



Journalist Shield Laws in OECD Jurisdictions

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Comparative Summary

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I. Introduction

This report, prepared by the research staff of the Law Library of Congress, surveys 36 OECD-member jurisdictions for laws that protect journalists (or those engaged in journalistic activities) from compelled disclosure of journalistic information and the identity of sources, similar to “journalist shield” laws that exist in many US states. In 31 out of the 36 jurisdictions surveyed, laws were found that afford journalists protection (to varied extent) from compelled disclosure of their sources. The report focuses on the definition of a protected journalist, the content that is considered protected information, the limits placed on the authorities’ powers to compel journalists to disclose information, and the procedures for disclosure. The report covers all OECD countries except the **United States** and **Israel**, and includes detailed survey reports for 12 jurisdictions selected among these, namely, **Canada, Chile, England and Wales, France, Germany, Italy, Latvia, Mexico, New Zealand, Portugal, Sweden, and Turkey**. Information pertaining to the rest of the surveyed OECD jurisdictions is compiled in the annexed table, wherein citations to the relevant laws are provided.

Of the surveyed countries, 27 are Council of Europe members and are party to the European Convention on Human Rights (ECHR).¹ The European Court of Human Rights (ECtHR), which is the international court of the Council of Europe (CoE) and the body that is tasked with the interpretation of the ECHR, ruled in the landmark 1997 case of *Goodwin v. United Kingdom* and its progeny cases that article 10 of the ECHR enshrining the right to freedom of expression requires contracting states to introduce effective legal procedural safeguards for the disclosure of journalistic sources compelled by judicial or law enforcement authorities. These include, at a minimum, the possibility of review of the decision compelling disclosure by an independent and impartial body whose review would be governed by clear criteria. That entity would consider whether less intrusive measures would be sufficient to address the public interest that is invoked by the authorities.² The reasoning provided by the ECtHR in this line of cases is that the protection of journalistic sources is crucial for the press to perform its “public watchdog” role in democratic societies.³

As a result, some surveyed jurisdictions, such as **Greece**, have developed court practices that created certain protections for journalists and their sources in accordance with the ECtHR’s case law, even in the absence of legislation specifically providing for such protection. Many of the

¹ Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, E.T.S. No. 5; 213 U.N.T.S. 221, art. 10, <https://perma.cc/ZMG7-RN9R>.

² *Goodwin v. United Kingdom*, 22 Eur. Ct. H.R. 123 (1996), <https://perma.cc/6LN8-KKTS>. For a non-exhaustive list of ECtHR judgments in this line of cases, see Council of Europe, *The Protection of Journalistic Sources, a Cornerstone of the Freedom of the Press* (June 2018), <https://perma.cc/R3BJ-38BH>.

³ *Goodwin v. the United Kingdom*, at § 39.

other jurisdictions that are CoE members have also incorporated the ECtHR's case law in their legislation or court practice concerning the interpretation of press-related laws or constitutional rules regarding freedom of expression and freedom of the press.

In most of the surveyed jurisdictions, journalist shield rules are provided in specific provisions included in legislation regulating the press, civil and criminal procedure laws, or in evidence rules. However, a number of the surveyed jurisdictions, such as **Germany** and **Sweden**, have constitutional provisions that, explicitly or by court interpretation, directly provide protection to journalists from compelled disclosure of their sources.

II. Definitions of Protected Journalist

The surveyed jurisdictions have adopted diverse approaches in defining the class of persons to which their "journalist shield" laws will apply.

Shield rules in some jurisdictions, such as **Sweden**, **Turkey**, and **England and Wales** do not limit the scope of the protection to professionals typically considered, or formally designated, as journalists, but cover all persons who use sources to collect information and convey it to the public over media that meets certain criteria. Some other jurisdictions such as **Germany** and **New Zealand** limit the protection to persons regularly and professionally involved in the dissemination of information in the public interest, while not requiring the person to be a journalist in the formal sense. In addition, protections in **Germany** only apply to persons working for "printed publications."

On the other hand, some jurisdictions such as **Canada**, **Chile**, **France**, **Italy**, **Latvia**, **Portugal**, and **Mexico City** (an entity with the authority to enact local laws as if it were a Mexican state) limit the scope of the protection of their shield laws to persons designated as journalists based on educational degree attained, employment by a journalistic entity, or registration with a professional organization. Some of these jurisdictions widen the class of persons protected to persons that have some relation to the profession of journalism: **Canada's** shield rules also cover assistants of journalists and former journalists, **Mexico City's** rule extends protection to "journalistic contributors" who practice journalism either regularly or sporadically, without having been employed by a journalistic entity, and the **Chilean** shield law extends protection to students in journalism schools under certain circumstances. Conversely, **France's** constitutional council ruled against the extension of the protection to managing editors and editorial staff.

III. Content Recognized as Protected Information

Shield rules in most of the surveyed jurisdictions are tailored to protect the confidentiality of the news source, and thus, the protections from disclosure also extend to documents, data, and other materials that are in the possession of the journalist or other protected persons that might reveal the identity of the source. In some jurisdictions, such as **Germany**, protections extend to information conveyed to the members of the press by informants, the content of material produced by members of the press themselves, and notes or professional observations.

IV. Limits on Compelled Disclosure

Shield laws in the surveyed jurisdictions typically offer two types of protection to journalists and related persons: procedural safeguards for searches, seizures, or surveillance ordered by judicial and law enforcement authorities that might reveal journalistic information, and the exemption from testifying in criminal—and in some jurisdictions, also civil—proceedings. In some jurisdictions, additional protections exist, such those granting journalists the right to protect the confidentiality of sources when the secrecy conflicts with the rights of others. For example, in **Italy**, a special provision in the personal data protection legislation upholds journalists' right not to disclose their news sources when it conflicts with a data subject's right to know the origin of personal data related to them.

In the surveyed jurisdictions, procedural safeguards applicable to searches and seizures typically appear to consist of a heightened standard that must be employed by courts when issuing warrants related to journalistic material and premises in which journalistic practice is done. For example, in **Canada**, a federal law requires courts in criminal proceedings to use a reasonableness and public interest test before issuing search warrants relating to communications of, or data in the possession of, a journalist. Journalists also have the right to object to the compelled disclosure of information or documents that might identify a journalistic source in other types of proceedings, upon which the disclosure can be authorized only after a court has applied the test and determined that disclosure should proceed.

However, some jurisdictions have introduced other types of specific safeguards. In **France**, a judge must carry out searches of premises related to journalistic practice in criminal proceedings, and the documents can only be examined by the judge and the journalist (or their representative) before being seized. Another type of safeguard is found in **Portugal**, where the journalists' union must be notified of a search of a media organization's premises so that a union delegate can be present during the search. In **Turkey**, it appears that telecommunications between suspects in criminal proceedings and protected persons under that country's shield law cannot be intercepted under a court order if those communications might reveal a news source.

Concerning rules exempting journalists from giving testimony that might reveal their sources, the surveyed jurisdictions have adopted diverse approaches. In many jurisdictions, such as **Denmark, Finland, Germany, Iceland, Italy, Mexico City, Norway, Portugal, Sweden, and Turkey**, there exist legal provisions that explicitly exempt journalists or authors of journalistic content from providing testimony in court regarding journalistic information or sources. In most of these jurisdictions, however, exceptions to these exemptions exist, such as in **Denmark, Finland, Germany, and Sweden**, where the protected person may be compelled to testify in cases concerning serious crimes that are enumerated in the law, or exceed a penalty threshold. In **Germany**, however, this exception only relates to the content of materials that members of the press have produced themselves or to notes or professional observations, and it only applies if it does not reveal the identity of the informant or the content of the information communicated. In some jurisdictions, such as in **Italy, New Zealand, and Norway**, courts may override the presumptive exemptions granted to protected persons under certain circumstances where the withheld information is crucial for the case. In a number of the jurisdictions, general procedural rules regarding the protection of professional secrecy appear to protect journalists from being compelled to provide testimony that might reveal their sources.

Survey of Journalist Shield Rules in OECD Jurisdictions

Jurisdiction	ECHR contracting party?	Do journalist shield laws exist?	Citations for relevant rules and comments
Australia	No	Yes	<ul style="list-style-type: none"> • Evidence Amendment (Journalists' Privilege) Act 2011 (Cth), https://perma.cc/H782-T3Y2. • See Kelly Buchanan, Australia: Journalist Shield Law Passed by Australian Senate, Global Legal Monitor (Mar. 9, 2011), https://www.loc.gov/item/global-legal-monitor/2011-03-09/australia-journalist-shield-law-passed-by-australian-senate/.
Austria	Yes	Yes	<ul style="list-style-type: none"> • Strafprozeßordnung 1975 [StPO], Bundesgesetzblatt [BGBl.] No. 631/1975, as amended, §157, para. 1, no. 4, §157, para. 2, §144, https://perma.cc/6VD3-PRNL in conjunction with Mediengesetz [MedienG], BGBl. No. 314/1981, as amended, § 31, https://perma.cc/R5JR-UHBG (original), https://perma.cc/8233-8SWG (English translation).
Belgium	Yes	Yes	<ul style="list-style-type: none"> • Constitution belge, 17 February 1994, D / 2019 / 3427 / 7, https://perma.cc/2Q5Y-EG6A. • Loi du 7 avril 2005 relative à la protection des sources journalistes [Law on the protection of journalists' sources], 2005-04-07/47, https://perma.cc/4TPU-F25E. • Code Pénal (Belg.), https://perma.cc/L7HH-A265.
Canada	No	Yes	<i>*See the full survey report for this jurisdiction included in this compilation.</i>
Chile	No	Yes	<i>*See the full survey report for this jurisdiction included in this compilation.</i>
Colombia	No	Yes	<ul style="list-style-type: none"> • Código de Procedimiento Penal, Diario Oficial Sept. 1, 2004, arts. 68, 385.g, https://perma.cc/M9T4-YFYL.
Costa Rica	No	Yes	<ul style="list-style-type: none"> • Constitución Política de Costa Rica de 1949 [Political Constitution of Costa Rica of 1949], https://perma.cc/5365-9GTG. • Ley No. 7594 de 1996, Código Procesal Penal [Law No. 7594 of 1996, Criminal Procedure Code], art. 206, https://perma.cc/9TVD-THKC. • Ley N° 8968, Protección de la Persona Frente al Tratamiento de sus Datos Personales [Law No. 8968, Protection of the Person on the Treatment of Their Personal Data], art. 9(1), https://perma.cc/Y43Y-CLRJ.

Survey of Journalist Shield Rules in OECD Jurisdictions: Table

Jurisdiction	ECHR contracting party?	Do journalist shield laws exist?	Citations for relevant rules and comments
			<ul style="list-style-type: none"> • Ley No. 4420 de 1969, Ley Orgánica del Colegio de Periodistas de Costa Rica [Law No. 4420, Organic Law of the Order of Journalists of Costa Rica of 1969], art. 2, https://perma.cc/YWH3-MM5S. • Sentencia de la Sala Constitucional del 30 de abril de 2013 [Decision of the Constitutional Chamber of Apr. 30, 2013], https://perma.cc/NB7T-SGFK. • Reglamento Interno de Orden y Disciplina del Colegio de Periodistas de Costa Rica, de 2010 [Internal Regulations of Order and Discipline for the Journalists' Order of Costa Rica, of 2010], art. 1, https://perma.cc/DKW8-DMQV. • Código de Ética de los Profesionales en Comunicación, de 2011 [Ethics Code of Communication Professionals, of 2011], art. 8, https://perma.cc/NPS3-C99H.
Czech Republic	Yes	Yes	<ul style="list-style-type: none"> • Act on Radio and Television Broadcasting Operation and on Amendments to Other Acts, No. 231/2001 Coll., May 17, 2001, last amended by Act No. 127/2005, https://perma.cc/58BS-B2LJ. • Act on Rights and Duties Related to Publishing Periodical Press and on Amendment to Certain Other Acts of the Czech Republic, No. 46/2000 (The Press Act), <i>Zákon ze dne 22. února 2000 o právech a povinnostech při vydávání periodického tisku a o změně některých dalších zákonů (tiskový zákon)</i> Official Gazette <i>Sbôrka zaâkonu</i>, https://perma.cc/XP8L-UEL3.
Denmark	Yes	Yes	<ul style="list-style-type: none"> • 172 Retsplejeloven (LBK nr 1445 af 29/09/2020), https://perma.cc/2Y4L-J25K. For more on who is protected and the publishing responsibilities of the media, see <i>Medieansvarsloven</i>, https://perma.cc/9D6N-RJCU. • §§ 152 – 152c Straffeloven (LBK nr 1650 af 17/11/2020), https://perma.cc/NNN2-3YB6.
England and Wales	Yes	Yes	<i>*See the full survey report for this jurisdiction included in this compilation.</i>
Estonia	Yes	Yes	<ul style="list-style-type: none"> • Media Services Act (abbr. MeeTS), adopted on Dec. 16, 2010, entered into force on Jan. 16, 2011, RT I, <i>Teataja Meediateenuste Seadus (lühend - MeeTS)</i> (official gazette), https://perma.cc/V627-MMGM (in Estonian). • Personal Data Protection Act, adopted on Dec. 12, 2018, <i>Isikuandmete kaitse seadus (lühend - IKS)</i>, <i>Riigi Teataja</i>, https://perma.cc/A7NM-XS2S.

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Jurisdiction	ECHR contracting party?	Do journalist shield laws exist?	Citations for relevant rules and comments
			<ul style="list-style-type: none"> Public Information Act, adopted on Nov. 15, 2000, <i>Avaliku Teabe Seadus, Riigi Teataja</i>, https://perma.cc/Y6US-PGAE.
Finland	Yes	Yes	<ul style="list-style-type: none"> 16 § Lag om yttrandefrihet i masskommunikation (FFS 2003/460), https://perma.cc/YS44-L8ZX. 17 kap. 20 § Rättegångsbalken (FFS 1734/4), https://perma.cc/ZEP3-CDZ4.
France	Yes	Yes	<i>*See the full survey report for this jurisdiction included in this compilation.</i>
Germany	Yes	Yes	<i>*See the full survey report for this jurisdiction included in this compilation.</i>
Greece	Yes	No	<ul style="list-style-type: none"> 1975 Syntagma [Constitution] 14, https://perma.cc/3ZES-TBPF (in Greek), https://perma.cc/8RAL-B52T (Hellenic Parliament's English translation, 2008).[†] Presidential Decree No. 77, E.K.E.D. 2003, A:75. <p>[†] Although there exists no journalist shield legislation in Greek law, Greek courts have regularly ruled that journalists have a right not to disclose the identities of their sources under the constitutional right to freedom of the press. See Eur. L. Students' Ass'n, <i>International Legal Research Group on Freedom of Expression and Protection of Journalistic Sources Final Report</i> 573-617 (2016), https://perma.cc/GUX5-8ZL8.</p>
Hungary	Yes	Yes	<ul style="list-style-type: none"> Act CIV of 2010 on the Freedom of the Press and the Fundamental Rules of Media Content, in force since Aug. 1, 2013, https://perma.cc/2ZL6-YCAC. Act CLXXXV of 2010 on Media Services and Mass Media in force since Sept. 30, 2014, https://perma.cc/58U7-ZKKM.
Iceland	Yes	Yes	<ul style="list-style-type: none"> § 25 Media Act 38/2011, https://perma.cc/BPQ4-4XUC (unofficial English translation by the Icelandic government), https://perma.cc/Z59Z-V7TL (original Icelandic text). § 119 Code of Criminal Procedure, No 88/2008, https://perma.cc/5XC4-XAYS (unofficial English translation by Icelandic government).
Ireland	Yes	No	<ul style="list-style-type: none"> Bunreacht Na Éireann [Constitution of Ireland] 1937, art. 40.6.1, https://perma.cc/P74Q-HMZB. European Convention on Human Rights Act 2003, No. 20 of 2003, https://perma.cc/VUP7-WA2Q. Mahon v Keena [2009] IESC 64, https://perma.cc/5H5R-KHJ3.[†]

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Jurisdiction	ECHR contracting party?	Do journalist shield laws exist?	Citations for relevant rules and comments
			†Journalist sources may be protected in certain circumstances due to freedom of expression provided by both the European Convention on Human Rights and the Irish Constitution. The protection is not absolute, and the law is not settled in this area.
Italy	Yes	Yes	<i>*See the full survey report for this jurisdiction included in this compilation.</i>
Japan	No	No	<p>* But see:</p> <ul style="list-style-type: none"> • 2005(Ra)1722, Tokyo High Ct. (Mar. 17, 2006). • 2006(Kyo)19, S. Ct (3rd Petit Bench, Oct. 3, 2006) (denying interlocutory appeal), Minshu 60-8, p. 2647.
Latvia	Yes	Yes	<i>*See the full survey report for this jurisdiction included in this compilation.</i>
Lithuania	Yes	Yes	<ul style="list-style-type: none"> • Law on the Provision of Information to the Public of the Republic of Lithuania, No. I-1418, July 2, 1996, last amended on Dec. 23, 2015, https://perma.cc/HPN7-2R67. • Code of Ethics of Lithuanian Journalists and Publishers, https://perma.cc/8S2Z-N2B6.
Luxembourg	Yes	Yes	<ul style="list-style-type: none"> • Texte coordonné du 30 avril 2010 de la loi du 8 juin 2004 sur la liberté d'expression dans les médias [Law on freedom of expression in the media], J.Off., Mémorial A n° 69 2010, p. 1325, https://perma.cc/6K2N-U25P. • Code de déontologie de la presse et des média [Code of Ethics for the Press and Media], J.Off., Mémorial A n° 69 2010, p. 1339, https://legilux.public.lu/eli/etat/leg/div/2006/03/28/n1/jo.
Mexico (Mexico City)	No	Yes	<i>*See the full survey report for this jurisdiction included in this compilation.</i>
Netherlands	Yes	Yes	<ul style="list-style-type: none"> • Wetboek van Strafvordering, Jan. 15, 1921, Staatsblad van het Koninkrijk der Nederlanden [Stb.] 1921, 14, as amended, art. 281a, https://perma.cc/F2B2-D72Q.
New Zealand	No	Yes	<i>*See the full survey report for this jurisdiction included in this compilation.</i>
Norway	Yes	Yes	<ul style="list-style-type: none"> • § 100 Grunnloven (LOV 1814-05-17), https://perma.cc/QT7Y-5H3H.

