



A Reporter's Field Guide



What is the extent of the right to gather news?

The question arises on a daily basis for journalists around the country: reporters and photographers are told by police that they cannot enter a crime scene, are threatened with arrest for not moving where police order them to move, or are ordered out of a building or an area where a newsworthy event is taking place.

Unfortunately, courts have not been good at clarifying what the newsgathering right entails. In a landmark case about the reporter's right to keep sources confidential, *Branzburg v. Hayes*, the U.S. Supreme Court court noted: "We do not question the significance of free speech, press, or assembly to the country's welfare. Nor is it suggested that news gathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated." The Court introduced this defense of a free press simply to state that forcing reporters to testify about sources is not covered by this constitutional protection. And in the years since the 1972 *Branzburg* decision, the high court has never spelled out that protection.

In two subsequent cases involving

media access to prisons — *Pell v. Procunier* and *Saxbe v. Washington Post* — the Supreme Court declined to extend this access right any further. The majority of the court concluded that as long as restrictions treat the media and public equally, they raise no constitutional questions.

After the prison access cases, the Court later found in *Richmond Newspapers Inc. v. Virginia* that the public and media have a First Amendment right to attend criminal judicial proceedings, which reinforces the idea that newsgathering is constitutionally protected. And in *Globe Newspaper Co. v. Superior Court*, the Court noted that because the right to publish news depends on the ability of the media to gather information, restrictions on the right to gather news diminish the right to publish. But these standards have been so far limited to the realm of access to court records and proceedings, and, in fact, the high court has not extended the access right to civil proceedings.

Some lower courts have granted the media special newsgathering privileges in specific situations where the public does not have access. But most of these decisions fail to clearly define the scope and nature of these privileges.

So what does this mean as a practical matter to the average journalist? Courts will generally defer to police and other officials if they interfere with reporters in the name of managing an emergency scene or protecting the public, but should protect reporters from “arbitrary” interference with newsgathering. But reporters should remember that they will never convince an officer on the scene that their First Amendment rights are being violated. Usually, the only remedy is an after-the-fact discussion with officials or a lawsuit.

This guide does not cover issues of liability that journalists may face for publishing information, such as lawsuits for libel or invasion of privacy. Instead, it looks at some of the common newsgathering scenarios encountered by journalists and discusses the law that applies.

Public places

Newsworthy events often occur in public places such as streets, sidewalks or parks. Since these places are open to the public and few restrictions are placed on the activities that take place in them, they are considered *public forums*. The public forum analysis is also used to determine speech rights in places like public schools, public television or radio stations, and government Web sites. The court will analyze whether the forum in question has been traditionally held open to all speakers, or if it is tightly controlled or used for a limited purpose.

Although governments generally may not limit or deny access to public forums, they may impose reasonable “time, place and manner” restrictions on expressive activity on such property. To comport with the First Amendment, such restrictions must satisfy a three-part test: they must be content neutral, narrowly tailored to serve a significant government interest, and must leave open alternative channels of communication. The Supreme Court has regularly used this test at least since a 1939 case, *Hague v. CIO*.

Although the cases addressed by the courts typically involved

political demonstrations, they are relevant to journalists and newsgathering. If the media have a right of access equal to the public's, and the public has a broad right of access to a place, then reporters will have equal access to gather news in that place.

But the fact that property is owned by the government does not necessarily make it a public forum. Courts allow greater restriction on speech and access on property that traditionally has not been open for general public use, such as courthouses, jails, government offices, city halls and public schools. This type of property is often referred to as *nonpublic-forum public property*.

In general, governments may exclude the news media from property that is publicly owned if authorities can show that media access would interfere with the normal operations of the facility. In 1966, the U.S. Supreme Court held in *Adderley v. Florida* that the government, “no less than a private owner of

property, has the power to preserve the property under its control for the use to which it is lawfully dedicated.”

In 1983, the U.S. Supreme Court ruled in *U.S. v. Grace* that a federal law barring protesters from public sidewalks surrounding the Supreme Court was unconstitutional. It said, however, that the law could be applied to restrict picketing and leafleting on the Supreme Court grounds, such as the grass and the terrace, as well as in the building itself.

Although the property is publicly owned, it has not been traditionally held open for the use of the public for expressive activities.



Few restrictions can be placed on protests — and newsgathering — in public places.

