



Responding to Subpoenas:

You kept material off-the-record, but a subpoena demands it anyway

PROJOURN



Denotes
KEY TIP

Journalists report what they see and hear – but not everything.

The piece was too long. The information wasn't relevant. The journalist promised confidentiality to a source or agreed to withhold certain details.

Whatever the reason, a journalist may one day receive a subpoena seeking unpublished information because a party in a criminal or civil matter believes the journalist has information that may help them. If the journalist refuses, he or she faces possible jail time, court fines, or both.

- In 2021, a journalist from *The Washington Post* was subpoenaed in connection with a lawsuit brought by former Chicago police officers. The subpoena sought documents related to the journalist's work on two stories he wrote a decade earlier as part of the Medill Innocence Project.
- Last year, the Seattle Police Department subpoenaed several area news stations for raw footage of the May 30, 2021, riots, during which six police vehicles were fire-torched, five firearms were stolen, and numerous businesses were vandalized and looted. Investigators sought the unpublished news footage as evidence in several arson and stolen weapons cases but eventually agreed to withdraw the subpoena.
- In 2019, a venture capital investor went to court against a senior news editor for the magazine *Fast Company*, seeking to uncover identifying information about a source cited in a 2017 article.

How a journalist must respond to a subpoena depends on a number of factors, including the type of subpoena (criminal or civil), whether it was issued from a state or federal court, or whether the information sought by the subpoena is available from another source or sources, among other factors.



JOURNALIST'S PRIVILEGE IN FEDERAL COURT

In 1972, the U.S. Supreme Court ruled in *Branzburg v. Hayes* that the First Amendment does not protect journalists from a court order to testify or disclose information when served with a criminal subpoena.

Branzburg, a newspaper reporter, was called twice to testify before state grand juries that were investigating drug crimes. He refused to testify and potentially disclose the identities of his confidential sources.

The Supreme Court ruled that when reporters receive information from sources in confidence, there is no privilege that allows them to withhold that information during a government investigation and that requiring reporters to disclose confidential information to grand juries served a “compelling” and “paramount” state interest.

Although the court found no privilege in a criminal investigation, the Ninth Circuit and other federal and state courts have recognized a limited privilege that protects journalists from disclosing information in a civil case.



- In *Shoen v. Shoen*, the U.S. Court of Appeals for the Ninth Circuit found that society’s interest in protecting the integrity of the newsgathering process and ensuring the free flow of information to the public is an important enough interest to justify some “incidental sacrifices of sources of facts.”
- As the U.S. Court of Appeals for the Second Circuit explained in *Gonzalez v. National Broadcasting Co.*: “If the parties to any lawsuit were free to subpoena the press at will, it would likely become standard operating procedure for those litigating against an entity that had been the subject of press attention to sift through press files in search of information supporting their claims. The resulting wholesale exposure of press files to litigant scrutiny would burden the press with heavy costs of subpoena compliance and could otherwise impair its ability to perform its duties — particularly if potential sources were deterred from speaking to the press, or insisted on remaining anonymous, because of the likelihood that they would be sucked into litigation.”
- The privilege recognized in *Shoen* is not limited to traditional “news” reporters but extends to all journalists engaged in gathering information for dissemination to the public.

The test for whether a person can invoke the privilege is whether he or she intended to use the material to disseminate to the public and the person had that intent at the start of the newsgathering process.



JOURNALIST'S PRIVILEGE IN FEDERAL COURT cont'd

For instance, in *In re Madden*, the U.S. Court of Appeals for the Third Circuit held that the reporter's privilege did not protect an employee of World Championship Wrestling ("WCW") against compelled disclosure of sources' identities. The WCW employee had admitted he was "an entertainer, not a reporter." During a deposition in an unfair business practices lawsuit, Madden refused to identify the sources of allegedly false and misleading statements by claiming that his sources were confidential and protected by the reporter's privilege.

The court disagreed, saying that Madden's activities were not reporting. Rather "Madden's work amounts to little more than creative fiction about admittedly fictional wrestling characters who have dramatic and ferocious-sounding names like 'Razor Ramon' and 'Diesel.'"