Survey of Journalist Shield Rules in OECD Jurisdictions: Table

Jurisdiction	ECHR contracting party?	Do journalist shield laws exist?	Citations for relevant rules and comments
			<ul style="list-style-type: none"> • § 125 Straffeprosessloven (LOV 1981-05-22-25), https://perma.cc/4Z8R-LWK9#&#x2a. • § 22-11Tvisteloven (LOV-2005-06-17-90), https://perma.cc/H9U8-2C7J.
Poland	Yes	Yes	<ul style="list-style-type: none"> • Press Law Act of the Republic of Poland, adopted in 1984, last amended in 2013, consolidated translation of the provisions, in force since May 2017, <i>Ustawa z dnia 26 stycznia 1984 r, Prawo prasowe</i>, (Dz. U. z 1984 r. Nr 5, poz. 24 ze zm.) Anna Garczewska, <i>Law and Administration in Post-Soviet Europe</i>, 4(1) <i>Kolegium Jagiellońskie Toruńska Szkoła Wyższa</i> 14-30 (Sept. 2017), https://perma.cc/N7HX-6T7M. • Penal Code of the Republic of Poland, art. 254, Act of June 6, 1997, https://perma.cc/K99X-PTGQ. • Code of Criminal Procedure of the Republic of Poland, art. 180, Act of June 6, 1997, https://perma.cc/CGL3-WJH2.
Portugal	Yes	Yes	<i>*See the full survey report for this jurisdiction included in this compilation.</i>
Slovakia	Yes	Yes	<ul style="list-style-type: none"> • Act of 14 September 2000 on Broadcasting and Retransmission and on the amendment of Act No. 195/2000 on Telecommunications of the Slovak Republic, Collection of Laws No. 308/2000, adopted on Sept. 14, 2000, last amended by Act No. 342/2012, https://perma.cc/7255-6ERM. • Act on Periodicals and Agency News Service and the Amendment and Supplementing of Certain Acts (The Press Act) of the Slovak Republic, adopted Apr. 9, 2008, Collection of Laws No. 167/2008, in force since June 1, 2008, last amended by Act No. 221/2011, https://perma.cc/3X38-BX7J.
Slovenia	Yes	Yes	<ul style="list-style-type: none"> • Mass Media Act, (ZMed), No. 35-2043/2001, Official Gazette of the Republic of Slovenia No. 35-2043/2001, https://perma.cc/J7V6-4X8P. • Access to Public Information Act, Mar. 22, 2003, Official Gazette of RS. No. 24/2003, with Changes and Amendments, https://perma.cc/8CYJ-3Y5N. • Code of Journalists of the Republic of Slovenia, adopted in 1993, Journalists of the Republic of Slovenia, Accountable Journalism, https://perma.cc/A8KA-Y9UM.
South Korea	No	No	
Spain	Yes	No	• Constitución Española (CE) sec. 20.1.d, Boletín Oficial del Estado 1978.†

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Jurisdiction	ECHR contracting party?	Do journalist shield laws exist?	Citations for relevant rules and comments
			<ul style="list-style-type: none"> • <i>Código Deontológico del Periodista</i>, FEPE (Nov. 27, 1993, updated Apr. 22, 2017), sec. II.3, https://perma.cc/4YS4-79PC. †The Spanish Constitution recognizes the freedom to communicate or receive truthful information by any means of dissemination. It further directs that a law regulating these rights include professional secrecy in the exercise of these freedoms. In spite of the constitutional mandate, the implementing legislation has not been enacted yet. See Borja Adsuara, <i>¿Es sagrado el ‘secreto profesional’ de los periodistas?</i>, La Información (Dec. 13, 2018), https://perma.cc/6XPH-8V22.
Sweden	Yes	Yes	<i>*See the full survey report for this jurisdiction included in this compilation.</i>
Switzerland	Yes	Yes	<ul style="list-style-type: none"> • Schweizerisches Strafgesetzbuch [StGB], Dec. 21, 1937, Systematische Rechtssammlung [SR] 311.0, as amended, art. 28a, para. 2, letter b, https://perma.cc/P473-PG69 (original), https://perma.cc/3GLP-6T8S (English translation). • Schweizerische Strafprozessordnung [StPO], Oct. 5, 2007, SR 312.0, as amended, art. 172, para. 1, https://perma.cc/DYY4-P922 (original), https://perma.cc/Q35B-SBYS (English translation).
Turkey	Yes	Yes	<i>*See the full survey report for this jurisdiction included in this compilation.</i>

Canada

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SUMMARY In Canada, the Journalistic Sources Protection Act shields journalists and media organizations from being compelled to disclose their sources and prescribes certain requirements and procedures for court-authorized disclosure of journalists' sources. The law amends Canada's Evidence Act to allow journalists to object to the disclosure of information or of a document that identifies or is likely to identify a source, unless a court authorizes it because the information or document cannot be obtained by any other reasonable means and the public interest in the administration of justice outweighs the public interest in preserving the source's identity. The law also amends the Criminal Code to protect journalists and media outlets targeted by a warrant or order and entitles journalists to apply for an order that documents not be disclosed to law enforcement while setting forth the conditions under which a disclosure may be made. According to the interpretation of the Supreme Court of Canada, this shield law establishes threshold requirements in the statutory scheme, including that the person objecting to the disclosure of information or a document because it could disclose a source's identity must show that he or she is a "journalist" and that the source is a "journalistic source" as defined under the law.

I. Introduction

In Canada, certain rights are constitutionally guaranteed under the Canadian Charter of Rights and Freedoms (Charter). Per section 1 of the Charter, reasonable limits "prescribed by law" and "demonstrably justified in a free and democratic society" can curtail the rights and freedoms guaranteed by the Charter. Fundamental freedoms most pertinent to journalists are the "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication" per section 2(b) and the "right to be secure against unreasonable search or seizure" per section 8.¹

In Canada, there are laws at the federal and provincial levels to shield journalists and news media organizations from being compelled to disclose their journalistic sources. At the federal level, the Journalistic Sources Protection Act, S.C. 2017, c. 22,² became law in October 2017, amending section 39.1 of the Canada Evidence Act,³ with the aim of protecting the confidentiality of journalistic sources.⁴ It codifies and builds upon common law doctrines governing the ability of others to compel journalists to produce information or documents and defines key classifications

¹ Canadian Charter of Rights and Freedoms 1982, § 2(b), 8, <https://perma.cc/7NCJ-ZYLC>.

² Journalistic Sources Protection Act, S.C. 2017, c 22, <https://perma.cc/NH64-BSY6>.

³ Canada Evidence Act, R.S.C., 1985, c C-5, <https://perma.cc/75AV-7VRE>.

⁴ Criminal Code, R.S.C., 1985, c C-46, <https://perma.cc/6QBF-RB3K>.

by statute.⁵ The law allows “journalists to **not disclose** [emphasis added] information or a document that identifies or is likely to identify a journalistic source unless the information or document cannot be obtained by any other reasonable means **and** [emphasis added] the public interest in the administration of justice outweighs the public interest in preserving the confidentiality of the journalistic source.”⁶ The law also amends section 488 of the Criminal Code,⁷

so that only a judge of a superior court of criminal jurisdiction or a judge within the meaning of section 552 of that Act may issue a search warrant relating to a journalist. It also provides that a search warrant can be issued only if the judge is satisfied that there is no other way by which the desired information can reasonably be obtained and that the public interest in the investigation and prosecution of a criminal offence outweighs the journalist’s right to privacy in the collection and dissemination of information. The judge must also be satisfied that these same conditions apply before an officer can examine, reproduce or make copies of a document obtained under a search warrant relating to a journalist.⁸

At the provincial level, in the province of Quebec, the P-33.1 Act to Protect the Confidentiality of Journalistic Sources was enacted to complement the federal legislation. It repeats to a great extent the definitions and conditions of the federal legislation and makes the necessary amendments to Quebec’s Code of Civil Procedure as well as its Code of Penal Procedure.⁹

II. Protection of Journalistic Sources

The Journalistic Sources Protection Act establishes “different tests for orders” issued under the “Criminal Code (e.g. search warrants, production orders and wiretaps),” and for “compelled disclosure” made “in the context of civil and other proceedings” regulated by the Canada Evidence Act.¹⁰

A. Definition of Protected Journalist

The Journalistic Sources Protection Act amends the Canada Evidence Act and the Criminal Code by prescribing the following definition of “journalist”:

[Canada Evidence Act]

39.1 (1) The following definitions apply in this section.

⁵ Andrew Matheson et al., *A New Era in Journalist Source Protection: The Supreme Court of Canada Clarifies Section 39.1 of the Canada Evidence Act*, McCarthy Tétrault LLP (Oct. 01, 2019), <https://perma.cc/W4JU-4GAF>.

⁶ Journalistic Sources Protection Act, S.C. 2017, c. 22, summary.

⁷ Criminal Code, R.S.C., 1985, c C-46, <https://perma.cc/6QBF-RB3K>.

⁸ Journalistic Sources Protection Act, S.C. 2017, c 22, summary.

⁹ Act to Protect the Confidentiality of Journalistic Sources, C.Q.L.R. c. P-33.1, <https://perma.cc/4QCJ-QWP3>.

¹⁰ Justin Safayeni & Andrea Gonsalves, *The Journalistic Sources Protection Act: A Primer*, Ctr. Free Expression (Oct. 26, 2017), <https://perma.cc/Y9SP-KJJN>.

journalist

journalist means a person whose main occupation is to contribute directly, either regularly or occasionally, for consideration, to the collection, writing or production of information for dissemination by the media, or anyone who assists such a person. (*journaliste*) . . .

Former journalist

(3) For the purposes of subsections (2) and (7), journalist includes an individual who was a journalist when information that identifies or is likely to identify the journalistic source was transmitted to that individual.¹¹

[Criminal Code]

488.01 (1) The following definitions apply in this section and in section 488.02.

journalist

journalist has the same meaning as in subsection 39.1(1) of the *Canada Evidence Act*. (*journaliste*)¹²

Commentators have noted that the definition of “journalist” is quite broad,¹³ and “[a]lthough this definition would exclude the hobbyist blogger who writes for free or has another main source of income, it would include freelancers, career bloggers, those engaged in news ‘start ups’ and others who fall outside the sphere of traditional media establishments.”¹⁴

B. Content Recognized as Protected Information

Under the Journalistic Sources Protection Act, “a journalist may object to the disclosure of information or a document before a court, person or body with the authority to compel the disclosure of information on the grounds that the information or document identifies or is likely to identify a journalistic source.”¹⁵ “Document” means “a medium on which data is registered or marked.”¹⁶ “Data” is defined as “representations, including signs, signals or symbols, that are capable of being understood by an individual or processed by a computer system or other device.”¹⁷ A “journalistic source” is also defined fairly broadly as:

¹¹ Journalistic Sources Protection Act, S.C. 2017, § 2 (amending Canada Evidence Act, § 39.1(1)).

¹² Id. § 3 (amending Criminal Code, § 488.01 (1)).

¹³ Omar Ha-Redeye, *Journalistic Sources Protection Act Evaluated by Supreme Court*, Slaw (Sept. 29, 2019), <https://perma.cc/2AYG-QAQ5>.

¹⁴ Safayeni & Gonsalves, *supra* note 10.

¹⁵ Journalistic Sources Protection Act, S.C. 2017, § 2 (amending Canada Evidence Act, § 39.1(2)).

¹⁶ Criminal Code, § 487.011.

¹⁷ Id.

a source that confidentially transmits information to a journalist on the journalist's undertaking not to divulge the identity of the source, whose anonymity is essential to the relationship between the journalist and the source. (*source journalistique*)¹⁸

Under the Criminal Code, "when it comes to warrants, wiretaps or production orders" that "target journalists, the JSPA protections extend beyond confidential journalistic sources."¹⁹ It relates to "a journalist's communications or an object, document or data relating to or in the possession of a journalist."

C. Requirements and Procedures for Disclosure of Sources

The Journalistic Sources Protection Act prescribes certain requirements and procedures for court-authorized disclosure of journalistic sources. Under its addition of section 39.1 (2) to the Canada Evidence Act, journalists can "provide a formal objection" to the disclosure of information or a document where it is likely to identify a journalistic source: "When an objection or the application is raised, the court, person or body shall ensure that the information or document is not disclosed other than in accordance with this section."²⁰

After a journalist makes an objection, the statutory test to be met by the court to authorize a disclosure is as follows:

Authorization

(7) The court, person or body may authorize the disclosure of information or a document only if they consider that

(a) the information or document cannot be produced in evidence by any other reasonable means; and

(b) the public interest in the administration of justice outweighs the public interest in preserving the confidentiality of the journalistic source, having regard to, among other things,

(i) the importance of the information or document to a central issue in the proceeding,

(ii) freedom of the press, and

(iii) the impact of disclosure on the journalistic source and the journalist.

Burden of proof

(9) A person who requests the disclosure has the burden of proving that the conditions set out in subsection (7) are fulfilled.²¹

¹⁸ Journalistic Sources Protection Act, S.C. 2017, § 2 (amending Canada Evidence Act, § 39.1(1)).

¹⁹ Safayeni & Gonsalves, *supra* note 10.

²⁰ Journalistic Sources Protection Act, § 2 (amending Canada Evidence Act, § 39.1(2)).

²¹ *Id.* § 2 (amending Canada Evidence Act, §§ 39.1(7), (8)).

Warrants and orders issued under the Criminal Code section 488.01(3) must also meet certain requirements before they are issued:

Warrant, authorization and order

(3) A judge may issue a warrant, authorization or order under subsection (2) only if, in addition to the conditions required for the issue of the warrant, authorization or order, he or she is satisfied that

(a) there is no other way by which the information can reasonably be obtained; and

(b) the public interest in the investigation and prosecution of a criminal offence outweighs the journalist's right to privacy in gathering and disseminating information.²²

The amendments to the Criminal Code specify that a journalist or media outlet targeted by a warrant or order is entitled to apply for an order that a document not be disclosed to law enforcement as it identifies or is likely to identify a journalistic source and detail the conditions under which a disclosure may be made:

Application

(3) The journalist or relevant media outlet may, within 10 days of receiving the notice referred to in subsection (2), apply to a judge of the court that issued the warrant, authorization or order to issue an order that the document is not to be disclosed to an officer on the grounds that the document identifies or is likely to identify a journalistic source.²³

Disclosure order

(5) The judge may order the disclosure of a document only if he or she is satisfied that

(a) there is no other way by which the information can reasonably be obtained; and

(b) the public interest in the investigation and prosecution of a criminal offence outweighs the journalist's right to privacy in gathering and disseminating information.²⁴

D. Limits on Compelled Disclosure

The Journalistic Sources Protection Act grants a court the authority to impose conditions considered appropriate to protect the identity of the journalistic source and to limit the disruption of journalistic activities.

²² Id. § 3 (amending Criminal Code, § 488.01 (2)).

²³ Id. § 3 (amending § 488.02 (3)).

²⁴ Id. § 3 (amending § 488.02 (5)).

[Canada Evidence Act]

39.1

Conditions

(8) An authorization under subsection (7) may contain any conditions that the court, person or body considers appropriate to protect the identity of the journalistic source.²⁵

Criminal Code

488.01

Conditions

(7) The warrant, authorization or order referred to in subsection (2) may contain any conditions that the judge considers appropriate to protect the confidentiality of journalistic sources and to limit the disruption of journalistic activities.²⁶

III. Supreme Court Decision

In 2019, the Supreme Court of Canada issued its first interpretation of Canada's federal shield law on appeal from the Quebec Court of Appeals in the case of *Marie-Maude Denis v. Marc-Yvan Côté*, 2019 SCC 44.²⁷ Chief Justice Wagner, writing for the majority, interpreted the provisions of the federal "press shield law" and provided clarification on the process by which a court must conduct its analysis. The high court provided its interpretation of section 39.1 "concerning a subpoena to give testimony or orders to produce documents that are issued to journalists and are likely to reveal the identities of confidential sources."²⁸ The chief justice stated the new statutory scheme differed from common law doctrines in "significant ways."