Private Property

Newsworthy events such as arrests, fires or demonstrations frequently occur on private property. But property owners or police sometimes deny journalists access to homes, businesses, and even seemingly public places such as shopping centers and privately owned housing developments. Even when reporters gain access without being stopped, they can be arrested for trespass and property owners may sue them after the fact, seeking damages for trespass or invasion of privacy. (Even though this is an access guide, some of the privacy cases will be discussed because they can create new standards of allowable access to property, although they don't directly interfere with the gathering of news.)

The U.S. Supreme Court has not yet considered whether the media have the right to follow news onto private property. Lower courts that have examined the issue have rendered widely varying opinions.

Courts frequently focus on whether the media had consent either from the owner or from law enforcement officials to enter the property to gather news. When reporters receive explicit consent, they should have little or no problem gaining access or defending coverage from any trespass and privacy suits.

In many cases, journalists enter without asking permission and the owner is not present to object, or is present but fails to

voice objection. The court must then determine whether the owner's silence amounted to "implied consent."

Reporters do not have a right to knowingly trespass just because they are covering the news. When Bryon Wells, a reporter for the *East Valley Tribune* in Phoenix, Ariz., ignored a "no trespassing" sign, opened an unlocked gate and rang a former police officer's doorbell in November 2003, he was charged with criminal trespass, even though he immediately left when the officer's wife told him to. A Superior Court judge ruled in July 2004 that the First Amendment didn't protect Wells. "Reporters who are in violation of a criminal trespass statute are not exempt from prosecution simply because they are exercising a First Amendment right," the judge wrote. (*Arizona v. Wells*)

Problems also occur when deception is used to gain access to a private place. Two producers for ABC's *PrimeTime Live* were able to enter the "employees only" sections of a Food Lion store by obtaining jobs based on falsified credentials, rather than identifying themselves as reporters and asking for consent. The resulting story reported unsanitary food handling practices at the store. Food Lion sued for fraud and trespass, alleging that the journalists were guilty of wrongdoing based not on what they reported but instead on the "deceptive" means used to gather information. The store initially won a \$5.5 million jury verdict in January 1997, and while the U.S. Court of Appeals in Richmond (4th Cir.) upheld the claims for trespass and breach of a duty of loyalty, it found that those acts had not caused any damage and awarded Food Lion only two dollars. (*Food Lion v. Capital Cities/ABC*)

"Ride-alongs," in which journalists accompany law enforcement officers during searches and arrests, present unique problems. Because ride-alongs often involve news that happens on private property — especially private residences — journalists need to take care to get the proper consent from the appropriate people.

Courts differ on what kind of consent to enter is required. Some courts have stated that the owner's silence alone is enough to imply consent. Others have found that police permission is sufficient if the owner is not present and cannot be asked for consent.

In Florida, an invasion of privacy suit was filed against *The (Jacksonville) Florida Times-Union* over a published photograph of the "silhouette" left on the floor by the body of a 17-year-old girl killed in a house fire. The local fire marshal and a police sergeant investigating the fire invited the news media into the burned-out home to cover the story.

In court the officials testified that their invitation was standard practice. The property owner, the victim's mother, was out of town at the time of the fire and therefore could not be asked to consent. The Florida Supreme Court agreed with the media that they had implied consent to enter the house based on the common practice of reporters entering private property without the owner's explicit consent in the course of covering crimes or disasters. However, the court added that if the owner had been present and objected to the reporter's presence then the report-

er might have been held liable for invasion of privacy. (*Florida Publishing Co. v. Fletcher*)

Other courts have ruled that consent may never be implied. For example, a Rochester, N.Y., Humane Society investigator obtained a search warrant to enter a private home where he suspected animals were being mistreated. Before going to the home, the investigator called three television stations and invited them to accompany him. Two news teams entered with the investigator over the objections of the owner. They filmed the interior of the house and broadcast the story on the evening news.

When the owner sued the media for trespass, a New York state appellate court held that "the gathering of news and the means by which it is obtained does not authorize, under the First Amendment or otherwise, the right to enter into a private home by an implied invitation arising out of a self-created custom and practice." The court also compared the case to the previous case in Florida, finding the Humane Society investigation less newsworthy than a fire that claimed the life of a young person. Further, the court noted the property owner's vociferous objections to the presence of the journalists. (*Anderson v. WROC-TV*)

However, courts are divided about whether as a rule ride-alongs — or more specifically, those parts of the ride-along that involve entering private property or a residence — violate property owners' Fourth Amendment right to freedom from unreasonable searches. Even though the journalists themselves may not be liable for alleged violations, the Fourth Amendment may still represent a barrier to ride-along coverage of investigations. If officers fear that the media's presence will lead a court to reject evidence from a search or find the officers liable for violating the subject's civil rights, they will not give journalists permission to accompany them.

