

To: Commission
From: Alexandra Kutner
Re: New Jersey's Newsperson's Shield Law
Date: March 10, 2014

NEW JERSEY'S NEWSPERSON'S SHIELD LAW

I. Introduction

This project results from the New Jersey Supreme Court decision in *In re January 11, 2013 Subpoena By the Grand Jury of Union County*¹, which has again “indicated that the Legislature has the ability, should they wish, to more clearly define the [Newsperson’s] privilege”² in the face of ever-evolving news media. The goal of this proposed project is to review the law and determine whether the Act’s ambiguity issue can be resolved.

In re January 11 involved an author’s filed motion to quash a subpoena to testify before a grand jury regarding information referenced in blog posts concerning alleged misuse of county-owned generators by county employers during Hurricane Sandy. The Supreme Court upheld the finding of the Superior Court, Union County, Criminal Division, whereby (1) the author waived newsperson’s privilege only as to the name of an individual that author had provided to FBI, and (2) the information at issue in subpoena was protected by the newsperson’s privilege under Shield Law. The case brought into question *N.J.S.A. 2A:84A-21* through 28 and *N.J.R.E. 508* – the Newsperson’s Privilege which allows news reporters to protect the confidentiality of sources and news or information gathered during the course of their work. As digital news outlets continue to pervade our media landscape, issues have begun to arise regarding not *what* the law protects, but rather *whom* the Legislature intended to “cloak with an absolute privilege.”³

In the event the Commission decides to pursue this project, an appendix has been prepared. Within the appendix you will find a constitutional history of the journalist privilege, a survey of all 50 states and how they handle this issue, as well as references to a number of Law Review articles on this topic. As our media has been continuing to evolve, New Jersey law has been the forerunner in the development of the journalist privilege.

A. New Jersey's Shield Law

The newsperson’s privilege in New Jersey was first enacted in 1933, and protected only the “source” of information. In the decades since, the Legislature has expanded the scope of the privilege to cover the entire newsgathering process.⁴ The statute was amended and expanded in 1960 as part of a general overhaul of the Rules of Evidence, but the information itself was not

¹ 41 Media L. Rep. (BNA) 1676, 2013 WL 1686909 (N.J. Super. Ct. 2013) published at 432 N.J. Super. 570, 75 A.3d 1260 (2013).

² *Id* at 1274.

³ *Too Much Media, LLC v. Hale*, 993 A.2d 845, 856 n.7 (N.J. Super. Ct. App. Div. 2010), *aff'd* and modified, 20 A.3d 364 (N.J. 2011).

⁴ *In re Venezia*, 191 N.J. 259 at 271, 922 A.2d 1263; *Maressa v. N.J. Monthly*, 89 N.J. 176 at 188, 445 A.2d 376.

privileged and the sources of the information were not privileged where the information gathered was not published. Decisions by the courts limiting the newsperson's privilege in *In Re Bridge*⁵ caused the Legislature to amend the statute in 1977, which expanded the source privilege to cover all sources of information and created an information privilege covering all information gathered in the scope of professional activities, whether or not it was disseminated.⁶ The Legislature again amended the statute in 1979 to reflect the holding in *In re Farber*,⁷ that a criminal defendant's right to exculpatory evidence can sometimes outweigh the privileges normally afforded to the press.

Currently, the New Jersey Newspaper's Privilege provides an absolute privilege, protecting journalists from revealing information or sources obtained during professional newsgathering. The law, which has been described by the New Jersey Supreme Court as among the broadest in the nation,⁸ promotes and protects the ability of journalists to gather and communicate information to the public. The law thereby buttresses constitutional safeguards for gathering news,⁹ and is not limited to traditional news outlets like newspapers and magazines.

Under the Newspaper's Privilege, *N.J.S.A. 2A:84A-21*,

... a person engaged on, engaged in, connected with, or employed by news media for the purpose of gathering, procuring, transmitting, compiling, editing or disseminating news for the general public or on whose behalf news is so gathered, procured, transmitted, compiled, edited or disseminated has privilege to refuse to disclose, in any legal or quasi-legal proceeding or before any investigative body, including, but not limited to, any court, grand jury, petit jury, administrative agency, the Legislature or legislative committee, or elsewhere.