Specifically, the Supreme Court identified a number of ways that the statutory scheme shifted away from the common law, including the new threshold requirements to meet the statutory definitions of "journalist" and "journalistic source" and the reverse onus provision under s. 39.1.²⁹

A threshold requirement for the application of the new scheme is that the person objecting to the disclosure of information or a document that identifies or is likely to identify a journalistic source must show that he or she is a "journalist", and his or her source a "journalistic source", as defined in the CEA. . . . If a journalist objects to the disclosure of information on the ground that it is likely to identify a confidential source, non-disclosure should be the starting point for the analysis. It is then up to the party seeking to obtain the information to rebut this presumption. This shifting of the burden of proof is the most

²⁵ Id. § 2 (amending Canada Evidence Act, §39.1(8)).

²⁶ Id. § 3 (amending Criminal Code, §488.01 (7)).

²⁷ *Denis v. Côté*, 2019 SCC 44, <https://perma.cc/PBE2-6WGL>.

²⁸ Léon H. Moubayed et al., *The Journalistic Sources Protection Act: How Does the Scheme of New Law Influence Search Warrant Authorization?*, Davies (July 13, 2021), <https://perma.cc/Z8CA-PGF6>.

²⁹ Matheson et al., *supra* note 5.

important difference between the former common law scheme and the new federal statutory scheme. Whereas the applicability of the journalist-source privilege was the exception in the former scheme, it has now become the rule.³⁰

In addition, the Supreme Court held that the criterion of reasonable necessity provided in Section 39.1(7)(a) is also a threshold requirement. The high court also reviewed the non-exhaustive list of considerations in the balancing exercise under Section 39.1(7)(b) to determine whether the “public interest in the administration of justice outweighs the public interest in preserving the confidentiality of the journalistic source.”

³⁰ *Denis v. Côté*, 2019 SCC 44, para. 34.

Chile

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I. Introduction

In Chile, Ley 19733 sobre Libertades de Opinión e Información y Ejercicio del Periodismo (Law 19733) protects the practice of journalism. Article 7 provides that the directors and editors of “social communication media,” protected journalists as defined under article 5 and 6 of the Law, and foreign correspondents have the right to keep their information sources confidential, including supporting documents or sources in their possession. They cannot be forced to identify a source, even upon a court order.¹ In addition, the article states that this right applies to other persons who, due to their office or activities, were necessarily present at the time the information was received.²

Whoever makes use of this right will be personally responsible for the crimes that may be committed by disseminating the information.³

II. Definition of Journalist

Article 5 of Law 19733 provides that those who are in possession of a university degree in journalism, validly recognized in Chile, and those who are legally recognized as journalists, are protected journalists.⁴

Under article 6, students enrolled in journalism school while they carry out the required professional practices, and graduates up to 24 months after their graduation, have the same professional rights and responsibilities as journalists under Law 19733.⁵

Social communication media, referred to in article 7, is defined in article 2 of the Law as those capable of transmitting, disclosing, disseminating, or broadcasting, on a steady and regular basis, texts, sounds, or images for public use, regardless of the medium or instrument used.⁶

¹ Ley 19733 sobre Libertades de Opinión e Información y Ejercicio del Periodismo art. 7, June 4, 2013, Diario Oficial, <https://perma.cc/Z95G-F8GJ>.

² Id.

³ Id.

⁴ Id. art. 5.

⁵ Id. art. 6.

⁶ Id. art. 2.

III. Code of Ethics of Journalists

The Code of Ethics of Journalists also requires journalists to keep the secrecy of their information sources and respect the trust of sources who disclose confidential information to them.⁷ A journalist who has promised to keep facts or information confidential should not disclose them publicly or privately.⁸

⁷ *Código de Ética del Colegio de Periodistas de Chile*, Doc. 273, art. 9, U. de Pontificia Salamanca, <https://perma.cc/2B93-CFFD>.

⁸ *Id.*

England and Wales

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SUMMARY A number of laws protect freedom of expression in England and Wales. While freedom of expression is protected, it is a qualified right that can be overridden in certain circumstances. The protection of journalist's sources are regulated by statute and a self-regulatory code. The primary statute that governs journalistic sources at the court level is the Contempt of Court Act 1981 (the 1981 Act), which must be read together with article 10 of the European Convention on Human Rights. Section 10 of the 1981 Act provides that the courts can require journalists to disclose their sources in limited circumstances, being when it is necessary in the interests of justice or national security or for the prevention of disorder or crime.

I. Introduction

The protection of journalists' sources in the UK is regulated by both statute and a self-regulatory code. The Editors' Code of Practice, utilized by the Independent Press Standards Organisation, provides that journalists have a moral obligation to protect confidential sources of information.¹ Legally, journalists have a qualified right to protect the anonymity of their sources. This is provided for by section 10 of the Contempt of Court Act 1981 (the 1981 Act) and article 10 of the European Convention on Human Rights. Section 10 of the 1981 Act provides that the courts can require journalists to disclose their sources only in limited circumstances:

No court may require a person to disclose, nor is any person guilty of contempt of court for refusing to disclose, the source of information contained in a publication for which he is responsible, unless it be established to the satisfaction of the court that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime.²

The courts have repeatedly acknowledged "the importance of the protection of sources as inherent in the freedom of the press and necessary to preserve the ability of the press to perform its role as a public watchdog."³ One of the leading judgments regarding these protections stated:

Protection of journalistic sources is one of the basic conditions for press freedom ... Without such protection, sources may be deterred from assisting the press in informing the public in matters of public interest. As a result the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable

¹ Independent Press Standards Organisation, *Editors' Code of Practice* ¶ 1.4 (Jan. 2021), <https://perma.cc/294H-EH4R>.

² Contempt of Court Act 1981, c. 49, § 10, <https://perma.cc/TF8Q-ULKZ>.

³ The Rt. Hon. Lord Justice Leveson, IV *An Inquiry into the Culture, Practices and Ethics of the Press* 1852 (2012), <https://perma.cc/DXZ4-JUY6>.

information may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest.⁴

As a result, when determining whether to order the disclosure of a journalist's source, the court must conduct a careful balancing exercise that is particular to the facts and circumstances of each case.

II. Definition of Protected Journalist

The 1981 Act does not define, nor even include, the term journalist. Instead, section 10 focuses on the fact that a person has provided content in a publication for which he or she is responsible. This is a broad definition that encompasses individuals who are not journalists in the traditional sense, such as "any person who writes a blog or tweets to a section of the public,"⁵ as well as publishers.

III. Content Recognized as Protected Material

Publication is defined in section 2(1) of the 1981 Act as "any speech, writing, programme included in a cable programme service or other communication in whatever form, which is addressed to the public at large or any section of the public." Section 10 of the 1981 Act applies to information that has been received for the purposes of publication "'even if it is not contained in a publication', because the purpose underlying the statutory protection of sources of information is as much applicable before as after publication."⁶

In cases involving sensitive material, such as that protected by legal privilege, the courts have held that it may not be in the interests of justice to order a journalist to disclose a source when the source likely has seen such sensitive material.⁷

IV. Limits on Compelled Disclosure

The court has stated that section 10 of the 1981 Act "creates no power or right of disclosure: what it does is assume the existence of such a power or right and place a strong inhibition on its exercise."⁸ Thus, individuals cannot be ordered to disclose, or be held in contempt of court for failing to disclose, his or her sources unless one of four exemptions provided for in section 10 of

⁴ *Goodwin v UK* (1996) 22 EHRR 123 ¶ 39, <https://perma.cc/6LN8-KKTS>.

⁵ Law Commission, *Contempt of Court*, Consultation Paper No. 209, ¶ 99, <https://perma.cc/XWW5-3BYU>.

⁶ *Blackstone's Criminal Practice* 2020 ¶ F9.23 (citing *X Ltd v Morgan-Grampian (Publishers) Ltd* [1991] 1 AC 1). See also *Financial Times Ltd. & Ors v Interbrew SA* [2002] EWCA Civ 274 ¶ 5, <https://perma.cc/42T8-MN4V>.

⁷ *Blackstone's Criminal Practice*, *supra* note 6, ¶ F9.28 (citing *Saunders v Punch Ltd* [1998] All ER 234).

⁸ *Financial Times Ltd. & Ors v Interbrew SA* [2002] EWCA Civ 274 ¶ 5, <https://perma.cc/42T8-MN4V>.

the 1981 Act is met,⁹ namely where it is necessary in the interests of justice or national security or for the prevention of disorder or crime. In all cases, the party seeking the disclosure of information must have “explored other means of ascertaining the source of the relevant material.”¹⁰

Whether an exception exists is a matter of fact and the burden of proof, which must be established on the balance of probabilities,¹¹ lies with the party seeking the disclosure.¹² Each of the exemptions require that the disclosure be necessary. The courts have held that necessity requires specific evidence. Necessity is a relative concept distinguished from mere convenience, but which “may be less than absolute indispensability,”¹³ and has been paraphrased as “really needed.”¹⁴

Ordering disclosure where it is necessary in the interests of justice requires the court to “identify and define the issue in the legal proceedings which requires disclosure, and then to decide whether, looking at the name of that issue and the circumstance of the case, disclosure is necessary . . . in the interests of justice.”¹⁵ When making this determination, the court must balance whether it is more important to meet the interests of justice or to protect the source.¹⁶ A number of factors must be considered when making this determination. The restriction must be in pursuit of a legitimate aim. Additionally, “the necessity of any restriction on freedom of expression must be convincingly established and any restriction on the right must be proportionate to the legitimate aim pursued.”¹⁷ The court must also consider the facts of the case, such as whether the information was obtained illegally, and the importance of the public interest served by the publication using the source.¹⁸

In order for the court to order the disclosure of a source for the prevention of crime or disorder, it must be necessary for the prevention of crime generally, or to prevent a particular and identifiable future crime.¹⁹

Once the court has established that disclosure is necessary under one of the exemptions, it must then use its discretion to consider whether disclosure should be ordered by “weighing the need

⁹ Lady Justice Arden, *Media Intrusion and Human Rights: Striking the Balance* ¶ 15 (Mar. 15, 2012), <https://perma.cc/JCL9-SV9R>.

¹⁰ *Archbold Criminal Pleading, Evidence & Practice*, § 28-78 (2018).

¹¹ *Secretary of State for Defence v Guardian Newspapers Ltd* [1985] AC 339 (accessed via ICLR).

¹² *Blackstone's Criminal Practice*, supra note 6, ¶ F9.23 (citing *Secretary of State for Defence v Guardian Newspapers Ltd* [1985] AC 345 & 364); *Archbold*, supra note 10, § 28-77 (citing *X v Y* [1988] 2 All ER 648 (QB)).

¹³ *Blackstone's Criminal Practice*, supra note 6, ¶ F9.29 (citing *X v Y* [1988] 2 All ER 648 and *Re an Inquiry under the Company Securities (Insider Dealing Act 1985)*).

¹⁴ *Re an Inquiry under the Company Securities (Insider Dealing) Act* [1988] AC 660, ¶ 704 (accessed via ICLR).

¹⁵ *Blackstone's Criminal Practice*, supra note 6, ¶ F9.24 (citing *Maxwell v Pressdram Ltd.* [1987] 1 All ER 621 at 308-9).

¹⁶ *Id.* ¶ F9.25.

¹⁷ The Rt. Hon. Lord Justice Leveson, supra note 3, at 1861.

¹⁸ *Blackstone's Criminal Practice*, supra note 6, ¶ F9.25.

¹⁹ *Id.* ¶ F9.29 (citing *Re an Inquiry under the Company Securities (Insider Dealing) Act* [1988] AC 660).

for disclosure against the need for protection.”²⁰ When discussing disclosure in the interests of justice, *Blackstone*, a leading treatise on criminal law, notes that “it is only if [the court is] satisfied that disclosure in the interests of justice is of such preponderant importance as to override the statutory privilege against disclosure that the threshold of necessity will be reached.”²¹

V. European Convention on Human Rights

The European Convention on Human Rights was incorporated into the national law of the United Kingdom by the Human Rights Act 1998.²² Article 10 of this Convention provides for freedom of expression. This is a qualified right, which means that it may be restricted in certain circumstances, provided it is prescribed by law and necessary in a democratic society to protect a legitimate aim.²³

Article 10 has influenced the courts’ approach to section 10 of the 1981 Act, because section 10 must be interpreted to consider whether disclosure is for a legitimate aim and meets the test of necessity used by the courts under the Convention. The European Court of Human Rights held that disclosure orders should only be made in exceptional circumstances when necessity can be convincingly established and where disclosure is justified as being in the public interest.²⁴ The approach of the European Court of Human Rights was affirmed in a decision of the House of Lords, which held that “as a matter of general principle, the necessity for any restriction of freedom of expression must be convincingly established and that limits on the confidentiality of journalistic sources call for the most careful scrutiny by the courts.”²⁵

VI. Requirements and Procedures for Disclosure of Sources

Other legislation enables law enforcement to identify journalistic sources and provides additional protections to journalists. The Police and Criminal Evidence Act 1984 provides journalistic material with statutory protection from seizure that arises in cases where a lawful search is being conducted.²⁶ The Investigatory Powers Act considers information identifying or confirming a

²⁰ Id. ¶ F9.23.

²¹ Id. ¶ F9.25.

²² Human Rights Act 1998, c. 42, <https://perma.cc/ZKN8-XVNC>.

²³ Notably, article 10(2) of the European Convention on Human Rights specifies:

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, and for maintaining the authority and impartiality of the judiciary.

²⁴ *Goodwin v UK* (1996) 22 EHRR 123.

²⁵ *Blackstone’s Criminal Practice*, supra note 6, ¶ F9.30 (citing *Ashworth Security Hospital v MGN Limited* [2002] UKHL 29 [2002] 1 WLR 2033, <https://perma.cc/JS42-5RKF>).

²⁶ Police and Criminal Evidence Act 1984, c. 60, §§ 8, 11 & sch. 1, <https://perma.cc/2QGX-KSY2>.

journalistic source²⁷ to be sensitive information that requires additional protections before it can be interfered with.²⁸ In order for a warrant to be issued to obtain communications data that may reveal a journalistic source—that is, information about who sent the communication, where, when, how, and with whom the communication occurred, but not the content—“the public interest justifying the request must override the public interest in protecting the source,”²⁹ and all applications require the approval of a judicial commissioner.³⁰

In these circumstances, the assessment whether an individual is a journalist for purposes of the Investigatory Powers Act is made upon the facts and circumstances at the time the application is made and involves looking at the “the frequency of an individual’s relevant activities, the level of professional rigour they seek to apply to their work, the type of information that they collect, the means by which they disseminate that information and whether they receive remuneration for their work.”³¹ This takes into account the statutory purpose of “protect[ing] the proper exercise of free speech,” and “reflect[s] the role that journalists play in protecting the public interest.”³²

²⁷ Source of journalistic information in this act is defined as “an individual who provides material intending the recipient to use it for the purposes of journalism or knowing that it is likely to be so used.” Investigatory Powers Act 2016, c. 25, § 263(1), <https://perma.cc/NQS4-ASXD>.

²⁸ Id. §§ 2, 29.

²⁹ Home Office, *Communications Data Code of Practice* ¶ 8.13 (Nov. 2018), <https://perma.cc/2CKS-462C>.

³⁰ Investigatory Powers Act 2016, c. 25, § 29.

³¹ Id. ¶ 8.15.

³² Id.

France

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SUMMARY The Law of 29 July 1881 on Freedom of the Press defines a journalist as any person employed by a press company or agency, online public communications company, or audiovisual communication company and whose work consists of collecting information and disseminating it to the public on a regular basis. Journalists have the right to refuse to divulge their sources or to be pressured to divulge their sources. Journalists summoned before an investigating judge or a criminal court to be heard as witnesses on information gathered in the course of their work are free not to reveal the origin of the information, but they are nevertheless required to appear. Under penalty of nullity of the proceedings, information obtained by judicial requisition in violation of the protection of confidentiality of sources may not part of a criminal case. Courts may only infringe the confidentiality of sources if there is an overriding public interest in doing so and if the measures considered are strictly necessary and proportionate to the legitimate aim pursued. French law has been criticized for not providing enough protection for journalists' sources.

I. Introduction

The rules applicable to the protection of journalists' sources in France stem principally from article 11 of the Declaration of the Rights of Man and of the Citizen, which enshrines freedom of speech,¹ the Law of 29 July 1881 on Freedom of the Press,² and articles 56-2, 60-1, 100-5, and 326 of the Code of Criminal Procedure.³ The 1881 Law has been amended by several subsequent laws, most notably the Law of 4 January 2010 on the Protection of Journalists' Sources.⁴ Many of these laws have incorporated case law, directly or indirectly, from the European Court of Human Rights.