However, the limitations of search warrants do not automatically exclude the press. When the owner of an animal shelter in Sanilac County, Mich., sued sheriff's deputies who allowed a camera crew from a TV station to accompany them on a search of the shelter and a private residence, the court held that because the search warrant specifically granted permission for videotaping and photographing, the owner's rights had not been violated even though the warrant itself said nothing about the TV news crew. (*Stack v. Killian*)

Journalists should be aware that in some cases, notably one involving a CNN camera crew that followed a federal Fish and Wildlife Service crew on a raid of a ranch, courts have held that when the media's actions are too "intertwined" with the officials' actions, the reporters become "joint actors" who can themselves be liable for improper searches. CNN settled the case with Montana ranchers Paul and Erma Berger in 2001 for an undisclosed amount. (*Berger v. CNN*)

In the end, journalists need to be concerned and aware any time they enter private property without an invitation or the permission of the owner.



AP PHOTO

Reporters can face arrest when they follow news onto private property.

Schools

Access to public schools also may pose special problems. Generally, public school property is treated as nonpublic-forum

public property, and regulations that restrict access but are designed to lessen interference with normal school activities would be constitutionally permissible.

No state laws bar the media from school grounds outright, but individual school districts may have adopted regulations limiting access to school property.

In June 1996, the California Attorney General's office issued an advisory opinion giving school administrators the authority to deny media access to school grounds. Ruling that "the constitutional right to gather information is not without limit," the attorney general authorized exclusion of the media if their presence "would interfere with peaceful conduct of the activities of the school." (*A.G. Op. No. 95-509*)

The opinion was unusual, considering that California law specifically exempts the news media from the definition of "outsiders" who must check with administrators before visiting schools. (*Calif. Penal Code §§ 627.1, .2; Calif. Evidence Code § 1070*)

Even if access to school grounds is permitted, reporting activities may still be limited. When a congressional candidate spoke at a high school in Auburn, N.Y., the school's principal allowed reporters to cover the candidate's speech but prohibited them from photographing or interviewing individual students.

Restrictions may also extend to activities that take place outside school grounds. When a reporter attempted to interview students after a high school graduation ceremony that took place in the Forum building in Harrisburg, Pa., police arrested him for refusing to leave the building. Though the police later claimed that school officials had told them to bar the press from the event, charges against the reporter were dropped.



AP PHOTO BY TOM REESE/THE SEATTLE TIMES

Access to news events at public schools can pose special problems.

Saxbe v. Washington Post)

Furthermore, prisoners' rights to talk to the media can be severely restricted if a regulation is implemented to further a legitimate safety or security interest, and courts are highly deferential to prisons in determining how rules serve those interests.

But even though media access may not be constitutionally guaranteed, state law or prison policy may allow reporters to interview specific inmates. Before assuming your state does not allow access, call the state department of corrections (or the Bureau of Prisons for access to a federal facility) to find the specific requirements for and limitations on interviews and visits. Policies vary widely from state to state, and corrections officials usually have considerable latitude in deciding whether a particular reporter may interview a particular inmate. Some

states have regulations that are very specific regarding who is a journalist and what kind of access journalists can get, while others leave it to the discretion of the prison warden.

If officials refuse an interview request, reporters still may be able to communicate with inmates by having their names added to the list of persons who may call, visit or write to a specific inmate. Regulations vary on how large the list can be and how long it may take to be added to it.

Prisons may also elect to offer no special access at all. For example, Arizona excludes all visitors except lawyers, family and friends. California rules specifically ban face-to-face interviews between prisoners and the news media. Pennsylvania also grants no special access right to members of the media; reporters must register as "social visitors" and are

subject to the same restrictions that apply to the general public.

Furthermore, in many states prison officials may legally eavesdrop on conversations between inmates and reporters and read inmates' mail.

Access may also depend on the status of the inmate a reporter wishes to see. It may be difficult to contact inmates who have been placed in administrative or disciplinary segregation, though in federal prisons even inmates in special segregation can usually receive visitors.