- a. The source, author, means, agency or person from or through whom any information was procured, obtained, supplied, furnished, gathered, transmitted, compiled, edited, disseminated, or delivered; and
- b. Any news or information obtained in the course of pursuing his professional activities whether or not it is disseminated

The provisions of this rule insofar as it relates to radio or television stations shall not apply unless the radio or television station maintains and keeps open for inspection for a period of at least 1 year from the date of an actual broadcast or telecast, an exact recording, transcription, kinescopic film or certified written transcript of the actual broadcast or telecast.

The Newspapers' Privilege further defines "news media" as "newspapers, magazines, press associations, news agencies, wire services, radio, television or other similar printed,

⁵ 120 N.J. Super. 460 (App. Div. 1972).

⁶ *In re Subpoena Issued to Schuman*, 114 N.J. 14, 552 A.2d 602 (1989).

⁷ 78 N.J. 481 (1991) at 23.

⁸ *Venezia*, 269, 922 A.2d 1263 (2007).

⁹ *Too Much Media*, *supra*, at 861.

photographic, mechanical or electronic means of disseminating news to the general public.”¹⁰ “News” is further defined as “any written, oral or pictorial information gathered, procured, transmitted, compiled, edited or disseminated by, or on behalf of any person engaged in, engaged on, connected with or employed by a news media and so procured or obtained while such required relationship is in effect.”¹¹

The seminal case concerning the applicability of the Newsperson’s Privilege in New Jersey is *Too Much Media, LLC v. Hale*,¹² decided in 2011. In it, the New Jersey Supreme Court rejected the intent test employed by the Third Circuit and earlier New Jersey state court decisions, which required a claimant to have an intent at the inception of the newsgathering process to disseminate investigative news to the public. Under federal law, a journalist’s privilege requires a showing “that they: (1) are engaged in investigative reporting; (2) are gathering news; and (3) possess the intent at the inception of the news-gathering process to disseminate this news to the public.”¹³ Instead, the New Jersey Supreme Court found that any hearing to determine the applicability of the newsperson’s privilege would require the claimant to make a prima facie showing that (1) they have the requisite connection to news media, (2) they have the necessary purpose to gather or disseminate news, and (3) the materials sought were obtained in the course of professional newsgathering activities. This was to ensure that the privilege does not apply to every self-appointed newsperson.

(1) They have the requisite connection to news media

The claimants connection to the news media does not require a newsperson be employed as a journalist for a traditional newspaper, nor have direct tie to an established magazine. However, the claimant must have some nexus, relationship, or connection to “news media” as that term is defined. To avail oneself of the privilege, a claimant cannot merely claim to be a reporter or blogger, he or she must be actively affiliated with and engaged in any aspect of the news process.¹⁴

Courts, however, have not limited the protection to those who consistently and exclusively author newsworthy writings, nor only to those who uphold certain journalistic standards in their writings.

“Maintaining particular credentials or adhering to professional standards of journalism – like disclosing conflicts of interest or note taking – is also not required by the Shield Law... Regardless, the statute mandates a connection to ‘news media’ and a purpose to gather or disseminate news; it does not limit the privilege to professional journalists who follow certain norms. The Legislature could have chosen that approach but did not. Compare N.J.S.A. 2A:84A-21 with

¹⁰ N.J.S.A. 2A:84A-21a(a)

¹¹ N.J.S.A. 2A:84A-21a(b)

¹² *supra*. 206 N.J. 209 (2011).

¹³ *In re Madden*, 151 F.3d 125, 131 (3d Cir.1998); *von Bulow by Auersperg v. von Bulow*, 811 F.2d 136, 144, 13 Media L. Rep. (BNA) 2041, 22 Fed. R. Evid. Serv. 3d 389 (2d Cir. 1987) (upholding that the individual claiming the privilege must demonstrate, through competent evidence, the intent to use the material in order to disseminate information for the public, and such intent must have existed at the inception of the newsgathering process)

¹⁴ *Gatsman v. N. Jersey Newspapers Co.*, 254 N.J. Super 140, 145, 603 A.2d 111 (App.Div.1992)

N.Y. Civ. Rights Law. § 79-h (applying New York’s Shield Law only to “professional journalists and newscasters.”)¹⁵

There is no governing case law that precludes the court from granting the privilege to a claimant who authors newsworthy posts, while also posting information, which is less newsworthy or in-artfully drafted.¹⁶