II. Definition of Protected Journalist

Under the terms of article 2 of the Law of 29 July 1881 on Freedom of the Press, a journalist is "any person who, exercising their profession in one or more press companies, online public communication companies, audiovisual communication companies or one or more press agencies, collects information and disseminates it to the public on a regular and paid basis."⁵ The

¹ Déclaration des Droits de l'Homme et du Citoyen de 1789, art. 11, <https://perma.cc/G3K5-CBGQ>.

² Loi du 29 juillet 1881 sur la liberté de la presse (as amended), <https://perma.cc/9AA8-KF5F>.

³ Code de procédure pénale, arts. 56-2, 60-1, 100-5, 326, <https://perma.cc/QVK7-M8HS>.

⁴ Loi n° 2010-1 du 4 janvier 2010 relative à la protection du secret des sources des journalistes, Jan. 4, 2010, <https://perma.cc/F69Q-G7BR>.

⁵ Loi du 29 juillet 1881, art. 2.

Constitutional Council (*Conseil constitutionnel*, France's highest jurisdiction for constitutional matters) ruled against the extension of this protection to managing editors and editorial staff.⁶

"Sources" are not defined in French law, and neither are the rights and obligations of journalists to ensure their protection, especially where a disclosure has occurred in violation of the law.⁷ Recognition of the secrecy of sources does not prevent a journalist from being sued for defamation, invasion of privacy, breach of national defense secrecy or failure to report a crime.⁸

III. Content Recognized as Protected Information

All journalists have the right to refuse to divulge their sources, and to refuse to be subject to pressure to divulge their sources.⁹ Furthermore, journalists have the right to refuse to be identified as authors of an article, a television or radio broadcast, part of a television or radio broadcast, or a contribution to an article or broadcast, the form or content of which has been modified without their knowledge or against their will.¹⁰ They may not be forced to accept an act contrary to their professional conviction formed in accordance with the ethical charter of their company or publishing house.¹¹ Seeking to discover a journalist's sources by investigating any person who, by virtue of their usual relations with a journalist, may have information that would make it possible to identify those sources is considered an indirect breach of confidentiality of sources.¹²

IV. Requirements and Procedures for Disclosure of Sources

A journalist summoned before an investigating judge or a criminal court to be "heard as a witness on information gathered in the course of their work" is free "not to reveal the origin of the information," but is nevertheless obliged to appear.¹³ Under penalty of nullity of the proceedings, information obtained by judicial requisition in violation of the protection of confidentiality of sources may not be part of the case.¹⁴ Furthermore, the Code of Criminal Procedure requires that when a prosecutor or investigative judge seeks to seize information concerning a journalist as

⁶ Conseil constitutionnel, Décision n° 2016-738 DC, Nov. 10, 2016, <https://perma.cc/3XRQ-97N2>.

⁷ Agnès Granchet, *Le secret des sources face à la justice pénale*, La Revue des médias (Feb. 17, 2020), <https://perma.cc/XX26-6MUY>.

⁸ François-Noël Buffet, *Rapport fait au nom de la commission des Lois constitutionnelles, de législation, du suffrage universel, du Règlement et d'administration générale (1) sur le projet de loi, adopté par l'Assemblée nationale, relatif à la protection du secret des sources des journalistes*, Sénat, Report No. 420 (June 25, 2008), <https://perma.cc/T8MV-NVSQ>.

⁹ Loi du 29 juillet 1881, art. 2 bis.

¹⁰ Id.

¹¹ Id.

¹² Id. art. 2.

¹³ Code de procédure pénale, arts. 109, 326, 437.

¹⁴ Id. arts. 60-1, 77-1-1, 99-3.

part of a criminal investigation, the custodian of that information may only hand it over to the authorities with the journalist's consent.¹⁵

Searches in the premises of a press company, an audiovisual communication company, an online public communication company, a press agency, the professional vehicles of these companies or agencies, or the home of a journalist when the investigations are related to their professional activity may only be carried out by a judge based on a reasoned, written decision.¹⁶ Only the judge and the journalist (or their representative) have the right to examine the documents or objects found during the search before they are seized.¹⁷

V. Limits on Compelled Disclosure

When the perpetrators of violations of protected secrets are the journalists' informants, their identification necessarily undermines the protection of the confidentiality of sources. This is known as a conflict of secrets.¹⁸ It is then up to the judge to settle this conflict by striking a fair balance between the journalists' right to the secrecy of their sources and the duty of professional secrecy incumbent on these sources.¹⁹

Article 2 of the Law of 29 July 1881 on Freedom of the Press provides that the courts may only investigate the origin of information, and thus infringe the confidentiality of sources, if "there is an overriding public interest in doing so and if the measures considered are strictly necessary and proportionate to the legitimate aim pursued."²⁰ In the course of criminal proceedings, the need to infringe on the confidentiality of sources must be assessed in the light of three criteria: "the seriousness of the crime or misdemeanor," "the importance of the information sought for the suppression or prevention of that offence" and "the fact that the investigative measures considered are essential for the determination of the truth."²¹ These criteria have not been further defined or refined.

VI. Critique of French Law on Protection of Journalists' Sources

French law regarding the protection of sources has been criticized for leaving too much room for interpretation, with the risk that the "overriding public interest imperative" could encompass a wide range of things, including political interests. Critics also point out that the law does not

¹⁵ Id.

¹⁶ Id. art. 56-2.

¹⁷ Id.

¹⁸ Agnès Granchet, *supra* note 7.

¹⁹ Id.

²⁰ Loi du 29 juillet 1881, art. 2.

²¹ Id.

create an autonomous offense of infringement of the secrecy of sources and, above all, that it does not provide for any sanctions, even when an infringement is established.²²

²² Samuel Laurent & Eric Nunès, *Plainte du "Monde": l'exécutif multiplie les approximations*, Le Monde (Sept. 14, 2020), https://www.lemonde.fr/politique/article/2010/09/14/plainte-du-monde-l-executif-multiplie-les-approximations_1410827_823448.html (by subscription).

Germany

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SUMMARY In Germany, members of the press have a right to refuse to testify regarding the identity of the informant and the content of the information revealed to them. This right derives from the constitutionally guaranteed freedom of the press and contributes to guaranteeing an institutionally independent and functional press. Members of the press have discretion to make use of this right, and courts have no obligation to point out that this right exists. However, in criminal trials, if the testimony is required to assist in investigating a serious criminal offense or other enumerated crimes, witnesses might be compelled to testify regarding the content of materials that they have produced themselves or regarding notes/professional observations. This exception does not apply if it would reveal the identity of the informant or the content of the information communicated to them.

I. Introduction

Article 5 of the German Basic Law, the country's constitution, guarantees freedom of expression and freedom of the press, among other enumerated communication rights.¹

Article 5 states that

- (1) Every person shall have the right freely to express and disseminate his opinions in speech, writing and pictures. . . . Freedom of the press . . . shall be guaranteed. There shall be no censorship.
- (2) These rights shall find their limits in the provisions of general laws, in provisions for the protection of young persons, and in the right to personal honour.

Freedom of the press is not just a subcategory of freedom of expression; it is an independent and separate freedom under article 5 of the Basic Law. In addition to expressing and disseminating an opinion using the press, the basic right guarantees the "institutional independence of the press that extends from the acquisition of information to the dissemination of news and opinion . . . this includes the right of persons working for the press to express their opinion as freely and unrestricted as every other citizen."²

¹ Grundgesetz [GG], May 23, 1949, Bundesgesetzblatt [BGBl.] I at 1, as amended, art. 5, paras. 1 & 2, <https://perma.cc/5MP9-MNAQ> (original), <https://perma.cc/ZJ6K-CGVQ> (English translation, updated through Mar. 28, 2019).

² Bundesverfassungsgericht [BVerfG], 10 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 118, para. 14, <https://perma.cc/RNX4-WPLP>.

Anyone who can claim freedom of the press is entitled to refuse to testify in a criminal trial on professional grounds.³ In addition, testimony cannot be compelled in a civil trial.⁴

The German Federal Constitutional Court (Bundesverfassungsgericht, BVerfG) has stated that

“Freedom of the press entails—as an essential requirement for its proper functioning—protecting the relationship of trust between the press and its private informants to a certain degree; it is indispensable, because the press cannot do without private information but information will only flow in abundance if the informant can generally trust that editorial secrecy will be upheld. The right of members of the press to refuse to testify regarding the content of information provided and the identity of the informant under certain circumstances directly serves that purpose and thereby indirectly contributes to guaranteeing an institutionally independent and functional press.”⁵

II. Definition of Protected Journalist

The Basic Law does not define the term “journalist.” The German Code of Criminal Procedure awards the right to refuse to testify to “persons who are or have been professionally involved in preparing, producing, or disseminating printed matter, radio broadcasts, or film documentaries, or who are or have been professionally involved in information and communication services that are involved in instruction or the formation of opinion.”⁶ Likewise, the German Code of Civil Procedure allows “persons who are or have been professionally involved in preparing, producing, or disseminating printed periodicals or broadcasts” to refuse to testify on personal grounds.⁷ Both provisions require that the person be “professionally” involved, meaning on a regular basis and not just as a one-time occasion. In addition to journalists, the refusal to testify includes other people that are involved in the preparation, production, and dissemination, such as editors, typists, or technical personnel.⁸ Freelance journalists are also covered.⁹

Whether bloggers or “citizen journalists” can claim freedom of the press and therefore refuse to testify is disputed among scholars; no court has yet ruled on it. The law itself refers to “printed publications.” In particular, this discussion became relevant when bloggers from the website

³ Strafprozeßordnung [StPO], Apr. 7, 1987, BGBl. I at 1074, 1319, as amended, § 53, para. 1, no. 5, <https://perma.cc/TW8J-XPXK> (original), <https://perma.cc/XVP3-PFGL> (English translation, updated through July 11, 2019).

⁴ Zivilprozessordnung [ZPO], Dec. 5, 2005, BGBl. I at 3202; 2006 BGBl. I at 431; 2007 BGBl. I at 1781, as amended, § 383, para. 1, no. 5, <https://perma.cc/5E29-Z4DX> (original), <https://perma.cc/DE7W-MDR3> (English translation, updated through Oct. 10, 2013).

⁵ BVerfG, 20 BVerfGE 162 (176), para. 38, <https://perma.cc/6BF9-8S32> (original), <https://perma.cc/W86N-6E9E> (unofficial English translation); BVerfG, 36 BVerfGE 193, para. 34, <https://perma.cc/8SG3-Y6FQ>.

⁶ StPO, § 53, para. 1, no. 5.

⁷ ZPO, § 383, para. 1, no. 5.

⁸ Matthias Huber, *StPO § 53 Zeugnisverweigerungsrecht der Berufsgeheimnisträger*, para. 26, in: BeckOK StPO mit RiStBV und MiStra, (Jürgen Graf ed., 40th ed. 2021).

⁹ Bundesgerichtshof [BGH], Jan. 13, 1999, docket no. 2 StB 14/98, para. 7, <https://perma.cc/HL8K-PYTS>.

netzpolitik.org were charged with treason in 2015 for publishing classified documents.¹⁰ It is undisputed that freedom of expression and freedom of broadcasting apply to blogs; however, only members of the press have a right to refuse to testify in court or claim other privileges reserved to the press.¹¹

III. Content Recognized as Protected Information

The Code of Criminal Procedure protects against revealing the identity of the author or contributor of comments and documents or any other informant, the information communicated to the press in their professional capacity, the content of the information, the content of materials that members of the press have produced themselves, and notes/professional observations.¹² The Code of Civil Procedures protects against revealing the identity of the author or contributor of articles or broadcasts and documents and the content of the information witnesses have been given in their professional capacity.¹³

IV. Requirements and Procedures for Disclosure of Sources

There are no specific rules or procedures for the disclosure of sources. A member of the press who has a right to refuse to testify in court has discretion to make use of this right.¹⁴ The court is not obligated to point out that this right exists, because it can be assumed that the witness is aware of his or her professional rights and duties.¹⁵ However, if it becomes obvious to the court that the witness is clearly unaware of his or her rights, it must inform the witness.¹⁶

As the objective of the right is primarily to guarantee an institutionally independent and functional press, an informant may not release a member of the press from the duty of confidentiality. As mentioned, it is up to the discretion of the witness.¹⁷ Likewise, an informant has no legal right to compel a member of the press to refuse to testify in court.¹⁸

¹⁰ Reporters Without Borders, *Reporters Without Borders Solidary [sic] with Journalists from netzpolitik.org*, refworld.org (Mar. 2015), <https://perma.cc/6FS4-AL6D>.

¹¹ Helena Kaschel, *#Landesverrat: Keine Pressefreiheit für Blogger?*, Deutsche Welle [DW], Aug. 5, 2015, <https://perma.cc/7PDW-6LZR>.

¹² StPO, § 53, para. 1, no. 5, sentence 2.

¹³ ZPO, § 383, para. 1, no. 5.

¹⁴ BGH, Nov. 16, 2017, docket no. 3 StR 460/17, para. 10, <https://perma.cc/ZKP6-FD26>.

¹⁵ BGH, Feb. 4, 2010, docket no. 4 StR 394/09, para. 7, <https://perma.cc/Z3GJ-V3YV>; BVerfG, Mar. 12, 1982, docket no. 2 BvR 1112/81, 1982 *Neue Zeitschrift für Strafrecht* [NStZ] 253.

¹⁶ Oberlandesgericht [OLG] Dresden, Apr. 16, 1997, docket no. 1 Ws 97/97, 1997 *Neue Zeitschrift für Strafrecht* Rechtsprechungsreport [NStZ-RR] 238, with further references.

¹⁷ BVerfG, *supra* note 14, at 253.

¹⁸ *Id.*

V. Limits on Compelled Disclosure

The Code of Criminal Procedure limits the right to refuse to testify regarding the content of materials that members of the press have produced themselves or regarding notes/professional observations.¹⁹ If the testimony is required to assist in investigating a serious criminal offense or other enumerated crimes, such as treason, crimes against sexual self-determination, and money laundering, witnesses might be compelled to testify. However, this exception does not apply if it would reveal the identity of the informant or the content of the information communicated to them.²⁰

¹⁹ StPO, § 53, para. 2, sentence 2.

²⁰ Id. § 53, para. 2, sentence 3.

Italy

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SUMMARY Italy has myriad laws aimed at shielding journalists and news media organizations from being compelled to disclose their sources. These provisions have been in existence for decades, and they have been the subject of important case law by the Italian Supreme Court. Italy's highest court has held that the protection of a journalist's right not to disclose sources extends to any information that could help to identify a source of confidential information. Under Italian law, it appears that only under the following circumstances may a journalist's privilege of non-disclosures of sources be exempted: (a) upon the uncertain authenticity of the news; (b) the indispensability of the news for the evidence of a crime; and (c) upon the impossibility to verify the authenticity of the information with instruments other than the identification of its source. The limitations on a judicial order compelling disclosure of sources is not completely clear in the Italian legal order, as courts interpret the applicable provisions on a case-by-case basis. What is clear, however, is that individual freedoms and rights established by the Italian Constitution prevail over any other rights and privileges established in ordinary legislation.

I. Definition of Protected Journalist

A. In General

In Italy, journalistic secrecy pivots around the source of the news and is based on a relationship of trust between the journalist and the provider of information.¹ As a result, professional journalists "cannot be obliged to testify on what they have known by reason of their profession, and in particular with regard to the names of the people from whom they have received news of a fiduciary nature in the exercise of their profession."²

In Italy, there are multiple laws protecting journalistic secrecy privileges concerning sources, also known as "shield laws."

B. Law on the Profession of Journalist (Law No. 69 of 1963)

Law No. 69 of 1963, which establishes the Order of Journalists,³ refers to professional journalists and publicists enrolled in their respective registry.⁴ It defines professional journalists as those

¹ Valeria Falcone, *Segreto Giornalistico ed Esigenze Processuali* (Nov. 1, 2007), <https://perma.cc/4ZQM-JGQV>.

² Id.

³ Legge 3 febbraio 1963, n. 69 Ordinamento della Professione di Giornalista [Law No. 69 of February 3, 1963 on the Profession of Journalist] (Law No. 69 of 1963), art. 1, para. 1, *Gazzetta Ufficiale della Repubblica Italiana* [Official Gazette, G.U.] Feb. 20, 1963, n.49, <https://perma.cc/FL3K-6VPD>.

⁴ Id. art. 1, para. 2.

