

WHEN THE POLICE KNOCK AT YOUR DOOR: NEWSROOM SEARCH WARRANTS

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What would you do if the police arrived at your newsroom's door with a search warrant for materials you had gathered while investigating a story? If you confront this situation, keep in mind a little-known statute that offers the press special protection against just this kind of search.

The federal Privacy Protection Act, 42 U.S.C. §§ 2000aa-2000aa-12, protects journalists from most searches of newsrooms by federal and state law enforcement officials. The Act supplements the protections that the Fourth Amendment of the United States Constitution provides to *all citizens* against unreasonable searches and seizures of their person, home, papers, and possessions. The Fourth Amendment requires that searches be "reasonable" and that search warrants be issued only when there is "probable cause" to believe that the evidence sought is in the place to be searched.

The Privacy Protection Act goes even further. In most cases, it requires police to use subpoenas, rather than search warrants, to search the premises of journalists who are not themselves suspects in the offense that is the subject of the search. A subpoena is less "invasive" than a search warrant. When a search warrant is issued, officers may immediately enter the property and search for the materials sought. There is no procedure for objecting before the search occurs. When a subpoena is issued, on the other hand, the person served with the subpoena is directed to report to court at a certain future time to deliver the materials sought. The person may file an objection before surrendering the materials. And in most states, journalists who are served with subpoenas have protections available to them under the First Amendment or their states' "shield statutes."

Congress passed the Privacy Protection Act in reaction to a famous Supreme Court decision, *Zurcher v. Stanford Daily News*, 436 U.S. 547 (1978). In *Zurcher*, a student newspaper, the Stanford Daily, published articles and photographs of a demonstration in which several police officers were injured. The district attorney obtained a search warrant that let the police search for and seize all photos and negatives of the demonstration that the newspaper possessed (based on the belief that the newspaper had in its office additional photos of demonstrators who assaulted the police). Four police officers searched the newspaper's photo labs, filing cabinets, desks, and trash cans. The officers read notes and correspondence during the search. But they found no photos of the demonstration beyond those already published, so they removed no materials from the newspaper's offices.

Afterward, the Stanford Daily filed a lawsuit, claiming that the search and seizure violated its constitutional rights. The lower courts agreed with the Stanford Daily that the Fourth Amendment protections against unreasonable searches and seizures had to be applied with special care when activities protected by the First Amendment -- such as newsgathering -- were involved. But the United States Supreme Court did not agree. It held that the Fourth Amendment provides no special protection for those who possess evidence but are not themselves suspects in an offense that is under investigation. Thus even journalists, whose activities are also protected by the First Amendment, were entitled to no special protection under the Fourth Amendment, the Court held.

After the *Zurcher* decision, many feared that journalists would find it harder to investigate and report the news. They feared that confidential sources, afraid of being exposed in newsroom searches, would dry up. Journalists also feared that the magistrates who issued warrants for these searches, often political allies of law enforcement officials, would be biased in deciding whether there was probable cause to justify issuing a warrant. In addition, they feared that such searches would physically disrupt the newsroom and its operations.

The Privacy Protection Act was passed to address these fears. The Act requires criminal investigators to get a subpoena instead of a search warrant when seeking "work product materials" and "documentary materials" from the press, except in certain limited circumstances, including: (1) when there is reason to believe the journalist is taking part in the underlying wrongdoing, (2) when immediate seizure of the materials could prevent a person from being killed or seriously injured, (3) when giving notice under a subpoena would likely cause the materials to be destroyed or concealed, (4) when the newsroom has ignored a court order to produce the materials, (5) when there is reason to believe that the delay related to a subpoena would "threaten the interests of justice," or (6) as provided under a 1996 amendment to the Act, when child pornography is involved.

The Attorney General has issued guidelines, required by the Act, on "Methods of Obtaining Documentary Materials Held by Third Parties." 28 C.F.R. §§ 59.1-6. Under these guidelines, federal agents must get authorization from a Deputy Assistant Attorney General or other high-ranking official in the Justice Department before they can seek a warrant rather than a subpoena for evidence in the hands of someone who is not a suspect.

The Privacy Protection Act gives journalists a legal remedy for an inappropriate search and seizure, but it does not say what a newsroom can do to repel such a search in the first place. Outlined below are suggestions to consider if you are confronted with a search warrant.

- Contact your lawyer immediately. Try to have the search delayed until your lawyer can examine the warrant. If the warrant is defective or violates some provision of the Privacy Protection Act, a law enforcement officer may be more likely to accept that message from a lawyer than from a journalist.
- The Privacy Protection Act is not well known to many attorneys and prosecutors, so have a copy of the Act available in the newsroom, and present it to the law enforcement officer if the lawyer cannot be there to do so. Call attention to section 2000aa-12 of the Act, which provides for sanctions against officials who search newsrooms in violation of the Act.

- If the search proceeds anyway, record it as you would any news event. Make a video recording if possible; if not, take pictures or even detailed notes. If a lawsuit is filed as a result of the search, the record you create may help prove damages and ensure that seized materials are returned.
- You cannot impede the search, but you are not required to assist in it either. Nevertheless, if the warrant lists specific items (as it should), and if your locating those items would prevent the rest of the office from being ransacked or prevent other confidential materials from being revealed, it may be advisable to assist.
- If the areas being searched contain confidential materials, make that clear to those who are conducting the search, and document that you have made it clear. (When the Court in *Zurcher* considered the reasonableness of that newsroom search, it noted that the police had not been told that the areas they were searching contained confidential materials.)

What recourse do you have if the search proceeds anyway? If you have been subjected to a search or seizure in violation of the Privacy Protection Act, you may file a civil lawsuit against the Government or the officers involved. Governmental agencies often -- but not always -- claim immunity from lawsuits, and immunity issues may determine how and against whom a lawsuit should be filed. The Act permits recovery of actual damages (of no less than \$1,000), as well as attorney's fees and costs. The Act does not preclude bringing claims for other wrongful acts committed during the search, such as trespass, destruction of property, or violations of civil rights.

But the best outcome, of course, is to stop the search from taking place at all. By making sure that everyone in your newsroom is familiar with the Privacy Protection Act (and any similar state law that may apply) and by having a clear policy on how to respond if the police arrive at your door, you will be in the best position to protect your rights and stop this intrusion before it begins.

NOTE: The information in this article is based on general principles of First Amendment law. It is not intended for specific application. State law on these issues varies. If you encounter a situation such as this, you should seek counsel concerning your state's law and the specific application of state and federal law to the issue you face.

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