Access to "death row" inmates may also be governed by unique rules. For example, federal regulations bar press access to an inmate within seven days before his or her scheduled execution, except by permission of the prisoner and the warden of the facility.

Prisons and executions

Important news events often happen behind bars, and prison inmates themselves may be newsmakers. Reporters often need to visit federal and state prisons to interview inmates and observe prison conditions or executions. But while the public has a limited right of access to the prison system, the U.S. Supreme Court has consistently ruled that the media have no right to insist on interviewing specific inmates.

Although inmates do not lose all their First Amendment rights, prisons may place some limits on their speech in the interests of prison administration and security. Similarly, the Supreme Court has upheld restrictions on journalists' access based on prison officials' arguments that media attention allowed some prisoners to gain "a disproportionate degree of notoriety and influence among their fellow inmates" and that such notoriety engendered "hostility and resentment among inmates who were refused interview privileges." Journalists, the court held, have "no right of access beyond that afforded the general public." (*Pell v. Procunier*;

Military facilities

Each branch of the U.S. military has its own broad guidelines regarding media access to bases. In addition, each base often has the authority to implement its own regulations. For that reason, it is best to call the individual base for its policy on press access.

Generally speaking, the military has been more restrictive about access to its facilities since the Sept. 11 attacks, and courts will continue to be deferential to the military regarding access limits. Military posts usually require that journalists be escorted

by a military public information officer, which means that access often depends on a scheduled appointment.

Reporters have been denied access to events at military bases. A federal Court of Appeals in Washington, D.C., ruled in 1996 that regulations banning media from covering the arrival at military bases of the remains of soldiers killed abroad do not violate the First Amendment. The Department of Defense argued that freedom of speech and of the press do not create a right of access to government property simply because access could aid in reporting. In ruling for the government, the court said that the restrictions did not place a significant burden on newsgathering and did not “impede acquisition of basic facts, the raw material of a story.” (*JB Pictures v. Department of Defense*)

Military restrictions on the press may extend beyond the borders of permanent facilities. For example, in September 1997 the Pentagon declared a neighborhood in Baltimore a “National Defense Area” after the crash of an Air Force fighter jet. Residents were evacuated after the plane crashed during an air show flyby; they were not allowed to return to their homes for three days. Eight-foot-tall tarpaulins were erected around the plane to shield investigators as they searched for evidence of the cause of the crash, the *Baltimore Sun* reported. Two days after the crash, reporters and photographers were allowed access to the site although an armed Air Force security squadron stood guard and the plane was roped off to keep reporters at least 60 feet away, according to the *Sun*.

A 1996 California Attorney General’s opinion stated that police may exclude “unauthorized persons,” including members of the news media, from military aircraft crash sites and “recover” photographs that may have been taken of classified materials. (*66 Op. Att’y Gen. 497*)

Civic centers and stadiums

Access to privately owned stadiums and arenas is treated the same as any private property, and reporters are usually subject to the whims of the owners in granting access. And when municipal property is used for a commercial rather than governmental purpose, the media may have no special right of access beyond that afforded the general public. Generally, this means that journalists who wish to photograph or record news such as concerts or sporting events may be prohibited from doing so even if the venue happens to be owned by the government.

A number of federal courts have found that even if a civic center is municipally owned, when the city participates in a commercial venture by leasing the center, it is not operating in a governmental capacity and is therefore free to exclude journalists from events. But other courts have held that private event organizers cannot admit some journalists while barring others; even though a facility is leased to a private organization, the private group was still bound by the same rules that applied to the use of municipal property for government functions.

Reporters and publishers have occasionally met with resistance for gathering or distributing news on public property outside of sporting events. In almost all cases, courts find such

restrictions invalid, unless the distribution is done in a way that interferes with public access to the facility.

Medical information

Reporters often need basic healthcare-related information while covering stories, even if just to state the condition of someone involved in a car crash. But a decade-old law — the Health Insurance Portability and Accountability Act, or HIPAA — and its more recent implementing regulations have cut off access to much of this information, either directly or by leaving health care professionals reluctant to cooperate with the news media for fear of receiving large fines.