“who practice the profession of journalist exclusively and continuously.”⁵ Publicists, instead, are those who carry out paid journalistic activities repeatedly even if they carry out other professions or employment.”⁶

C. Personal Data Protection Code

The Personal Data Protection Code also protects journalists’ professional secrecy privileges, which apply even “in the event of a request by the interested party to know the origin of personal data,”⁷ but this privilege covers only the source of the news.⁸ This right not to disclose their sources prevails over the right of interested parties to know the “origin of personal data related to them.”⁹

An asymmetry has been detected by commentators in this regard, as the Code of Criminal Procedure (articles 200-205), protects “the professional” (referring to full-time journalists) to the exclusion of publicists. The latter are compelled to disclose their sources during a criminal trial.¹⁰

D. Law on the Protection of Personal Data (Law No. 675 of 1996)

Law No. 675 of 1996, on the Protection of Personal Data, concerning the rights of interested parties, reinforces the right to confidentiality of sources, stating, “the rules on professional secrecy of journalists remain in force, limited to the source of the news.”¹¹

E. Ethics Code of Journalists

According to the Ethics Code for Journalists,

The journalistic profession takes place without authorization or censorship. As an essential condition for the exercise of the right-duty to report, the collection, recording, conservation and dissemination of news on events relating to people, organizations, institutions, conducts, scientific research and movements of thought, carried out in the context of

⁵ Id. art. 1, para. 3.

⁶ Id. art. 1, para. 4.

⁷ Decreto Legislativo 30 giugno 2003, n.196, Codice in materia di Protezione dei Dati Personali [Personal Data Protection Code], <https://perma.cc/F6YH-NC54>.

⁸ Id. art. 138(1).

⁹ Eur. L. Students’ Ass’n, *Final Report: International Legal Research Group on Freedom of Expression and Protection of Journalistic Sources* 727 (2016) (ELSA Report), <https://perma.cc/8MVD-E2JH>.

¹⁰ Id. at 740.

¹¹ Legge 31 dicembre 1996, n.675, Tutela delle Persone e di Altri Soggetti Rispetto al Trattamento dei Dati Personali [Law No. 675 of December 31, 1996, Protection of Persons and Other Subjects concerning the Treatment of Personal Data], art. 13(5), G.U. Jan. 8, 1997, n.5, ordinary supp. n.3, <https://perma.cc/M94G-MERU>.

journalistic activity and for the purposes of such activity, clearly differ in their nature from the storage and processing of personal data by databases or other subjects.¹²

II. Content Recognized as Protected Information

Italian courts have ruled that professional secrecy “must necessarily be considered extended to all indications that may lead to the identification of those who have faithfully provided the news.”¹³ In that circumstance, journalists who refuse to name their source do not commit the crime of falsity set forth in the Criminal Code.¹⁴

A. Constitution

The basic rules on the scope of journalists’ professional secrecy are established in the Italian Constitution, which states “freedom and confidentiality of correspondence and of every other form of communication are inviolable.”¹⁵ Additionally, under the Constitution, “anyone has the right to freely express their thoughts in speech, writing, or any other form of communication,”¹⁶ and “the press may not be subjected to any authorisation or censorship.”¹⁷

B. Code of Criminal Procedure

The Code of Criminal Procedure (CCP) is the most important piece of legislation concerning professional secrecy. According to the CCP, “no one may be obliged to testify on what they have known by reason of their ministry, office or profession, except in cases where they must report to the judicial authority.”¹⁸

The same code provides an exception to the privilege of nondisclosure of the source if “the information is indispensable for the purposes of proving the crime for which one proceeds and its truthfulness can be ascertained only by identifying the source of the news, the judge orders the journalist to indicate the source of his information.”¹⁹

¹² Codice Deontologico relativo al Trattamento dei Dati Personali nell’Esercizio dell’Attività Giornalistica [Ethics Code on the Treatment of Personal Data During the Exercise of Journalistic Activities] art. 1(2), <https://perma.cc/38GY-M9UL>, enacted pursuant to article 25 of Law No. 675 of 1996.

¹³ Id.

¹⁴ Codice Penale [Criminal Code] (CC) art. 371 bis, <https://perma.cc/N5VQ-6XYT>.

¹⁵ Constitution of the Italian Republic, Dec. 27, 1947, as amended, [Const.] art. 15, para. 1, <https://perma.cc/K4P3-NX8V> (in Italian); Comparative Constitutions Project, *Italy’s Constitution of 1947 with Amendments Through 2012*, <https://perma.cc/7JZW-2CHL> (in English).

¹⁶ Const. art. 21, para. 1.

¹⁷ Id. art. 21, para. 2.

¹⁸ Codice di Procedura Penale [Code of Criminal Procedure] (CCP) art. 200, para. 1, <https://perma.cc/4UWF-VGYY>.

¹⁹ Id. art. 200, para. 3.

This provision (article 200) “is the cornerstone of the system and it regulates the relationship between the duty to testify in criminal proceedings . . . and the professional secrecy.”²⁰ The protected content of this provision has been the object of academic debate in Italy. Most legal authors believe article 200

ensures the protection of journalistic activities; and within this uniform evaluation some of them consider the requirement of confidentiality of the source as fully satisfied, to the extent to constitute a right to anonymity. Unlike [sic], other scholars believe to be instead protected the interest of the carrier, specifically identified in the exercise of his profession: in this view the secret receives protection only if attacked through its holder.”²¹

In a recent decision interpreting the extent of the privilege for the protection of sources set forth in article 200 of the CCP, the Italian Supreme Court affirmed that “the protection of the right of the journalist not to disclose its sources extends to all the information which is likely to facilitate the identification of the source of the confidential information.”²² Therefore, the key provision of CCP article 200, according to the Supreme Court, encompasses not only the disclosure of the source’s name, but extends also to “any information capable to reveal the identity of the source.”²³

C. Law on the Profession of Journalist

Law No. 69 of 1963 indicates that, “freedom of information and criticism is the irrepressible right of journalists, limited by the observance of the laws dictated to protect the personalities of others, and it is their mandatory obligation to respect the substantive truth of the facts, always observing the duties imposed by loyalty and good faith.”²⁴ The same law provides that “information that is inaccurate must be rectified and any errors corrected.”²⁵

Further, per Law No. 69 of 1963, “journalists and publishers must respect the professional secrecy on the sources of the news, when this is required by their fiduciary character, and to promote the spirit of collaboration between colleagues, cooperation between journalists and publishers, and trust between the press and readers.”²⁶

²⁰ ELSA Report, *supra* note 9, at 746.

²¹ *Id.* at 728.

²² 22397 [2004] Supreme Court of Cassation [2004] *Giust Penale* III, 282, as quoted in ELSA Report, *supra* note 9, at 728.

²³ ELSA Report, *supra* note 9, at 739.

²⁴ Law No. 69 of 1963, art. 2, para. 1.

²⁵ *Id.* art. 2, para. 2.

²⁶ *Id.* art. 2, para. 3.

III. Requirements and Procedures for Disclosure of Sources

Professional secrecy can be removed under the CCP, which provides that

[t]he judge who has reason to doubt that the declaration made by such persons [those holding a right to refuse disclosure of their sources] to refrain from testifying is unfounded, must make the necessary investigations. If it turns out to be unfounded, the judge must order the witness to testify.²⁷

In addition, the CCP states that these rules

apply to professional journalists registered in their [respective] professional register, concerning the names of the persons from whom they have received news of a fiduciary nature in the exercise of their profession. However, if the news is essential for proving the crime under investigation and the veracity of the news can only be ascertained by identifying its source, the judge orders the journalist to indicate the source of his information.²⁸

Therefore, professional secrecy can be removed with an order from the judge exclusively when meeting the aforementioned requirements,²⁹ namely: “the uncertain authenticity of the news (implicit requirement); the indispensability of the news for the evidence of crime; and the impossibility to verify the authenticity of the information with other instruments than the identification of its source (procedural requirement).”³⁰

However, the CCP only sets forth procedural criteria to that effect, and the extent of disclosure will depend on “the severity of the offences . . . [as] the procedural rules are applied in the same way for all crimes, irrespective of the violations prosecuted.”³¹ Thus, courts in a given case must balance the contours of the privilege not to disclose with the “interests protected by the criminal law, making at least a distinction between the crimes against person and the crimes against patrimony.”³²

Once disclosure has been ordered, the following provisions of article 256 of the CCP apply:

The persons indicated in articles 200 and 201 must immediately surrender to the judicial authority, who requests it, the deeds and documents, even in the original if so ordered, as well as data, information and computer programs, also by copying them on an adequate medium, and everything else existing with them for reasons of their office, position,

²⁷ CCP art. 200, para. 2.

²⁸ Id. para. 3.

²⁹ ELSA Report, *supra* note 9, at 748-49.

³⁰ Id. at 746.

³¹ Id. at 739.

³² Id.

ministry, profession or art, unless they declare in writing that it is a state secret or a secret inherent in their office or profession.³³

If the declaration concerns an office or professional secret, and the judicial authority has reason to doubt its merits and believes that it cannot proceed without acquiring the deeds, documents or things indicated in paragraph 1, it orders the necessary investigations. If the declaration is unfounded, the judicial authority orders the seizure.³⁴

Additionally, article 362, para. 1, details a public prosecutor's right to access the information obtained under the provisions above.³⁵

IV. Limits on Compelled Disclosure

A. Constitution

The Italian Constitution contains the most important provisions on the topic of compelled disclosure of sources by journalists:

Limitations [to freedom and confidentiality of correspondence and of every other form of communication] may only be imposed by judicial decision stating the reasons and in accordance with the guarantees provided by the law. . . .³⁶

Seizure may be permitted only by judicial order stating the reason and only for offences expressly determined by the law on the press or in case of violation of the obligation to identify the persons responsible for such offences. . . .³⁷

In such cases, when there is absolute urgency and timely intervention of the Judiciary is not possible, a periodical may be confiscated by the criminal police, which shall immediately and in no case later than 24 hours refer the matter to the Judiciary for validation. In default of such validation in the following 24 hours, the measure shall be revoked and considered null and void.³⁸

B. Law on the Profession of Journalist

Per Law No. 69 of 1963, "anyone registered on the list or on the registry, who is found guilty of facts inconsistent with the decorum and the professional dignity, or of facts compromising their own reputation or the dignity of the Association, shall be subject to the disciplinary procedure."³⁹ The same law states

³³ CCP art. 256, para. 1, <https://perma.cc/E7PJ-ANAD>.

³⁴ *Id.*

³⁵ CCP art. 362, <https://perma.cc/9XDT-6K4K>.

³⁶ Const. art. 15, para. 2.

³⁷ *Id.* art. 21, para. 3.

³⁸ *Id.* art. 21, para. 4.

³⁹ Law No. 69 of 1963, art. 48, para. 1.

Disciplinary sanctions will be imposed by a reasoned decision of the Council, after hearing from the accused.

They are:

- (a) the warning;
- (b) censorship;
- (c) suspension from the exercise of the profession for a period of time not less than two months and not more than one year;
- (d) removal from the register.⁴⁰

C. Criminal Code

The Criminal Code (CC), in turn, states:

Whoever, having news of a secret, by reason of their status or office, profession or art, reveals it without a just reason, or uses it in order to gain an advantage for himself or others, shall be punished, if the fact can cause harm, with imprisonment up to one year or a fine ranging from EUR 30 to EUR 516 [about US\$36 to US\$612].⁴¹

The penalty is aggravated if the offense is committed by directors, general managers, executives in charge of preparing the corporate accounting documents, statutory auditors or liquidators or if the offense is committed by those who carry out the company's auditing.⁴²

The crime is punishable upon complaint by the injured person.⁴³

V. Conclusion

It appears that Italy has robust legal protections for the right of nondisclosure of sources by professional journalists, to the exclusion of publicists, who instead can be compelled to reveal their sources in ordinary criminal procedures.

What is not clear, however, is the exact scope of the right not to reveal a source, as the specific limitations of that right are not spelled out piecemeal in the legislation, but are subject to the ascertainment of courts on a case-by-case basis.

⁴⁰ Id. art. 51.

⁴¹ CC art. 622, para. 1, <https://perma.cc/E4NW-J245>.

⁴² Id. art. 622, para. 2.

⁴³ Id. art. 622, para. 3.

Latvia

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SUMMARY The Latvian Constitution protects freedom of expression, and laws regulating the legal status of journalists provide for the right of journalists to protect their sources from identification. This right applies to those who meet the formal requirements for institutional journalists and is extended to mass media outlets. In order for sources to be protected, the material must be obtained legally and not be among the categories of information prohibited from publication. Disclosure of sources may be ordered by a court only following a petition by law enforcement authorities. While the law does not provide for a definitive list of circumstances when a disclosure of sources can be compelled, it requires the judge to balance between the public interest and the rights of the person. A court decision can be appealed. No reports of serious violations of the right of journalists to protect their sources were located.

I. Introduction

Latvia's legal framework on the right of journalists and their sources to protection from disclosure and the circumstances in which this right may be restricted is based on constitutional provisions, national legislation, and journalists' ethical norms. The general obligation of state authorities to respect human rights, including the right to protect journalist sources, can be found in the Criminal Procedural Law.¹ Article 100 of the Constitution protects the right to freedom of expression, guaranteeing everyone the "right to freely receive, keep, and distribute information and to express his or her views," and prohibits censorship.² However, for the purposes of maintaining the democratic nature of the state, public welfare, safety, and morals, the Constitution allows restrictions on freedom of expression within the limits established by law.³

II. Definition of Protected Journalist

The Law on the Press and Other Mass Media of the Republic of Latvia (the Press Law)⁴ is the main legal act defining the status of journalists and media outlets and regulating their role and rights. Article 2 defines mass media as "newspapers, magazines, newsletters and other

¹ Criminal Procedure Law sec. 154 (Apr. 21, 2005), as amended, <https://perma.cc/4CW8-LCY8>.

² Latvia's Constitution of 1922, Reinstated in 1991, with Amendments through 2016, art. 100, <https://perma.cc/8583-KXPG>.

³ Id. art. 116.

⁴ Law on the Press and Other Mass Media of the Republic of Latvia, adopted Dec. 20, 1990, consolidated version from Apr. 17, 1997, <https://perma.cc/QRQ3-C4G7>.

periodicals (published not less frequently than once every three months, with a one-time print run exceeding 100 copies), and television and radio broadcasts, newsreels, information agency announcements, audio-visual recordings, and programmers intended for public dissemination.”

The Press Law defines journalist as “a person who gathers, compiles, edits or in some other way prepares materials for a mass medium and who has entered into an employment contract or performs such work upon the instruction of a mass medium, or is a person who is a member of the Journalists’ Union.”⁵ It states that a journalist has the right to gather information by any method not prohibited by law and from any source of information not prohibited by law.⁶ The right to nondisclosure of sources under the Press Law is granted only to those who meet the definition of journalist in the law. Those who do not meet the requirements of this definition are not explicitly covered by the right to source protection under the statute.⁷

As explained in an article by two Latvian attorneys, the Press Law

does not specify what journalistic methods, experiments and technical equipment are permitted or prohibited. However, any action must be proportionate to the privacy, data protection and public interest of an individual. Additionally, a journalist must take into consideration the prohibitions stated in the Criminal Law, such as the prohibition to illegally open or destroy mail.⁸

III. Content Recognized as Protected Information

The Press Law protects journalists and mass media outlets from disclosing the source of their information, and the right of sources to maintain confidentiality. It states,

[a] mass medium may choose to not indicate the source of information. If the person who has provided the information requests that his or her name is not to be indicated in a mass medium, this request shall be binding upon the editorial board.

The source of information shall only be produced at the request of a court or a prosecutor.⁹

A similar provision is found in the Latvian Journalists’ Code of Ethics, which confirms that “a journalist has no right to reveal the source without permission, except if this is demanded in the

⁵ Id. art. 23.

⁶ Id. art. 24(1).

⁷ Andris Taurins & Gunvaldis Leitens, *Spotlight: Free Speech and Media Freedom in Latvia*, Lexology.com (Jan. 12, 2021), <https://perma.cc/Q7EF-CMMB>.

⁸ Id.

⁹ Press Law art. 22.

court.”¹⁰ Committing a breach of confidence with respect to a source of information constitutes a professional violation and is a basis for a journalist’s liability.¹¹

However, if a person who provided information to a journalist requests to be identified as an author of the material published, a journalist is required to do so.¹²

If submitted material affects official or other secrets protected by law, a journalist is required to inform the editor about this fact.¹³

IV. Requirements and Procedures for Disclosure of Sources

Procedures for ordering the disclosure of sources are prescribed by the Criminal Procedural Law.¹⁴ Section 154 of this law is entitled “Duty to Indicate the Source of Information” and describes the judicial process required to force a journalist to disclose the source. According to the law, this can be done by a court order following a hearing conducted by an investigative judge after an investigator or prosecutor submits a disclosure request to the court. The law requires that the requester of disclosure and the journalist or mass media editor testify at the hearings, and the judge must be familiar with the materials in question.¹⁵

The judge’s decision can be appealed to a higher court, which is required to review the case and issue its own decision within a 10-day period. The higher court’s ruling is final.¹⁶

V. Limits on Compelled Disclosure

The Law does not specify in what circumstances a disclosure of sources can be ordered and what type of information is subject to compelled disclosure. It states that the principle of “proportionality of the rights of the person and the public interest” shall serve as the basis for making a judge’s decision regarding the disclosure of the source of information.¹⁷

It appears that categories of information defined by the Press Law as those prohibited for publication are not protected. These are:

¹⁰ Code of Ethics, adopted at the Conference of the Latvian Union of Journalists on Apr. 28, 1992, last amended on Oct. 24, 2018, art.4.1, <https://perma.cc/477T-USJ4>.

