appeals court rejected the magazine's argument that the promise was too vague or ambiguous to be enforced.
- **Journalist not liable because the source left behind evidence revealing his identity:** In *Ventura v. Cincinnati Enquirer*, the U.S. Court of Appeals for the Sixth Circuit ruled against a plaintiff who alleged a newspaper disclosed his identity as a confidential source. The source had helped the newspaper's reporter illegally access voice mail messages, and the journalist had promised that the source and his role in providing access would be kept secret.



After the newspaper published its investigation, both the journalist and the source were charged criminally for accessing the company's voice mail messages. The appeals court rejected the promissory estoppel claim, in part because the source had left behind evidence showing he committed the crime (so his identity could be obtained without the journalist breaking his promise) and the journalist had invoked his privilege not to disclose the source's identity.

- **Journalist not liable because of the source's bad faith:** In *Steele v. Isakoff*, a federal court in the District of Columbia dismissed a promissory estoppel claim against a magazine and its reporter for an alleged failure to honor an agreement with a source that her statements were "off the record" and she would not be named. In doing so, the court noted that the plaintiff intended to lie to the journalist and in fact did lie, and that bad faith amounted to breach of contract that relieved the journalist of his side of the bargain.

Weighing the rewards, the factors, and the legal risks will help journalists make a more informed decision on whether to make the promise of anonymity, ways to limit it depending on the value of the information sought, and the price of not keeping it.



If confronted with a subpoena or other efforts to reveal a confidential source, journalists should consider contacting an attorney who can advise on the pros and cons of revealing or keeping a confidential source.