Generally, the privacy-related provisions require that most doctors, hospitals and other health care providers obtain a patient’s written consent before using or disclosing the patient’s personal health information. Federal officials have said that the rules apply to any health-related records or communications — oral, written, electronic or otherwise — that contain information that could identify a patient. The rules create severe civil and criminal penalties for noncompliance, including fines up to \$25,000 for multiple violations within a calendar year and fines up to \$250,000 and/or imprisonment up to 10 years for knowingly misusing individually identifiable health information. The regulations offer some provisions for disclosure, but only in

emergency situations and only to groups such as law enforcement officials.

But the rules have led to a significant loss of what was previously public information, despite the fact that the rules themselves make no reference to journalists nor do they specifically prohibit the release of information for newsgathering purposes.

Although the rules allow for an exception for limited disclosure in the case of directory information — the name and hometown of pa-

tients, their admittance and discharge times and general status — journalists are finding that hospital officials are withholding more information than necessary to avoid any risk of penalties. Ambulance records were also an early casualty in the effort to protect medical privacy. Ambulance logs can yield abundant information about first response medical efforts. But whether or not ambulance operators and emergency personnel are covered by HIPAA, most of them seem to believe that it’s better to withhold information that they once regularly released.



HIPAA has led to overly restrictive practices in the health care field.

AP PHOTO

Access to court proceedings

Courtrooms traditionally have been open to the public, and anyone who wanted to watch a trial could, as long as there was a seat available.

However, the right of access is never absolute. The courts usually apply a balancing test to determine whether the interest

in access outweighs any interest in confidentiality. The standard the courts use in striking that balance depends on the source of the right; courts have found a right of access under common law, the First Amendment and state and federal laws. These methods of access are not exclusive; courts may find a right of access under both the common law and the First Amendment.

Under common law — the traditional court-made law that U.S. courts adopted centuries ago from English standards — courts have recognized a *presumed* right of access to criminal and civil court records, but the presumption of openness can be overcome by a balancing of competing interests. And the U.S. Supreme Court said in 1978 in *Nixon v. Warner Communications, Inc.* that the common-law balancing is “best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case.”

Because of this simple balancing test, gaining access under the common-law right is more difficult than when relying on the First Amendment right, under which closure must pass a higher level of scrutiny.

In *Richmond Newspapers, Inc. v. Virginia* and other cases that followed in the early 1980s, the Supreme Court established a two-part test to determine whether the press and public have a First Amendment right of access to criminal proceedings. First, courts must consider “whether the place and process have been historically open to the press and general public.” Second, they must consider “whether public access plays a significant positive role in the functioning of the particular process in question.” Since *Richmond Newspapers*, courts have extended this “history and logic” test to establish a constitutional right of access to many types of criminal and civil court proceedings and records.

Once a court determines that the First Amendment right of access applies and there is a presumptive right of access, courts must grant access unless specific, on-the-record findings demonstrate that closure is necessary to protect a compelling governmental interest, and is narrowly tailored to serve that interest.

In criminal cases, courts issuing closure orders most often point to the defendant's right to a fair trial by an impartial jury. However, general fear that publicity will jeopardize a defendant's right to a fair trial is usually insufficient to close a criminal proceeding. In addition, sometimes judges consider closing proceedings in light of privacy interests of witnesses or jurors, or the emotional trauma of testifying in public, particularly in sexual assault cases.

The U.S. Supreme Court has never decided whether the public has a First Amendment right of access to civil proceedings. However, several federal appeals courts and state courts have held that civil cases are presumed to be public under the First Amendment as well.

The high court also has never ruled on whether the public has a constitutional right of access to juvenile court proceedings. But traditionally, juvenile courts have been closed to the public. Although many states have enacted statutes that open up their juvenile court systems — particularly in response to high-profile crimes involving minors — it is unlikely that a court will find a First Amendment right of access exists.

Trial secrecy has been increasing recently, prompted by controversial trials ranging from O.J. Simpson to Theodore Kaczynski, Timothy McVeigh and Terry Nichols, and, more

recently, individuals accused of supporting terrorism.

Judges also increasingly are limiting information about jurors, citing concerns about their privacy. However, some appeals courts have ruled that the First Amendment gives the public a general right of access to names and addresses of jurors.

Unlike criminal courtroom proceedings, grand jury proceedings have not been historically open to the public, and few courts have ever allowed access to grand jury materials or related proceedings.

Grand jury witnesses

Courts generally do not allow any public access to grand jury proceedings or documents. But federal rules and the majority of states, either expressly or impliedly, allow grand jury witnesses to disclose what transpired when they testified. In fact, President Clinton appeared on national television on the same day he testified before the grand jury and revealed his status as a witness.

