

CALIFORNIA SHIELD LAW

Cal. Const. article 1 § 2(b)

Cal. Evidence Code § 1070

THE BASICS

The California Shield Law provides legal protections to journalists seeking to maintain the confidentiality of an unnamed source or unpublished information obtained during newsgathering.

WHO IT PROTECTS

The Shield Law protects a “publisher, editor, reporter, or other person connected with or employed upon a newspaper, magazine, or other periodical publication, or by a press association or wire service” and a “radio or television news reporter or other person connected with or employed by a radio or television station.”

The Shield Law also likely applies to stringers, freelancers, and perhaps authors

WHAT INFORMATION IS PROTECTED

? The source of any information. There need be no assurance or expectation of confidentiality.

? Unpublished information

- Specific information obtained during newsgathering but not disclosed to the public
- Includes “all notes, outlines, photographs, tapes or other data of whatever sort”
- Includes newsgatherer’s eyewitness observations in a public place
- Applies even if published information was based upon or related to unpublished information

? Protects only information obtained during newsgathering

WHAT IT PROTECTS FROM

The Shield Law only protects a journalist from being adjudged in contempt by a judicial, legislative, or administrative body, or any other body having the power to issue subpoenas, for the failure to comply with a subpoena. The Shield Law does not protect the journalist from other legal sanctions. Thus the Shield Law generally does not apply when the journalist or news organization is a party to a lawsuit and other sanctions are available.

EXCEPTIONS

? The Shield Law is a provision of the California Constitution. Therefore, there are no statutory exceptions.

? However, the California Supreme Court recognized a situation in which the Shield Law provides only qualified, not absolute, protection from contempt:

? When the information is sought by a criminal defendant or upon cross-examination by the prosecution if the journalist has testified for the defendant. In this circumstance, the defendant’s federal 6th Amendment right to a fair trial preempts the state constitutional shield law. *Delaney v. Superior Court*, 50 Cal. 3d 785 (1990); *Miller v. Superior Court*, 21 Cal.4th 883 (1999); *Fost v. Superior Court*, 80 Cal. App 4th 724 (2000).

In this situation, a journalist may be subject to contempt for not disclosing information if:

1. The defendant demonstrates a reasonable possibility that the information will materially assist the defense; and

2. The defendant’s fair trial rights outweigh the journalist’s rights. In deciding this, a court will consider:

- A. The degree of importance of the information to the defendant
- B. Whether the information is otherwise available from another source and the defendant has attempted to obtain it
- C. If testifying would hinder the newsgathering ability of the reporter
- D. If the information is confidential or sensitive

If the court does order disclosure of the information, it must:

1. Give the reporter 5 days notice before a contempt citation will be issued
2. Issue a written order

? Disclosure of information under these conditions does not constitute a waiver of the right to assert the Shield Law for the same information in the future

What are the legal threats to a journalist protecting the identity of sources and unpublished information?

1. Contempt of Court

This is primarily a threat when the journalist is not a party to the lawsuit but is seen as a source of information by one or both of the parties. A judge may issue a contempt citation against a journalist for failing to comply with a subpoena issued in the action requesting disclosure of the information. Contempt may involve jail time and/or monetary fines. There are two kinds of contempt:

a. Criminal: Punishes one for not obeying a court rule or order

? may result in up to 6 months in jail

b. Civil: Designed to coerce one to comply with the court’s order

? may result in unlimited jail time

? In California, an unlimited civil contempt citation may be switched to a limited criminal contempt citation upon a finding by a judge that:

(1) The journalist has a clearly articulated moral principle; and (2) Jail will not induce compliance with the court’s disclosure order.

In re Farr, 36 Cal.App.3d 577(1974)

2. Liability

When a journalist is a party to an action, typically defending a defamation or privacy action, information may be sought by the opposing party through the rules of discovery. Judges can impose monetary or procedural sanctions for failure to comply with these rules. Moreover, when disclosure of information may be necessary in order to defend oneself, a judge can prevent one who refuses to disclose the information from asserting that defense.

TIP:

Be careful not to disclose unpublished information inadvertently. You may waive your rights under the Shield Law by disclosing information in conversations or telephone calls, with the investigators or the parties’ lawyers, even if it is never published.

THE “REPORTER’S PRIVILEGE”

THE BASICS

The Reporter’s Privilege is a non-statutory doctrine that also offers protection to those seeking to protect the identity of confidential sources and unpublished information. The Reporter’s Privilege is recognized in most federal and many state courts including California.

WHEN TO USE IT

The Reporter’s Privilege should be invoked in situations **in which the Shield Law does not apply**, such as:

- Federal Law or the law of a state without a shield law applies
- The threatened sanction is something other than contempt
- The one seeking protection is not one to whom the Shield Law applies

HOW IT WORKS

The Reporter’s Privilege is a qualified, not absolute, privilege in all situations. In California, a court will only require a newsgatherer to reveal sources and unpublished information if:

1. The information is relevant and goes to the heart of the plaintiff’s claim
2. The plaintiff has exhausted all other alternative means of obtaining the information
3. The plaintiff’s need for the information outweighs the public interest in protecting confidentiality, including, for example, the need to protect whistleblowers; and
4. The plaintiff has made a showing of merit of the case (in libel cases, present evidence of falsity) *Mitchell v. Superior Court*, 37 Cal.3d.268 (1984).

Most Federal courts apply a similar test.

WHAT TO DO IF:

1. You receive a call from a prosecutor or a defense lawyer asking you about a story you have written.

1. Be careful not to disclose any unpublished information. You may waive your right to use the Shield Law for that information.

? If you are threatened with a subpoena,

1. End the conversation
2. Call your lawyer

2. You are not a party to a lawsuit and you are served with a subpoena requiring you to appear in court.

1. Contact your lawyer
2. Appear in court and assert the Shield Law or Reporter’s Privilege. You should not just ignore the subpoena

? If you are ordered to disclose the information, request a written decision and delay of five days before a contempt citation is issued

3. You are not a party to a lawsuit and you are served with a subpoena requiring you to provide information directly to the parties.

1. Contact your lawyer
2. Assert the Shield Law or Reporter’s Privilege in a letter to the parties

? If the parties persist, consider bringing a Motion to Quash Subpoena to the court

4. You are a party to a lawsuit and you are served with a discovery request seeking the identity of a confidential source or unpublished information.

1. Object to the discovery on the basis of the Reporter’s Privilege

A POCKET GUIDE TO PROTECTING UNPUBLISHED INFORMATION AND CONFIDENTIAL SOURCES

A SERVICE OF:

**THE FIRST AMENDMENT PROJECT
SOCIETY OF PROFESSIONAL
JOURNALISTS (Nor. Cal.)**

HOW TO USE THIS GUIDE

This pocket guide is intended to be a quick reference and provide general information to journalists and citizens. It addresses some common problems, but does not substitute for research or consultation with a lawyer on detailed questions. This guide current as of September 16, 2004.

FOR MORE INFORMATION OR HELP:

FIRST AMENDMENT PROJECT.....510/208-7744
www.thefirstamendment.org

CALIFORNIA FIRST AMENDMENT COALITION...415/460-5060
www.cfac.org

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