(2) They have the necessary purpose to gather or disseminate news

Claimants must be connected with the news media for the “purpose of gathering, procuring, transmitting, compiling, editing or disseminating news for the general public.”¹⁷

(3) The materials sought were obtained in the course of professional newsgathering activities

“In the course of pursuing his professional activities” is defined by the Shield Law as any situation, including a social gathering, in which a reporter obtains information for the purpose of disseminating it to the public. It does not include any situation in which report intentionally conceals from the source the fact that he is a reporter, and does not include any situation in which a report is an eyewitness to, or participant in, any act involving physical violence or property damage.¹⁸ “[T]he Shield Law affords newspersons complete protection against disclosure of their confidential sources and the editorial processes leading to publication of [the subject matter at issue in the legal proceeding for which the claimant seeks protection under the Shield Law.”¹⁹

Whom does the Newsperson’s Privilege Protect?

Over the past decade, the Internet has dramatically transformed the nature of journalism. “With the traditional media of newspapers, radio, and television, there was a natural physical limit to the space and time available for individual participation. With the internet, these... barriers no longer exist.”²⁰ “The Internet poses a particularly perplexing problem in deciding who should qualify for the privilege given its easy accessibility, connectiveness, virtually limitless research capacity and universality.”²¹ Digital news outlets, particularly blogs, are increasingly present and vital to the delivery of news to the public in our modern Internet age.²² This delivery shift has resulted in an increasing number of bloggers – most of whom have no formal ties to traditional media entities – have actively assumed the role of news media and now perform a watchdog function on the media itself.²³ However, not all blogs are created equal.

¹⁵ *In re January 11*, 2013, 432 N.J. Super. 570, 75 A.3d 1260 (2013)

¹⁶ *Id.*

¹⁷ *N.J.S.A. 2A:84A-21*

¹⁸ *N.J.S.A. 2A:84A-21a(h)*.

¹⁹ *In re January 11*, 2013, 432 N.J. Super. 570, 75 A.3d 1260 (2013)

²⁰ Mary-Rose Papandrea, *Citizen Journalism and the Reporter's Privilege*, 91 *Minn. L. Rev.* 515, 523 (2007).

²¹ *Too Much Media, LLC, supra*, 413 N.J. Super at 153, 993 A.2d 845.

²² Joshua Rich, *New Media and the News Media: Too Much Media, LLC. v. Hale and the Reporter’s Privilege in the Digital Age*, 25 *Loy. L.A. Rev.* 963 (2012).

²³ *Too Much Media, LLC*, 206 N.J. 209 (2011)

“[T]he fact of presenting information on a new, different medium, even if capable of reaching a wider audience more readily does not make it ‘news,’ for the purpose of qualifying for the Newsperson’s Privilege. Simply put, *new* media should not be confused with *news* media. There is, of necessity, a distinction between, on the one hand, personal diaries, opinions, impressions and expressive writing and, on the other hand, news reporting. The transmission or dissemination of a ‘message’ through the new medium of the of the Internet, or the display of one’s content or comment thereon, does not necessarily entitle the author or writer to the same protection as a ‘newsperson.’”²⁴

New Jersey courts have yet to determine as a matter of law whether a blog in and of itself meets the prima facie test for the Newspaper’s Privilege. When it comes to new technology and other nontraditional electronic media, “form alone does not tell us whether a particular method of dissemination qualifies as “news media” under the statute.”²⁵

However, “[i]t is clear that the legislature has continually acted to establish the strongest possible protection from compulsory testimony for the press.”²⁶ In the protection of the public policy goal of encouraging the free flow of news reporting, the privilege is evidence of the Legislature’s findings that “[e]very compelled production chills confidential sources.”²⁷ The New Jersey Supreme Court’s opinion does not foreclose a trial court from considering the professionalism of the medium or its similarity to enumerated “news media” in the statute. As such, a claimant need not satisfy each factor and no one is dispositive.

Conclusion

If the Commission chooses to authorize a project in this area, Staff would conduct additional research and draft language supplementing the existing statutory provisions to clarify the language by incorporating the determinations of the court in this area, without foreclosing further developments in this area on a case-by-case basis as the courts determine to be necessary.

²⁴ *Id.* at 237.

²⁵ *Id.*

²⁶ *In re Schuman, supra*, 114 N.J. 14.

²⁷ *State v. Boiardo*, 83 N.J. 350, 260, 416 A.2d 192 (1980).