¹¹ Id. art. 27.1.

¹² Press Law art. 25.

¹³ Id.

¹⁴ Criminal Procedure Law (Apr. 21, 2005), as amended, <https://perma.cc/4CW8-LCY8>.

¹⁵ Id. sec. 154 (2).

¹⁶ Id. sec. 154 (4).

¹⁷ Id. sec. 154 (3).

- Official secrets
- Materials from pre-trial investigations without written permission of the prosecutor or investigator
- Content of correspondence, phone calls and telegraph messages without the consent of the person addressed and the author or their heirs
- Information about the health of individuals without their consent
- Business secrets
- Information that violates the private life of individuals¹⁸

Also, sources of information excluded from protection under article 100 of the Constitution, such as hate speech, cannot be protected from source disclosure.¹⁹

Because the right to protect sources applies to journalists only, electronic communications stored by electronic communications companies may be a subject to review by government authorities. The Law on Electronic Communication allows the state regulator to request and receive data from an electronic communications provider if it is necessary to examine a dispute or fraud performed using electronic networks.²⁰ Article 71 (1) of this law states that data collected by an electronic communications provider shall be retained for eighteen months and transferred to pre-trial investigation or state security authorities, the Office of the Public Prosecutor, and the court if they request it.

VI. Domestic Practices

According to the previously cited article by Latvian lawyers:

one of the most prominent European Court of Human Rights (ECHR) cases dealing with journalists' rights to the protection of sources, where the state police had overstepped its borders – the 2010 *Nagla* case – comes from Latvia. However, this situation should not be seen as a norm, but rather an isolated misunderstanding, as there have been no similar matters in recent years. In 2017, the head of the Corruption Prevention and Combatting Bureau wanted to access information acquired by a Latvian magazine; however, the Journalists' Association condemned this action.²¹

¹⁸ Press Law art. 7.

¹⁹ Taurins & Leitens, *supra* note 7.

²⁰ Elektronisko Sakaru Likums [Electronic Communications Law] (Oct. 28, 2004), as amended, <https://perma.cc/6UN2-C35N>.

²¹ Taurins & Leitens, *supra* note 7.

Mexico

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Mexico is a federal republic comprising 31 states and Mexico City (the nation's capital),¹ some of which have issued laws protecting against the compelled disclosure of journalistic sources in their respective jurisdictions.² According to an expert on shield laws in Mexico, there is not a federal statute specifically addressing this issue.³

The Law of Professional Secrecy and Conscience Clause for the Profession of Journalism of Mexico City ("Shield Law")⁴ is salient to this report, as a number of news organizations with national coverage and their respective staffs are based in the capital. It provides that journalists have the inalienable right to secrecy and confidentiality as to the identity of their sources of news information, regardless of whether such information is published or not.⁵ Thus, this shield law provides that in the event that a journalist is summoned to testify in court, they may refrain from revealing their source, unless the source expressly authorizes the journalist to disclose their identity.⁶

I. Definition of Protected Journalist

The Shield Law defines a journalist as an individual that has relevant experience or a degree in journalism and pertinent work duties such as searching, processing, editing, commenting, publishing or providing journalistic information in any communication medium (including in print, radio and digital) on a permanent basis.⁷

This law also protects "journalistic contributors," defined as individuals who practice journalism either regularly or sporadically, without the need of being affiliated to, or paid by, a journalistic entity.⁸

¹ Constitución Política de los Estados Unidos Mexicanos, arts. 40, 43, 44, 122, as amended through 2021, Diario Oficial de la Federación [DOF], Feb. 5, 1917, <https://perma.cc/8PPU-K6HB>.

² Socorro Apreza Salgado, *Libertad de Expresión y Derechos de los Periodistas* 48 (2018), <https://perma.cc/9FQK-353G>.

³ Id. at 53.

⁴ Ley del Secreto Profesional y Cláusula de Conciencia para el Ejercicio Periodístico de la Ciudad de México, Gaceta Oficial de la Ciudad de México, June 8, 2020, <https://perma.cc/ZQ2P-ZU2V>.

⁵ Id. art. 4.

⁶ Id. arts. 4, 5-I.

⁷ Id. art. 2-IV.

⁸ Id. art. 2-III.

II. Content Recognized as Protected Information

The Shield Law provides that notes, drafts, recording and computing equipment, telephone records, personal data, as well as any other records that could lead to the identity of the sources of journalists and journalistic contributors are protected.⁹ Accordingly, such records and devices may not be reviewed or seized by judicial or administrative authorities.¹⁰

III. Requirements for Disclosure of Sources

The Shield Law provides that in the event that journalists are summoned to testify in court, they may refrain from revealing their sources, unless the sources expressly authorize the journalist to disclose their identity.¹¹

The law does not include rules specifically addressing duties of electronic communication service providers. Additional relevant sources reviewed on this matter did not reveal pertinent information.

IV. Limits on Compelled Disclosure

The Shield Law does not authorize courts to order the disclosure of the sources of journalistic information. Additional relevant sources reviewed on this matter did not reveal relevant information.

⁹ Id. art. 5 (III, IV).

¹⁰ Id.

¹¹ Id. arts. 4, 5-I.

New Zealand

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SUMMARY In New Zealand, the Evidence Act 2006 provides that a journalist may not be compelled to “answer any question or produce any document” that would disclose the identity of an informant to whom the journalist has promised confidentiality. However, the High Court may make an order that this privilege not apply if, as a result of a balancing exercise, it considers that the public interest in the disclosure of the identity of the informant outweighs any likely adverse impact on the informant or other person, as well as the public interest in the communication of facts and opinion by the news media.

The privilege afforded to journalists in the Evidence Act 2006 can also be claimed in the context of police surveillance and searches conducted under the Search and Surveillance Act 2012, but is not explicitly recognized under the Intelligence and Security Act 2017, which contains the search and surveillance powers of New Zealand’s intelligence agencies. However, the inspector-general with oversight of these agencies has recommended that their policies reflect a “high bar” for interfering with journalists’ communications.

The High Court has held that bloggers can claim the journalistic privilege contained in the Evidence Act 2006, depending on their meeting various factors relevant to the definition of a journalist. In an earlier decision, the High Court also set out the process for conducting the balancing exercise required by the provision, and stated that the presumptive right to protect sources “should not be departed from lightly.”

I. Relevant Provisions

A. Evidence Act 2006

New Zealand’s Evidence Act 2006 contains a specific provision on the “protection of journalists’ sources” within part 2, subpart 8, which relates to “privilege and confidentiality.” Section 68 of the act provides that

- (1) If a journalist has promised an informant not to disclose the informant’s identity, neither the journalist nor his or her employer is compellable in a civil or criminal proceeding to answer any question or produce any document that would disclose the identity of the informant or enable that identity to be discovered.
- (2) A Judge of the High Court may order that subsection (1) is not to apply if satisfied by a party to a civil or criminal proceeding that, having regard to the issues to be determined in that proceeding, the public interest in the disclosure of evidence of the identity of the informant outweighs—

- (a) any likely adverse effect of the disclosure on the informant or any other person; and
 - (b) the public interest in the communication of facts and opinion to the public by the news media and, accordingly also, in the ability of the news media to access sources of facts.
- (3) The Judge may make the order subject to any terms and conditions that the Judge thinks appropriate.
- (4) This section does not affect the power or authority of the House of Representatives.¹

A final subsection, subsection 5, sets out the following definitions of relevant terms in this section:

informant means a person who gives information to a journalist in the normal course of the journalist's work in the expectation that the information may be published in a news medium

journalist means a person who in the normal course of that person's work may be given information by an informant in the expectation that the information may be published in a news medium

news medium means a medium for the dissemination to the public or a section of the public of news and observations on news

public interest in the disclosure of evidence includes, in a criminal proceeding, the defendant's right to present an effective defence.²

Furthermore, section 69 of the act, which is not specific to information obtained by journalists, provides the courts with "overriding discretion as to confidential information," including "any information that would or might reveal a confidential source of information."³ A judge may give a direction that such information not be disclosed in a proceeding if he or she considers that public interest in disclosure as part of the proceeding is outweighed by the public interest in preventing harm to a particular person or relationship, or "maintaining activities that contribute to or rely on the free flow of information."⁴ The provision then lists factors that a judge must have regard to in considering whether to give a direction that the particular information not be disclosed.⁵ A direction may be given under section 69 "whether or not the communication or information is privileged by another provision of this subpart or would, except for a limitation or restriction imposed by this subpart, be privileged."⁶

¹ Evidence Act 2006 s 68, <https://perma.cc/Y93M-HCXR>. For background information on the law related to journalists' privilege, see Thomas Stuart, *The Protection of Journalists' Sources in New Zealand and Australia* (Paper submitted for the LLB (Honours) Degree, Victoria University of Wellington, 2014), <https://perma.cc/UDG9-SVDW>.

² Evidence Act 2006 s 68(5).

³ Id. s 69(1)(c).

⁴ Id. s 69(2).

⁵ Id. s 69(3).

⁶ Id. s 69(5).

B. Search and Surveillance Act 2012

The Search and Surveillance Act 2012 “outlines rules for how New Zealand Police and some other government agencies (like the Department of Internal Affairs and Inland Revenue) conduct searches and surveillance when investigating and prosecuting offences and when monitoring compliance with the law.”⁷ It “does not apply to New Zealand’s intelligence agencies (the Government Communications Security Bureau and the New Zealand Security Intelligence Service). Their search and surveillance powers are contained in the Intelligence and Security Act 2017.”⁸

Section 136 of the Search and Surveillance Act 2012 lists the privileges that are recognized for the purposes of subpart 5 of part 4 of the act. These include “the rights conferred on a journalist under section 68 of the Evidence Act 2006 to protect certain sources.”⁹

Section 140 sets out the “effect of privilege on surveillance conducted under the Act.” It provides that a person who makes a claim of a relevant privilege in respect of any surveillance has the right to “prevent, to the extent that it is reasonably practicable to do so, the surveillance under this Act of any communication or information to which the privilege would apply if it were sought to be disclosed in a proceeding, pending determination of the claim to privilege, and subsequently if the claim to privilege is upheld.”¹⁰ If the claim is upheld, the person has the right “to require the destruction of any record of any such communication or information, to the extent that this can be achieved without destruction of any record of any other communication or information.”¹¹

A person undertaking authorized surveillance must “take all reasonable steps to prevent the interception of any communication or information to which a privilege recognised by this subpart would apply if the communication or information were sought to be disclosed in a proceeding.”¹² The person must also destroy any record of such a communication made as a consequence of the surveillance, “unless that is impossible or impracticable without destroying a record of information to which such a privilege does not apply.”¹³ Under section 141, the person claiming a privilege must provide the person responsible for the surveillance “with a particularised list of the matters in respect of which the privilege is claimed,” or otherwise apply to a judge for directions or relief.¹⁴

Section 142 sets out the “effects of privilege on search warrants and search powers,” which include a person who claims a privilege in respect of anything that is seized or sought to be seized having the right “to prevent the search under this Act of any communication or information to

⁷ *Review of the Search and Surveillance Act 2012 – Questions and Answers*, New Zealand Law Comm’n (Jan. 30, 2018), <https://perma.cc/M4ZA-8WCG>.

⁸ *Id.*

⁹ Search and Surveillance Act 2012 s 136(1)(i), <https://perma.cc/AR6F-GL93>.

¹⁰ *Id.* s 140(1)(a).

¹¹ *Id.* s 140(1)(b).

¹² *Id.* s 140(2)(a).

¹³ *Id.* s 140(2)(b).

¹⁴ *Id.* s 141.

which the privilege would apply if it were sought to be disclosed in a proceeding, pending determination of the claim to privilege, and subsequently if the claim to privilege is upheld,” and “to require the return of a copy of, or access to, any such communication or information.”¹⁵

Subsequent provisions contain requirements and procedures related to searches involving items that may be the subject of a privilege claim, and for claiming privilege in respect of items seized or sought to be seized.¹⁶

C. Intelligence and Security Act 2017

Section 70 of the Intelligence and Security Act 2017 provides that an intelligence warrant may not authorize “the carrying out of any activity or any power for the purpose of obtaining privileged communications or privileged information” of New Zealand citizens or permanent residents.¹⁷ However, such information and communications are only defined with reference to sections 54 and 56 to 59 of the Evidence Act 2006; it does not include journalists’ privilege with respect to the disclosure of confidential sources. In a 2018 report on the handling of privileged communications, the inspector-general of the Security Intelligence Service recommended that

[w]hile journalists, their confidential sources, and MPs’ communications are not covered by s 70 ISA, the agencies’ policies should reflect a high bar for interfering with such communications. As the Departmental Report on the New Zealand Intelligence and Security Bill 2016 noted:

“In terms of protection for communications with Members of Parliament and journalists and their sources, the Bill does not confer a clear prohibition in relation to such communications. However, clause 3 [now ISA, s 3] makes clear that the primary purpose of the Bill is the protection of New Zealand as a free and democratic society. All of the provisions of the Bill will need to be given effect in light of this ... It would be an exceptionally high bar to target a Member of Parliament or a journalist.”¹⁸

II. Definition of a Journalist

The definitions of “journalist” and “news medium” in subsection 68(5) of the Evidence Act 2006 were examined in detail by the High Court in 2014 in *Slater v Blomfield*,¹⁹ which involved a blogger

¹⁵ Id. s 142.

¹⁶ Id. ss 145–147.

¹⁷ Intelligence and Security Act 2017 s 70, <https://perma.cc/5AK5-YSB8>.

¹⁸ Cheryl Gwynn, *A Review of the New Zealand Security and Intelligence Service's Handling of New Zealanders' Privileged Communications and Privileged Information: Public Report* ¶ 27 (Office of the Inspector-General of Intelligence and Security, Dec. 2018), <https://perma.cc/WQL4-QAW5>, quoting Department of the Prime Minister and Cabinet, *New Zealand Intelligence and Security Bill: Departmental Report to the Foreign Affairs, Defence and Trade Committee* ¶ 593 (Dec. 2016), <https://perma.cc/VWE5-VFMJ>.

¹⁹ *Slater v Blomfield* [2014] NZHC 2221 (Sept. 12, 2014), <https://perma.cc/WJ6D-6WHT>.

who was sued for defamation seeking to protect his sources under subsection 68(1).²⁰ The judge found that subsection 68(1) did apply to the particular blogger, but also that, following the balancing process under subsection 68(2), “public interest in disclosure [of the evidence regarding the informants’ identity] outweighs any adverse effects on the informants and the ability of the media to freely receive information and access sources.”²¹ Therefore, the judge determined that subsection 68(1) did not apply to the disclosures sought in the proceedings.²²

In determining that a blogger can be a “journalist” for the purposes of subsection 68(1), and that a website or blog could be a “news medium,” the judge considered that

- “Some regular commitment to the publishing of news must exist before a blog is a news medium.”²³
- “[A] news medium that published articles of such a low standard that they could not objectively be regarded as “news” might not qualify.”²⁴
- The element of “regularly providing new or recent information of public interest” is determinative. The quantity need not be equivalent to a corporate news organization and the motives for reporting are not crucial.²⁵
- The following matters are relevant in assessing whether a person was receiving information in the normal course of his or her work:
 - (a) whether the receiving and disseminating of news through a news medium was regular;
 - (b) whether it involved significant time on a frequent basis;
 - (c) whether there was revenue derived by the blog site; and
 - (d) whether it involved the application of journalistic skill²⁶
- The policy behind section 68(1), to protect the free flow of information, “does not apply if the identity of the informant as the source of particular information is already known or able to be ascertained.”²⁷

III. Balancing Exercise and Discretion of the Court

In the earlier case of *Police v Campbell*, the High Court considered the approach to be taken to the application of subsection 68(2) of the Evidence Act 2006, which gives a judge the discretion to

²⁰ For a discussion of the case, see Jane Johnston, *Are Bloggers ‘Journalists’? New Zealand’s High Court Says Yes, The Conversation* (Sept. 15, 2014), <https://perma.cc/D9VV-DQJ9>; Steven Price, *The Blogger and the Journalist*, Media L.J. (Oct. 28, 2014), <https://perma.cc/VQL6-TSX3>.

²¹ *Slater v Blomfield* [2014] NZHC 2221, ¶ 150.

²² *Id.* ¶ 154.

²³ *Id.* ¶ 54.

²⁴ *Id.* ¶ 61.

²⁵ *Id.* ¶ 65.

²⁶ *Id.* ¶ 74.

