

# PROTECTION OF A REPORTER'S SOURCES AND MATERIALS:



## A Reporter's Manual

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# EXECUTIVE SUMMARY

## **Q. Are my sources and confidential information regarding sources subject to subpoena and potential disclosure during in-court testimony?**

A. Generally, no. There are two protections in Pennsylvania that prevent disclosure: the Pennsylvania Shield Law and the Qualified Reporter's Privilege under the First Amendment. Both provide significant protections of a reporter's confidential sources and unpublished materials relating to the newsgathering and editorial process. These protections are intended to promote the free flow of information to the press. Knowing the differences between these two bodies of law is critical to understanding the protections, and a brief summary is therefore included here at the outset:

**Shield Law:** The Shield Law is a Pennsylvania statute that protects all information that can identify sources. It does not protect other unpublished materials that cannot be used to identify a source. Properly invoked, it cannot be overcome, i.e. it is absolute.

**Qualified Reporter's Privilege (the "Privilege"):** The Privilege under the First Amendment is broader than the Shield Law in that it protects a reporter's confidential sources and unpublished materials relating to the newsgathering and editorial process. While the Privilege protects a broader amount of information, it can be overcome where a demonstrated, specific need for evidence presents a paramount interest to which the Privilege must yield. The Shield Law cannot be overcome if it applies.

# PENNSYLVANIA SHIELD LAW

## **Q. What does the Shield Law protect?**

A. The Shield Law provides that any person engaged in gathering, procuring, compiling, editing or publishing news shall not be required to disclose in any legal proceeding, trial, or investigation before any government unit the source of any information procured or obtained by a reporter.

## **Q. Does the Shield Law protect my notes and documents, or just in-person testimony?**

A. The Shield Law prevents the disclosure of sources regardless of its form, i.e. audio tapes, notes, documents, video interviews. Thus, it protects source information no matter the medium if it would result in disclosure of a source.

## **Q. Under what circumstances will the Shield Law be overcome?**

A. As noted previously, if the Shield Law is properly invoked, it cannot be overcome. Because of its absolute nature, however, the Pennsylvania Supreme Court has limited its application: information is protected only so far as necessary to prevent the disclosure of a source. Thus, for example, courts can compel the press to provide redacted versions of documents and notes that avoid revealing a source's name. Note: if documents and information could lead to disclosure of a source, it is protected.

## **Q. Are there any bright-line exceptions to the Shield Law?**

A. Yes. The protection does not apply to radio or television stations unless exact recordings are maintained for a period of one year.

## **Q. Does the Shield Law apply to all types of proceedings?**

A. Yes. It is a comprehensive protection that applies to all types of legal proceedings.

## **Q. Does the source have to be confidential?**

A. Yes, only confidential information is protected. If the source is not confidential and notes of an interview would not disclose other confidential sources, there is no protection. Also, once the information is no longer confidential, such as once it is published or the source is known to the public, the protection ceases as to that information.

## **Q. Who has the burden of proof?**

A. The individual seeking to obtain the information has the burden of production and persuasion to prove that the Shield Law does not apply.

# CASE LAW ON THE PENNSYLVANIA SHIELD LAW

In **Castellani v. Scranton Times**, L.P., 956 A.2d 937 (Pa. 2008), the Pennsylvania Supreme Court declined to adopt a “crime-fraud” exception to the Shield Law that would allow disclosure of a source if the communication between the reporter and the source constituted a criminal act. At issue was the disclosure of grand jury testimony and proceedings to a newspaper, an act which violated the Grand Jury Act of Pennsylvania.

The *Castellani* Court relied heavily on the Pennsylvania Supreme Court’s 1963 decision *In re Taylor*, 193 A.2d 181(Pa. 1963), where it was held that the Shield Law applies despite the fact that it may allow reporters to conceal or cover up crimes.

In **Hatchard v. Westinghouse Broadcasting Co.**, 532 A.2d 346 (Pa. 1987) the Pennsylvania Supreme Court held that “unpublished documentary information” is discoverable only if it does not reveal the identity of a source or if it can be redacted to prevent disclosure of the source’s identity. The Court thus reaffirmed *In re Taylor*’s primary holding that the Shield Law protects the identity of sources.

The Pennsylvania Supreme Court held in **Com. v. Bowden**, 838 A.2d 740 (Pa. 2003) that documents may be considered “sources” for purposes of the Shield Law, but in accord with *Hatchard*, *supra*, only to the extent they protect the identity of a source and the free flow of information to the press.