Even if a journalist can claim the privilege, it is not absolute.



To overcome the privilege, the subpoenaing party must show that the information sought from the journalist is:

- (1) unavailable after exhausting all reasonable alternative sources;
- (2) noncumulative (does not repeat information gathered from other sources); and
- (3) clearly relevant to an important issue in the case.

While the federal privilege may protect some journalists, others may be able to invoke their own state constitutions (for example, Washington and New York) or state statutes known as journalist shield laws. There is no federal shield law, despite efforts to have one passed.

STATE LAW PROTECTIONS FOR JOURNALISTS

In *Branzburg*, the Supreme Court made clear that state courts and legislatures are free to pass laws regarding (in the case of legislatures) or recognize (in the case of the courts) a reporter's privilege as long as it is within First Amendment limits.

Currently, only two states have no clear protections: Wyoming and Hawaii.

These so-called shield laws typically require that the party seeking the journalist's testimony demonstrate that the information being sought is relevant, material (meaning significant or not incidental), and cannot be obtained from a different source.

Some statutes define who is a "journalist" who can seek the privilege.

In addition, the laws vary in the level and types of protections given to journalists and the circumstances under which journalists can claim the privilege.



STATE LAW PROTECTIONS FOR JOURNALISTS cont'd

- In California, for instance, the reporter's privilege is in both article I, § 2(b) of the California Constitution and California Evidence Code § 1070. California's Supreme Court has interpreted these "shield laws" as giving broad protection to journalists. The California Legislature also has adopted procedural mechanisms under state statutory law designed to give greater protection for journalists. While California's shield law generally is very protective, there are limits to the protection it provides against criminal defendants and in cases where the reporter is a party to the litigation.
- Similarly, in Washington, those state courts have recognized, under the state's common law, a qualified confidential source privilege in both criminal and civil actions, and in 2007 the state legislature enacted a shield law. The statute provides the "news media" (as defined in the statute) with absolute protection for confidential sources and qualified protection for other journalistic materials and information. The statute clarifies and expands the scope of protection for reporters from compelled testimony and disclosure.

RESPONDING TO A SUBPOENA

How you should respond will depend on the actual subpoena, in part because there are so many different types, such as state court versus federal court, whether the subpoena is from a prosecutor or a defendant (in criminal cases), and if the subpoena is served to media as a non-party in a civil case.



- The subpoena should specify details such as whether it seeks your testimony, notes, or both;
- whether it seeks published information or unpublished information; and
- whether it is for a trial, grand jury, or something else.

Also, different courts have different rules on how to respond to a subpoena (state court rules are entirely different than rules in federal court).



Some suggested next steps:

- Do contact a lawyer.
- Don't ignore it or delay dealing with it.
- Do read and do your best to understand it. Look for important details about deadlines and the scope of the request.
- Do check to see what records or documents you have in your possession, including those you have access to (documents in your "possession, custody or control").
- Don't destroy any records related to the subpoena, including those being sought as part of the subpoena.



RESPONDING TO A SUBPOENA cont'd

If a journalist is served with a civil subpoena, generally he or she can respond by objecting or making a motion to quash the subpoena.

The laws of the jurisdiction where the journalist is located will apply to the legal dispute. A response will also depend on the applicable court rules. If the journalist is served with a criminal subpoena in federal court, such a subpoena will be harder to defend against as was the issue in *Branzburg*. For either type, the party seeking access must still meet basic standards of relevance and admissibility and show that the request is not a mere fishing expedition for information.

As a practical matter, a journalist may not need to go to court to fight the subpoena.

Instead, a journalist's lawyer may be able to show the party issuing the subpoena that pursuing information from the journalist will take too much time and effort, especially in jurisdictions that have strong case law in support of a journalist's privilege.

For instance, the requirement that the party exhaust all other reasonable ways to get the information is a high bar to meet in the Ninth Circuit, and the party seeking the information may realize it is easier to get the information from another source. The law applicable to the subpoena will determine the journalist's bargaining power and ability to resist either inside or outside court.



Ultimately, the journalist will need to determine what he or she wants to protect — what is reasonable to protect — while considering the impact on his or her credibility and professional reputation.