²⁷ *Id.* ¶ 87.

make an order that a journalist's privilege against the disclosure of informants not apply in the particular proceedings. The High Court stated that "three points are straightforward":

- The starting point is that a journalist is not obliged to answer questions or produce documents that would disclose the identity of the informant or enable that identity to be discovered: s 68(1).
- The journalist's prima facie immunity may be displaced by an order under s 68(2).
- The onus is on the party seeking an order under s 68(2) to satisfy a High Court Judge that such an order should be made.²⁸

The steps to be followed by a judge in considering an order under subsection 68(2) were summarized as follows:

- a) Determine whether s 68(1) is engaged and the protection applies.
- b) Identify the issues to be determined in the proceeding for which the evidence is sought.
- c) Weigh the public interest factors identified in s 68(2).
- d) If, having regard to the issues identified, the Court is satisfied that the public interest in the disclosure of the evidence of the identity of the informant outweighs the matters in both s 68(2)(a) and (b), the Court may make an order.
- e) Consider whether, as a matter of discretion, an order should be made and, if so, on what terms and conditions.²⁹

The judge in the case further discussed aspects of this process, including stating that

- "While the statute does not give any specific guidance as to the relative weight to be attached to the elements which must be assessed under s 68(2), the trend of authority both in New Zealand and in the United Kingdom is to attach substantial weight to freedom of expression in a broad sense as well as in the narrow sense of encouraging the free-flow of information and the protection of journalists' sources."³⁰
- "The presumptive right to the protection [in subsection 68(1)] should not be departed from lightly and only after a careful weighing of each of the statutory considerations."³¹
- "In considering the weight to be attached to the public interest in the disclosure of the evidence of the identity of the informant in a case such as this, it will ordinarily be relevant to consider whether, in the circumstances of the case, other means are available to obtain the information sought. That is because the journalist's protection should not normally be overridden if the public interest in the disclosure of the identity of the informant can be satisfied by an alternative route."³²

²⁸ *Police v Campbell* [2009] NZHC 2632; [2010] 1 NZLR 483; (2009) HRNZ 517 (Aug. 7, 2009), ¶ 86, <https://perma.cc/E2GD-KJZE>.

²⁹ Id. ¶ 103.

³⁰ Id. ¶ 92.

³¹ Id. ¶ 93.

³² Id. ¶ 96.

- “The Court will also assess the significance to the prosecution case of the information sought. Where the prosecution has sufficient evidence to secure a conviction without the disclosure of the identity of the informant, one would expect an order to be declined. On the other hand, the more crucial the identity of the informant is to the prosecution case, the greater the weight to be attached to the public interest in the disclosure of the evidence of identity. The evidence in question need not be essential or critical but it must at least be important and not merely desirable or ‘nice to have’.”³³
- “[T]he Court would also take into account the importance of the charge. A prosecution for a minor offence is unlikely to carry the degree of public interest that would attach to the prosecution of a serious charge.”³⁴
- Under subsection 68(2), the court would consider “whether the effect of an order would be likely to have the chilling effect referred to in the evidence. Such an effect could be specific to the informant in the particular case or more generally as tending to deter members of the public from communicating confidential material to the media. While any potential impact of this kind may be difficult to quantify, the courts and the legislature have specifically recognised the public interest in preserving the ability of the media to access sources of fact. . . . The Court would also take into account the potential to undermine the ability of the media to access information if orders under s 68(2) were lightly or frequently made.”³⁵
- “Even if the Court is satisfied that the public interest in disclosure outweighs the matters identified in s 68(2)(a) and (b), it does not follow that an order under s 68(2) must be made. The Court ‘may’ make such an order. If it does, the Court may make the order subject to any terms and conditions the Judge thinks appropriate: s 68(3).”³⁶
- “It should be noted that an order made under s 68(2) does not require disclosure. Its effect is to order that the privilege against disclosure in s 68(1) does not apply. The next step would be for the prosecutor to subpoena the journalist. As already mentioned, the admissibility of the journalist’s evidence would still be open to challenge on the grounds of relevance, reliability, unfairness or otherwise.”³⁷

³³ Id ¶ 97.

³⁴ Id. ¶ 98.

³⁵ Id. ¶ 101.

³⁶ Id. ¶ 102.

³⁷ Id.

Portugal

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SUMMARY The Portuguese Constitution guarantees the freedom of the press, which includes the protection of the independence and professional secrecy of journalists. The Press Law, the Statute of Journalists, and the Journalists Code of Ethics all assert the right to professional secrecy of journalists. The Code of Criminal Procedure recognizes that the law may allow members of several professions to refuse to testify. However, the courts may issue an order requiring a journalist to testify after an inquiry determines the journalist's refusal to testify is illegitimate.

I. Constitutional Principle

The Portuguese Constitution guarantees the freedom of the press.¹ This right includes, among other things, the right of journalists, under the terms of the law, to have access to information sources and protection of their professional independence and secrecy.²

II. Press Law

Law No. 2 of January 13, 1999, established the Press Law,³ which states that freedom of the press is guaranteed under the terms of the Constitution and the law.⁴ Freedom of the press includes the right to inform and to be informed, without hindrance or discrimination.⁵ The exercise of these rights cannot be prevented or limited by any type or form of censorship.⁶

Freedom of the press includes, among other things, the recognition of the fundamental rights and freedoms of journalists, namely those referred to in article 22 of the Press Law.⁷ The freedom of the press is limited only by provisions in the Constitution and the law to safeguard the rights to reputation, privacy, and ownership of one's own image and words; to ensure the rigor and objectivity of information; and to defend the public interest and the democratic order.⁸

¹ Constituição da República Portuguesa, VII Revisão Constitucional [2005], art. 38(1), <https://perma.cc/5P3S-RUCE>.

² Id. art. 38(2)(b).

³ Lei No. 2/99, de 13 de Janeiro, as amended by Lei No. 78/2015, de 29 de Julho, <https://perma.cc/27S4-F8UN>.

⁴ Id. art. 1(1).

⁵ Id. art. 1(2).

⁶ Id. art. 1(3).

⁷ Id. art. 2(1)(a).

⁸ Id. art. 3.

According to article 22 of the Press Law, the fundamental rights of journalists, the content and extent of which are defined in the Constitution and the Journalist Statute, are freedom of expression and of creation; freedom of access to information sources, including the right of access to public places and their protection; the right to professional secrecy; the guarantee of independence and the conscience clause; and the right to participate in the guidance of the respective information body.⁹

III. Journalist Statute

A. Definition of a Journalist

A journalist is defined as anyone who, as their main, permanent, and gainful occupation, exercises editorial functions of research, collection, selection, and processing of facts, news or opinions through texts, images or sounds, intended for dissemination, for informational purposes, via the press or news agencies, or by radio, television, or any other electronic means of dissemination.¹⁰

The exercise of these functions is not considered a journalistic activity when performed in the service of publications that predominantly aim to promote activities, products, services or entities of a commercial or industrial nature.¹¹

Citizens who, regardless of their actual exercise of the profession, have carried out journalistic activity as a main, permanent, and gainful occupation for 10 consecutive years or 15 interpolated years are also considered to be journalists, provided that they obtain a license from the journalists' professional association and keep it updated.¹²

Citizens over 18 years of age in full enjoyment of their civil rights can be journalists.¹³ Possession of a journalist's license is a condition for exercising the profession.¹⁴ The exercise of the profession is incompatible with the performance of functions listed in article 3 of the Journalist Statute, such as advertising, public relations, or being an information officer for the police or the military.¹⁵

B. Limits on Compelled Disclosure

Article 6 of the Statute of the Journalist defines the fundamental rights of journalists, which include freedom of expression and creation, freedom of access to information sources, the

⁹ Id. art. 22.

¹⁰ Estatuto do Jornalista, Lei No. 1/99, de 01 de Janeiro, as amended by Lei No. 64/2007, de 6 de Novembro and Declaração de Rectificação No. 114/2007, de 20 de Dezembro, art. 1(1), <https://perma.cc/N95J-HHTT>.

¹¹ Id. art. 1(2).

¹² Id. art. 1(3).

¹³ Id. art. 2.

¹⁴ Id. art. 4(1).

¹⁵ Id. art. 3(1).

guarantee of professional secrecy and independence, and participation in the guidance of the respective information body.¹⁶

Without prejudice to the provisions of criminal procedure law, journalists are not required to reveal their sources of information, and their silence is not subject to any direct or indirect sanction.¹⁷

C. Requirements and Procedures for the Disclosure of Sources

1. Court Orders

Judicial authorities before which journalists are called to testify must inform them in advance, under penalty of nullity, about the content and extent of the right to nondisclosure of sources of information.¹⁸ If the disclosure of sources is ordered under the terms of the criminal procedure law, discussed below, the court must specify the scope of the facts on which the journalist is obliged to testify.¹⁹

When the criminal procedure law permits the disclosure of sources of information, the court on its own motion or at the journalist's request may restrict public access or hear the testimony in private, with the participants obligated to keep the reported facts confidential.²⁰

2. Disclosure by an Employer

Media information directors, administrators or managers of the companies that own media entities, and their staff may not disclose the respective sources of information, including the journalistic text, sound or image files of the companies or any documents likely to reveal them, except with the written authorization of the journalists involved.²¹

3. Search and Seizure of Information

A search of a media organization can only be authorized by a judge who personally presides over the proceedings, after notifying the president of the journalists' union so that the president or a delegate can be present, subject to confidentiality.²²

Material used by journalists in the exercise of their profession may only be seized during searches of a media organization or carried out under the same conditions in other places by means of a court order, in cases where the breach of professional secrecy is legally permissible.²³ Material obtained

¹⁶ Id. art. 6.

¹⁷ Id. art. 11(1).

¹⁸ Id. art. 11(2).

¹⁹ Id. art. 11(3).

²⁰ Id. art. 11(4).

²¹ Id. art. 11(5).

²² Id. art. 11(6).

²³ Id. art. 11(7).

in any of these actions that allows the identification of a source of information is sealed and sent to the competent court to order disclosure. The information cannot be used as evidence without a disclosure order.²⁴

IV. Code of Criminal Procedure

Clergy, lawyers, doctors, journalists, members of credit institutions, and other persons whom the law permits or requires to keep information secret may refuse to testify on the facts covered by confidentiality.²⁵

In the event of well-founded doubts about the legitimacy of the refusal to testify, the judicial authority hearing the matter must carry out the necessary inquiries. If, after these inquiries, it concludes that the refusal is illegitimate, it will require the journalist to testify.²⁶

The court superior to the one hearing the matter, or, if the matter is before the Supreme Tribunal of Justice (*Supremo Tribunal de Justiça*, STJ), the criminal section of the STJ, may authorize testimony that discloses a professional secret whenever this proves to be justified, according to the principle of the prevailing interest, namely, taking into account the indispensability of the testimony for the discovery of the truth, the seriousness of the crime, and the need to protect legal assets.²⁷ This action is taken by the court on its own motion or upon request.²⁸ In these cases, the decision of the judicial authority or of the court must be made after hearing the representative body of the profession related to the professional secrecy in question, under the terms and with the effects provided for in the legislation applicable to that professional body.²⁹ These provisions do not apply to religious secrecy.³⁰

V. Penal Code

Article 195 of the Penal Code states that anyone who, without consent, reveals a secret of someone else that he or she has learned because of his status, occupation, employment, profession or art is punishable with a prison sentence of up to one year or a fine.³¹

²⁴ Id. art. 11(8).

²⁵ Código de Processo Penal, Decreto-Lei No. 78/87, de 17 de Fevereiro, as amended by Lei No. 39/2020, de 18 de Agosto, art. 135(1), <https://perma.cc/JS7Q-LCEW>.

²⁶ Id. art. 135(2).

²⁷ Id. art. 135(3).

²⁸ Id.

²⁹ Id. art. 135(4).

³⁰ Id. art. 135(5).

³¹ Código Penal, Decreto-Lei No. 48/95, de 15 de Março, art. 195, <https://perma.cc/BY5B-Q4H5>.

VI. Code of Ethics

The Journalists Code of Ethics states that the protection of a source's identity is fundamental. Journalists must not reveal, even in court, their confidential sources of information, nor can they disregard their commitments, unless they are being used to channel false information. Opinion articles, however, must always be attributed (*atribuídas*).³²

³² Código Deontológico, sec. 7, <https://perma.cc/V9NB-3DK6>.

Sweden

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SUMMARY Press freedom and freedom of expression are protected in the Swedish Constitution. The freedom of the press includes the right to obtain information, the right to communicate information, and the specific prohibition against public officials, including public employers, investigating statements made in the press.

Journalists and other persons working in or producing print or audiovisual media are constitutionally protected against being compelled to disclose their sources in Sweden.

In addition, a journalist may be fined or imprisoned for up to one year for disclosing an anonymous source without the source's specific consent. Journalists can only be compelled to disclose a source in court in the investigation of certain enumerated serious crimes, including treason.

I. Introduction

Press freedom and freedom of expression are protected in the Swedish constitutional texts (Tryckfrihetsförordning (TF)) and (Yttrandefrihetsgrundlagen (YGL)).¹

Specifically, 1 ch. 7 § of TF provides that:

Everyone is free to communicate information on any subject for the purpose of making it public in a printed publication (freedom of information). This freedom refers to information provided to

- an author or other author of a presentation in printed form,
- the publisher or editors of the publication, or
- a company for the professional dissemination of news or other messages to periodicals.

Everyone is also free to obtain information on any subject for the purpose of making it public in print or to provide information referred to in the first subparagraph (freedom of acquisition).

To these freedoms, no other limits may be made than those that follow from this constitutional text.²

¹ Tryckfrihetsförordning (SFS 1949:105) (TF), <https://perma.cc/QBF6-DLA9>; Yttrandefrihetsgrundlagen (SFS 1991:1469) (YGL), <https://perma.cc/M2NH-FHEE>; SOU 2006:96 Ett nytt grundlagsskydd för tryck- och yttrandefriheten? (del II), <https://perma.cc/ZLJ8-HB4B>.

² 1 ch. 7 § TF.

Three of the fundamental freedoms related to press freedoms are the right to obtain information (*anskaffarfrihet*),³ the right to communicate information (*meddelarfrihet*),⁴ and the ban on official investigations of the sources of information (*efterforskningsförbud*).⁵ The right to communicate information includes a right to share information anonymously with the press and an obligation of members of the press to protect the integrity and anonymity of their sources.⁶ Moreover, a person also has the right to publish a text or produce an audiovisual program anonymously, and a designated publisher may not be compelled to reveal the person's identity in court.⁷

II. Scope of Source Shield Provision

A. Legislation

Under Swedish law, an author of a text, publisher, or other person involved in the publication of a protected text or audiovisual program, cannot be compelled in court to disclose a source or to produce communication with a source (*editionsförbud*).⁸

However, the right is limited. It does not apply to the following crimes enumerated in the Swedish Constitution: "rebellion, high treason, espionage, aggravated espionage, aggravated unauthorized use of secret information, treason, treason or attempt, preparation or conspiracy to commit such a crime."⁹

B. Definition of Protected Person

Swedish source shield provisions are not limited to journalists, as the term "journalist" is not included in Swedish law. Instead, protection of the identity of a source is afforded any author of a text if the information from the source is intended for publication in constitutionally protected media, i.e., print, online, or in audiovisual programs that must meet additional requirements.¹⁰ Any author, publisher, or other person involved in such a publication is protected from being compelled to testify about the identity the source behind the published information.¹¹

³ 1 ch. 7 § TF; 1 ch. 10 § YGL.

⁴ Id.

⁵ 3 ch. 5 § TF; 2 ch. 5 § YGL.

⁶ 3 ch. 1, 2 §§ TF; 2 ch. 1, 2 §§ YGL.

⁷ 3 ch. 1, 2 §§ TF; 2 ch. 1, 2 §§ YGL.

⁸ 36 ch. 5 § RB; 38 ch. 2 § RB; 3 ch. 4 -5 §§ TF; 2 ch. 4 § YGL.

⁹ 7 ch. 22 § TF; 5 ch. 4 § YGL.

¹⁰ 3 ch. 1, 3 §§ TF; 1 ch. 10 § YGL.

¹¹ 3 ch. 4 -5 §§ TF; 2 ch. 4 § YGL.

C. Constitutionally Protected Publications

The Swedish Constitution protects information produced in text by “printing presses.”¹² There is no special law that protects “journalists.” Specifically, chapter 1 section 2 provides that:

This Constitution applies to publications that have been produced in a printing press.

The Constitution shall also apply to writings which have been reproduced by photocopying or any similar technique, if

1. proof of publication applies to the publication, or
2. the publication is provided with a designation indicating that it is reproduced and in connection with the designation clear information about who has reproduced the publication and about the place and year for this.

What is stated in this Constitution about publications that have been produced in the printing press and about printing applies, unless otherwise stated, also to publications and reproduction referred to in the second paragraph.

Images, with or without accompanying text, are also considered writings when applying the Constitution.¹³

In addition, the Swedish Constitution protects “broadcast of programs directed at the public and intended to be received with audiovisual aides.”¹⁴ This includes “live or pre-taped programs, provided that the start time and content cannot be altered by the recipient.”¹⁵ Digital content published online is protected also, if only the publisher (producer) of the text or information can change it.¹⁶ For example, when a journalist publishes a comment on a private blog, it is typically not constitutionally protected unless the blog specifically has a publishing certificate for the website (*utgivningsbevis*).¹⁷ In order to receive an *utgivningbevis*, the blog must have a name that cannot be easily confused with another blog or publication, and there must be a designated publisher or editor who is responsible for the contents of the blog and comments.¹⁸

D. Limits to Shield Protection

Notwithstanding the provisions specified in Section II.A., above, the right not to be compelled to produce protected information is limited. As noted above, it does not apply in relation to the following enumerated crimes: rebellion, high treason, espionage, aggravated espionage,

¹² 1 ch. 2 § TF.