But witnesses still may not enjoy complete freedom to talk publicly. A California Court of Appeal in Santa Clara in 2004 upheld a warning given to grand jury witnesses not to disclose their testimony, or anything they learned during their appearance before the grand jury, until the transcript is made public.

The case arose after a newspaper unsuccessfully tried to interview grand jury witnesses in connection with the criminal investigation of a local judge. The *San Jose Mercury News* complained that a witness declined to talk to one of its reporters after a prosecutor told the reporter, within earshot of the witness, that anyone who spoke publicly about his testimony could be thrown in jail. Another prospective witness refused to be interviewed without the district attorney's permission. The

appeals court ruled that the admonition read to all witnesses was not an unconstitutional prior restraint on the press. (*San Jose Mercury News, Inc. v. Criminal Grand Jury of Santa Clara County*)

The ruling appears to conflict with a 1990 U.S. Supreme Court case, *Butterworth v. Smith*, which holds that all grand jury witnesses have a First Amendment right to disclose the contents of their testimony, at least once the grand jury has concluded its activities. But

because the court in *San Jose Mercury News* limited its discussion to the single issue of prior restraint, it expressly declined to analyze the constitutionality of the warning under *Butterworth*.

One thing is certain: witnesses are completely free to discuss anything they knew prior to testifying before the grand jury. That doesn't mean they will be willing to do so, however — especially when a prosecutor may threaten to throw them in jail for talking.

Grand jury “ancillary proceedings” — court hearings on matters affecting a grand jury proceeding, such as motions to quash grand jury subpoenas, motions requesting immunity from prosecution and motions to compel testimony — are also



Grand jury witnesses are free to discuss their own testimony with the news media.

presumed to be secret. The press, in theory, can overcome the presumption by showing that the need for disclosure outweighs the need for secrecy. But case law indicates that such an argument has a slim chance of succeeding, especially if the grand jury's investigation is ongoing.

That is not to say the press can get no information at all about grand jury ancillary proceedings. Recently, Dow Jones & Co. petitioned the U.S. Court of Appeals in Washington, D.C., to release information that was redacted from the court's own opinion in the matter regarding subpoenas to *New York Times* reporter Judith Miller and *Time* reporter Matt Cooper. The court released the information regarding I. Lewis "Scooter" Libby, who had been indicted by then, but kept information related to other grand jury targets or witnesses confidential.



All states have detailed open meetings laws that govern closure of meetings.

AP PHOTO

Public meetings

Access to public meetings is controlled by state open meetings laws. Each state has its own detailed laws on what constitutes a meeting, who may attend, and when a public body may properly close a meeting. But the law is not so clear on when particular reporters or citizens can be removed from meetings. If public officials can claim a legitimate reason for excluding particular people and the exclusion is not done for reasons related to First Amendment expression — such as retribution for critical or negative coverage of an official — courts will usually defer to the decision of the officials. But content-related bans can prompt civil rights suits; state officials are not allowed to use their authority to interfere with constitutionally protected rights.

Most states allow access to “the public,” and do not bother to define that term more. However, some states, such as Delaware, restrict access only to citizens of the states, or allow cities and town to limit access to local residents.

Many state laws specify exacting procedures governing the closure of a public meeting, or the use of secret executive sessions to keep the public and press out. A number of states require that closed sessions must be announced at a public meeting, and that reasons for the closure must be spelled out.

State laws also spell out what types of meetings can be closed. Discussions with attorneys regarding litigation will almost always be closed, as will discussions of real estate purchases. But the laws will usually specify the exact conditions under which these types of meetings are closed, and whether or when the information must eventually be released.

The open meetings act of each state will also describe how the public or members of the news media can challenge closures of meetings. Some states will allow for an administrative review, such as Connecticut and Hawaii, which have public bodies that monitor compliance with the openness laws. Other states have similar bodies that issue nonbinding advisory opinions. But in most states, the only remedy involves seeking an injunction in court.

A more troubling area of access issues involves not the public meetings and press conferences themselves, but the ability of reporters to interview and receive more information from public servants. In February 2006, the U.S. Court of Appeals in Richmond (4th Cir.) upheld the dismissal of a lawsuit brought

by two *Baltimore Sun* reporters after Maryland Gov. Robert Ehrlich had ordered state officials not to talk to the journalists. The decision was particularly surprising because Ehrlich made it clear that the action was taken specifically because of what the reporters had written about him.