The Pennsylvania Supreme Court in *Bowden* held that where the source of a statement is clearly known, the source is not protected by the Shield Law. In that case, there were published interviews of a defendant in a murder case and the Court ruled the source was already known from the articles.

In **Sprague v. Walter**, 543 A.2d 1078 (Pa. 1988), the Pennsylvania Supreme Court held that invocation of the Shield Law does not carry with it an inference of reliability or accuracy of the information provided by the source. The *Sprague* Court further held that state and federal constitutional principles do not require a broader interpretation of the Shield Law.

The Pennsylvania Superior Court held in **Davis v. Glanton**, 705 A.2d 879 (Pa. Super. 1997) that the Shield Law creates an absolute privilege that, if applicable, renders unnecessary the Qualified Reporter’s Privilege analysis regarding a party’s need for information.

# QUALIFIED REPORTER'S PRIVILEGE

## **Q. What does the Privilege protect?**

A. The Privilege prevents the disclosure of a reporter's confidential sources and other unpublished materials in their possession relating to the newsgathering and editorial process.

## **Q. When can the Privilege be invoked?**

Since it is based on the First Amendment's protection of the press, it can be invoked in any proceeding in a United States federal or state court, i.e. not just Pennsylvania courts.

## **Q. Is the Privilege absolute?**

A. No. The Privilege can be overcome depending on a claimant's need for information.

## **Q. Under what circumstances will the Privilege be overcome?**

A. The determination of whether the Privilege has been overcome is made on a case-by-case basis, balancing the rights of a reporter against the interests of those seeking the information the reporter possesses. The person seeking the information has the burden of proof. To overcome the Privilege, he or she must demonstrate: (1) the information cannot be obtained by other means; (2) the information sought is material, relevant, and necessary; and (3) the information sought is crucial to the party's claim.

## **Q. Who can claim the Privilege?**

A. To claim the Privilege, a reporter must demonstrate: (1) he or she is engaged in investigative reporting; (2) is gathering news; and (3) has the intent to publish the information to the public.

## **Q. Are there any bright-line exceptions to the Privilege?**

A. Yes. The United States Supreme Court has held that the Privilege does not apply to grand jury proceedings.

## **Q. Does the source have to be "confidential"?**

A. Whether or not the source is "confidential" is a factor that is considered in the balancing test set forth above.

# CASE LAW ON THE QUALIFIED REPORTER'S PRIVILEGE

The decision of the United States Court of Appeals for the Third Circuit ("Third Circuit") in **Riley v. City of Chester**, 612 F.2d 708 (3d Cir. 1979) is an excellent summary of the Privilege. The Court noted the Privilege is based in the "strong public policy which supports the unfettered communication to the public of information."

In **U.S. v. Cuthbertson**, 630 F.2d 139 (3d Cir. 1980), the Third Circuit stated that the interests of the press that form the foundation of the Privilege apply whether the proceeding is civil or criminal. It further held that the Privilege extends to sources and unpublished material in a reporter's possession. This is defined as materials used by a reporter during the newsgathering and editorial process. The Privilege thus was defined as a comprehensive one that protects most of a reporter's materials.

In **In re Madden**, 151 F.3d 125 (3d Cir. 1998), the Third Circuit held that, when a reporter obtains facts in the newsgathering process which later become a target for discovery, the Privilege applies. The *Madden* Court further held that, to claim the Privilege, individuals must demonstrate: (1) they are engaged in investigative reporting; (2) are gathering news; and (3) possess the intent to publish the information to the public.

In **U.S. v. Criden**, 633 F.2d 346 (3d Cir. 1980), the Third Circuit held that a reporter could not refuse to affirm or deny a conversation with an individual who had already publicly affirmed that the conversation took place.

In **Commonwealth v. Bowden**, 838 A. 2d 740 (Pa. 2003), the Pennsylvania Supreme Court held the Privilege did not protect the reporters who interviewed the defendant in a murder case. The defendant's statements in the interviews contradicted statements he made to authorities. The Court found that the reporters were the "only feasible sources" and the statements were crucial to the Commonwealth's case.

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<sup>1</sup>Pennsylvania is in the Third Circuit and thus Third Circuit cases are of particular importance to PNA reporters.



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