¹³ 1 ch. 2 § TF.

¹⁴ 1 ch. 3 § YGL.

¹⁵ 1 ch. 3 § YGL.

¹⁶ 1 ch. 4 § YGL.

¹⁷ 1 ch. 4-5 §§ YGL.

¹⁸ 1 ch. 5 § YGL.

aggravated unauthorized use of secret information, treason, attempted treason, and preparation or conspiracy to commit such a crime.”¹⁹

III. Requirements and Procedures for Disclosure of Sources

A. Lawful Disclosure of Sources

The Swedish Procedural Code provides that a person (author, journalist, publisher, etc., as defined in Section II, above) may only bear witness regarding the identity of a source or the contents of the underlying documents of a constitutionally protected text when specified in the Swedish Constitution.²⁰ Moreover, a person or company that holds documents that include the protected information cannot be compelled to reveal that information if it would reveal the identity of the source.²¹

Accordingly, a source shield law may only be pierced either with the express consent of the source or to solve certain crimes.²² Specifically, 3 ch. 4 § TF provides that:

The duty of confidentiality in accordance with 3 § does not apply in these cases:

The beneficiary of the duty of confidentiality has consented to his or her identity being revealed.

It is permissible in accordance with 2 § 2 para to address the issue of identity.

It is a matter of one of the crimes specified in 7 ch. 22 § 1 para 1 mom.

A court finds that in relation to a crime in 7 ch. 21 § or 22 § 1 para 2 or 3 that it is necessary that information be divulged on whether it is the defendant or suspect of the criminal act that has provided the message or contributed to the production. The information must in such cases be produced at a court deliberation.

A court finds that in another case, that it in consideration of public or private interest is of exceptional importance, that a piece of information regarding the identity is revealed in a witness testimony or a party examination with a party under oath.

During those witness testimony and party examination referenced in 1 para 4 and 5 the court must vigilantly oversee that questions that may intrude on the duty of confidentiality are not to be asked in excess of what has been approved in every specific situation.²³

In addition to meeting the criteria above, a proportionality test is always required by law.²⁴

¹⁹ 7 ch. 22 § TF; 5 ch. 4 § YGL.

²⁰ 36 ch. 5 § 2 st RB. Rättegångsbalken, <https://perma.cc/6E72-Z58U>; 3 ch. 4 § TF; 2 ch. 4 § YGL.

²¹ 38 ch. 2 § RB.

²² 3 ch. 4 § TF.

²³ 3 ch. 4 § TF.

²⁴ 27 ch. 1 § 3 st RB.

Swedish courts have been reluctant to pierce shield laws and compel disclosure. For example, in 2003, the Swedish Supreme Court refused to compel a newspaper to disclose who had purchased an advertisement in the newspaper, even though the advertisement's claims were fraudulent.²⁵ In 2015, the Swedish Supreme Court denied access to digital images held by a newspaper in a robbery case on the ground that it would reveal the photographer of the photo and the source behind the article.²⁶ The constitutionally protected right to communicate information thus outweighed the police's need for the picture.²⁷ As part of the decision, the Swedish Supreme Court issued a rare press release.²⁸ In it, the high court explained that it was restricted by the fact that Swedish "legislation regarding the use of coercive measures in the so-called virtual space is outdated."²⁹ The statement continued, "[i]t is urgent that the legislative branch [Swedish Parliament] correct this [as the Court cannot do this, not least] as good legal custom presumes a significant level of technical or other non-legal expertise."³⁰

B. Liability for Journalists Who Unlawfully Reveal Sources

Under Swedish law, journalists are not only protected from revealing their sources, they also have an active duty to protect the identity of an anonymous source.³¹ Failure to do so is punishable by a fine or imprisonment for up to one year.³² In a 2015 case, the Swedish Supreme Court found that the publication of a photograph together with an article resulted in the identification of an anonymous source. The publication thus violated the constitutional right to communicate information, and the publisher was fined.³³

IV. Protection Against Workplace Investigations

In addition to the source protection afforded to journalists in court, an anonymous source is protected also from inquiries from his or her public employer.³⁴ Thus, if a journalist publishes information that was obviously received from an employee at public company X, company X cannot start an investigation to find out who the informant is.

²⁵ Nytt Juridiskt Arkiv [NJA] [Supreme Court Reports] 2003 s. 107, <https://perma.cc/CR36-THQS>.

²⁶ Press Release, Supreme Court of Sweden, Court Case HD Ö 3074-15, 43, HD, Högsta domstolen avslår åklagarens begäran om husrannsakan hos Aftonbladet (Aug. 18, 2015), <https://perma.cc/W4KA-CL4S>.

²⁷ 1 ch. 1 § 3 st TF.

²⁸ Press Release, Supreme Court of Sweden, *supra* note 26.

²⁹ *Id.*

³⁰ *Id.*

³¹ 3 ch. 3-5 §§ TF.

³² 3 ch. 7 § TF.

³³ NJA 2015 s. 166, <https://perma.cc/Z5Q2-227T>.

³⁴ 3 ch. 5 § TF; 2 ch. 5 § YGL.

Turkey

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SUMMARY Article 12 of the Press Law of 2004 protects authors of published works from being compelled to disclose the identities of their news sources, and grants them the right to abstain from testifying in court with regard to their sources. While this provision does not appear to limit the scope of the protection to “journalists” as they are defined in the Press Labor Law, the protection appears to be otherwise limited by the definition of “news” provided in case-law, which covers only activity that is traditionally considered “journalistic.” Commentators have argued that the Criminal Procedure Law protects persons covered by article 12 of the Press Law from interception of their telecommunications, to the extent that the communication may reveal sources protected under article 12.

I. Introduction

Under Turkish law, the legal framework governing disclosure of journalistic information and sources is found in the constitutional provisions on the rights to freedom of expression and freedom of the press, Turkey’s related obligations under the European Convention of Human Rights (ECHR), the main “shield” provision of the Press Law of 2004, and provisions of the Code of Criminal Procedure prohibiting the interception of communications of persons who may abstain from giving testimony in court.¹ Additionally, as Turkey is a member of the Council of Europe, Turkish courts may be expected to use the relevant soft law instruments of that body, in particular Recommendation No. R (2000) 7, as persuasive authority in cases involving the compelled disclosure of journalistic sources or information.²

In the Constitution of Turkey, the right to the freedom of the press is enshrined in an article on the general right to freedom of expression,³ and in a second article on freedom of the press

¹ Constitution of Turkey, Law No. 2709, arts. 26, 28 (Official Gazette [O.G.] No. 17863, Nov. 9, 1982), as amended, <https://perma.cc/PW3T-KHEY> (official English translation); Convention for the Protection of Human Rights and Fundamental Freedoms, art. 10, Nov. 4, 1950, E.T.S. No. 5; 213 U.N.T.S. 221, <https://perma.cc/ZMG7-RN9R>; Basın Kanunu, Law No. 5187, art. 12 (O.G. No. 25504, June 26, 2004), <https://perma.cc/V4EK-KQPR>; Hukuk Muhakemeleri Kanunu, Law No. 6100, art. 135(3) (O.G. No. 27836, Feb. 4, 2011), <https://perma.cc/7WSQ-9ZUK>.

² Council of Europe, Comm. of Ministers, Recommendation No. R (2000) 7 (adopted Mar. 8, 2000), <https://perma.cc/ABN8-VLUU>.

³ Constitution art. 26(1) (“Everyone has the right to express and disseminate his/her thoughts and opinions by speech, in writing or in pictures or through other media, individually or collectively.”).

specifically.⁴ Both articles provide that the exercise of these rights can be restricted for specified reasons.⁵

While these provisions do not specify the scope of disclosure that journalists could be compelled to make to law enforcement or judicial authorities regarding their sources or related information, Turkish courts when assessing the constitutionality of such compelled disclosure must take into account the jurisprudence of the European Court of Human Rights (ECtHR) related to the freedom of expression enshrined in article 10 of the ECHR. This is because of the conflict rule of the Constitution that gives the ECHR (and indirectly, the ECtHR's interpretation of the ECHR) primacy over national law.⁶

Consequently the ECtHR's interpretation of the right to freedom of expression enshrined in article 10 of the ECHR as expressed in its judgment in *Goodwin v. United Kingdom* case and its progeny will be binding on Turkish courts whenever courts are required to review compelled disclosures of journalistic sources.⁷ This line of ECtHR case-law requires ECHR signatory States to introduce effective legal procedural safeguards to the compelled disclosure of journalistic sources by judicial or law enforcement authorities in order minimize the potential chilling effect that might arise from the perception that journalists are helping in the identification of anonymous sources. These procedural safeguards must include, at a minimum, the possibility of review of the decision compelling disclosure by an independent and impartial body whose review would be governed by clear criteria and would consider whether less intrusive measures would be sufficient to address the public interest invoked by the authorities.⁸

II. Definition of Protected Journalist

The Press Law of 2004 was enacted to “regulate the [constitutional] right to freedom of the press and its uses.”⁹ Article 12 of the law states, “[t]he owner of the periodical, the responsible director, and the author may not be compelled to disclose any kind of news source including information or documents or to testify on this matter.”

While this article is the main provision protecting journalistic sources and information in the Turkish legal system, it does not refer to “journalists,” but to “owners of periodicals,” “responsible managers,” and “authors” as parties shielded from compelled disclosure. “Owners

⁴ Id. art. 28.

⁵ Id. art. 26(2); art. 28(3), (4), (6), (8).

⁶ Id. art. 90(5) (“In the case of a conflict between international agreements, duly put into effect, concerning fundamental rights and freedoms and the laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail.”).

⁷ *Goodwin v United Kingdom*, 22 Eur. Ct. H.R. 123 (1996), <https://perma.cc/6LN8-KKTS>. For a non-exhaustive list of ECtHR judgments in this line of cases, see Council of Europe, *The Protection of Journalistic Sources, A Cornerstone of the Freedom of the Press* (June 2018), <https://perma.cc/R3BJ-38BH>.

⁸ Council of Europe, *supra* note 7.

⁹ Law No. 5187, *supra* note 1, art 1(1).

of periodicals” refer to any natural or legal person who is the proprietor of the periodical.¹⁰ “Responsible manager” refers to a natural person (typically an editor) who is responsible for ensuring compliance of the publication with the provisions of the Press Law under pain of various civil and criminal sanctions provided by the law.¹¹ According to article 5, all periodical publications must register one or more responsible managers. Finally, the law defines “author” as “the person who wrote or translated the text or news, or created the picture or cartoon, that constitutes the content of the periodical or non-periodical publication.”¹²

Thus article 12 of the Press Law grants protection to a wider class of persons – owners, managers, and “authors” – than those traditionally considered to be in the journalistic profession based on employment relationships or education. The class of protected persons (and the scope of protection) partly depends on the meaning of the term “news” as it appears in article 12. The term “news” is not defined in the text of the law. However, within the context of the constitutional right to freedom of the press, the Court of Cassation has described the role of the news as “presenting to the public opinion the thoughts and actions of those running public affairs ... and notifying the public of information and ideas related to political developments and other areas of public interest that are relevant to public debate.”¹³ The fact that the protection was granted in the Press Law, which applies to all publications, and not the Press Labor Law, where “journalist” as a professional status is defined, supports the conclusion that the protected class of “authors” includes those outside of the Press Labor Law’s definition for “journalist,” thus including freelance writers or individual bloggers engaged in the communication of “news.”¹⁴ The Court of Cassation has not had occasion to address this issue, however.

III. Content Recognized as Protected Information

While the protection granted to news sources and related information from compelled disclosure—including judicial compulsion—appears to be extensive under article 12, there appears to be no clear judicial guidance as to the scope of this protection. One apparent limit is the subject-matter to which the Press Law itself is applicable, which is limited to “the publication and distribution of published works.”¹⁵ The definition of “published works” under the Law includes print publications and broadcasts of news agencies.¹⁶ In the paucity of juridical guidance, it is not clear whether journalistic sources that are not related to any realized

¹⁰ Id. art. 6.

¹¹ Id. art. 5.

¹² Id. art. 2(1)(i).

¹³ General Assembly of the Court of Cassation, Decision No. E.2013/4-2436, K.2015/1731. For a compilation of significant decisions of Turkish high courts on the right to freedom of the press, see Council of Europe, *İfade Özgürlüğü İle İlgili Türk Yüksek Mahkeme Kararları Kaynakçası*, <https://perma.cc/8RH3-FVSD>.

¹⁴ Basın Mesleğinde Çalışanlarla Çalıştıranlar Arasındaki Münasebetlerin Tanzimi Hakkında Kanun, Law No. 5953 (O.G. No. 8140, June 20, 1952) (Press Labor Law). This law defines “journalist” as a person who is employed in a news or photograph agency or a newspaper or periodical distributed in Turkey and performs intellectual or artistic work for remuneration. Id. art. 1.

¹⁵ Law No. 5187, art. 1(2).

¹⁶ Id. art. 2(1)(a).

publication or news agency product, such as prepublication drafts, can benefit from the protections of article 12. Furthermore, there appears to be no specific judicial or legislative guidance on how “any kind of news source including information or documents” in article 12 of the Press Law should be interpreted. While it is undisputed that “news source” refers to the traditional term of art, that is, the person who provides the related information to the journalist (or other person protected under article 12), it is not clear whether the “information or documents” that are protected from disclosure are limited to those that might compromise the anonymity of the news source.¹⁷

IV. Limits on Compelled Disclosure

The text of article 12 of the Press Law and its legislative history suggest that the protection afforded therein is absolute.¹⁸ While it is clear that the protected persons cannot be compelled to offer testimony disclosing their sources, there is a lack of judicial and legislative guidance on whether courts may order search and seizure of papers and data that might reveal a news source.

Nevertheless, a substantial body of legal literature suggests that evidence revealing news sources obtained by interception of telecommunications should be considered inadmissible in criminal process. Article 135(3) of the Criminal Procedure Code (CPC) prohibits the interception of communications between suspects and “persons who can abstain from giving testimony,” and makes any evidence obtained from such interception inadmissible and subject to immediate destruction.¹⁹ A list of “[p]ersons who can abstain from giving testimony” is provided in article 46 of the CPC, which includes persons that can abstain from testifying in criminal cases “because of their professions or occupations,” e.g. attorneys, health professionals, public accountants, or notaries public. The provision does not include journalists or the protected parties under article 12 of the Press Law in the class of relevant professionals. The explanatory memorandum of the bill that became the CPC justified excluding “journalists” from the protected class under article 46 on the basis that in comparative law, journalists’ communications are not generally considered to be covered by professional secrecy rules (unlike the communications of attorneys, health professionals, or members of religious institutions in counseling roles).²⁰

However, the relevant literature argues that article 135(3) is not limited to the class of persons provided in article 46 and that the prohibitions of article 135(3) also applies to protected persons under article 12 of the Press Law with respect to communications related to news sources. The commentators argue that the list of covered professions in article 46 of the CPC is nonexclusive, and under the prohibition of compelled testimony in article 12, the persons protected must also

¹⁷ Cf. Turkish Journalists’ Association, *Türkiye Gazetecileri Hak ve Sorumluluk Bildirgesi* § C (Apr. 17, 2019), <https://perma.cc/Q7EW-AJ4P>; Basın Konseyi, *Professional Principles of the Press* (2009), <https://perma.cc/V62M-4S3E>.

¹⁸ See explanatory memorandum of the Press Law bill, *Basın Kanunu Tasarısı*, Bill No. 1/781, at 15 (Mar. 24, 2004), <https://perma.cc/R89U-7CVC>.

¹⁹ Ceza Muhakemesi Kanunu, Law No. 5271 (O.G. No. 25673, Dec. 17, 2004), <https://perma.cc/NSS7-YHZT>. See also M. Süheyl Karakaya, *İletişimin Denetlenmesi Tedbiri Esnasında Elde Edilen Tesadüfi Deliller*, 21 D.E.Ü. Huk. Fak. Der. 1491 (2019).

²⁰ *Ceza Muhakemesi Kanunu Tasarısı*, Bill No. 1/535, at 19 (Mar. 7, 2003), <https://perma.cc/PQ6T-XZYG>.

be considered “persons who can abstain from giving testimony” under the CPC.²¹ However, thus far there appears to be no case law or court practice addressing this argument.

²¹ See, e.g., Seydi Kaymaz, *Ceza Muhakemesinde Telekomünikasyon Yoluyla Yapılan İletişimin Denetlenmesi* (2015); Tülay Kitapçioğlu Yüksel, *Meslek ve Sürekli Uğraşları Sebebiyle Tanıklıktan Çekinme Yükümlülüğü Altındaki Kişilerin Suçu Bildirme Yükümlülüğü*, 38 *Ceza Hukuku Dergisi* 193.