The governor's press office in November 2004 ordered state public information officers and executive branch officials “not to return calls or comply with any requests” from the two journalists, although they were allowed to attend press conferences and receive press releases.

A trial judge initially dismissed the case, viewing it as a demand for government information. He ruled that journalists do not have a greater First Amendment right than private citizens to access government information.

The appellate court affirmed that decision. Allowing the reporters' retaliation claim to stand would turn the relationship between journalists and government officials on its head, the court said. “Having access to relatively less information than other reporters on account of one's reporting is so commonplace that to allow *The Sun* to proceed on its retaliation claim addressing that condition would ‘plant the seed of a constitutional case’ in ‘virtually every’ interchange between public official and press,” according to the court. (*The Baltimore Sun Company v. Ehrlich*)

Attacking access problems

Regardless of whether news occurs on public or private property, if you ignore police orders regarding access you risk arrest and prosecution. Case law makes clear that police can limit media access when they believe such restrictions are needed for public safety or to prevent interference with an investigation, and that the First Amendment does not provide immunity from criminal sanctions for disobeying police orders.

However, courts often acknowledge after the fact that a reporter or photographer should have been granted access to a particular scene. An Associated Press photographer who was charged with interfering with the arrest of a homeless man saw the charges dismissed when the judge ruled that the photographer had a legitimate purpose in photographing the arrest. The photographer, Charles Palla Jr., later sued the police and city for violating his civil rights by arresting him. In 1996, a jury awarded him more than \$100,000 in damages, finding that the police had arrested him without probable cause and that the city had condoned the arresting officer's misconduct. (*Palla v. Pittsburgh*)

You and your news organization can minimize restrictions on access to crimes, accidents and disasters.

But it is very hard to do this in the middle of an ongoing investigation or rescue. You rarely will accomplish anything by arguing with a police officer at the scene or a shopping center manager concerned that bad publicity will hurt merchants.

Your news organization should have a “battle plan” for dealing with such situations before they develop, providing names of police officials and other contacts who may be able to facilitate access to the area and legal advisers who should be called. More importantly, however, you should develop a good working relationship with police officials.

If police in your area have press relations guidelines, find out what they say. If police issue press passes and grant access only to reporters who have them, obtain a pass.

The plan should tell you what to do if you are ordered to keep out by police or property owners — whether to stand your ground and risk arrest or a suit, or to depart.

If an event occurred on private property, you need to know how your state's courts have resolved the issue of consent. For example, have they ruled that consent will be implied in the

absence of explicit orders to leave, that you must obtain explicit consent or have they taken some middle position?

If someone other than a government official orders you to leave, try to determine whether that person is the owner or has authority to act in the owner's behalf. For example, if a crime has occurred in a shopping mall outside a particular store, the mall manager may have authority to order you to leave. But the owner of the store probably cannot prevent you from covering the event.

Be aware that courts are more likely to hold you liable for trespass or invasion of privacy if the property at issue is a dwelling, rather than business or commercial property.

The Reporters Committee will try to answer questions concerning access to places. Journalists should call our legal defense hotline at 1-800-336-4243. ♦

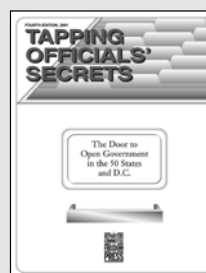
Publications used in this guide:



The First Amendment Handbook is a primer on the laws affecting reporters' rights to gather and disseminate news, with additional chapters on libel, confidential sources, freedom of information, prior restraints and access to courts.



Access to Places is intended to give reporters a "plan of attack" when access to newsworthy events has been unreasonably denied, and discusses legal restrictions that may be placed on reporters.



Tapping Officials' Secrets is a guide to open meetings and open records laws available as one-state booklets or a compendium. (The new edition coming soon will be retitled **The Open Government Compendium**.)



The Lost Stories examines how a steady stream of laws, regulations and judicial decisions have eroded reporting on important issues by curtailing access to information.



Medical Privacy vs. The Public Interest is a reporter's guide to HIPAA privacy rules, which greatly restrict how journalists can gather information and cover important stories.



Secret Justice: Grand Juries is part of a series of court access booklets, with this installment examining access to grand jury information, including interviews with witnesses.

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