

Prepare yourself for when law enforcement comes knocking

I've been asked to devote this column to the subject of what you should do if what happened in Marion, Kansas, should ever happen to you. (I presume that every one of you know what I'm talking about without further explanation.)

There will be specific suggestions in a bit, but first I want to make sure all of you have heard of the Privacy Protection Act of 1980 (42 U.S.C.A. § 2000aa). Congress passed this law in response to a U.S. Supreme Court decision that upheld a search of a student press newsroom by officers seeking photographs taken at a demonstration during the Vietnam War era.

The newsroom was left in shambles (although the search ended fruitlessly). The lawsuit, *Zurcher v. Stanford Daily*, alleged First and Fourteenth Amendment violations, unsuccessfully. The Court upheld the right of city police to make the search.

In those days, Congress felt it critical to support journalists' rights and this law was passed. It states "... Notwithstanding any other law, it shall be unlawful for a government officer or employee, in connection with the investigation or prosecution of a criminal offense, to search for or seize any work product materials possessed by a person reasonably believed to have a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication, in or affecting interstate or foreign commerce;"

Before such a search is to occur, a court must have issued a court order finding there is probable cause to believe a criminal offense is being committed by the person possessing such material. In other words, a journalist is to be given notice that law enforcement is seeking the material being sought and a hearing held to determine if law enforcement has "probable cause" to believe such material exists and the journalist is involved in a criminal offense.

The law also says it is a good faith defense to the journalist if he or she has

"...a reasonable good faith belief in the lawfulness of his conduct." In other words, the journalist cannot be actively involved in a crime, there cannot be a danger of bodily harm or loss of life to a third person involved, or a danger the material sought will be destroyed.

The law allows for recovery of damages, actual or liquidated, in an amount of \$1,000 or more. More importantly, the law allows for recovery of your attorneys' fees. (You can find this language at Section 2000aa-12 of the Act.)

So, what steps should a newsroom and its staff take to protect itself from such incidents? First, your reporters and management need to be aware this law exists and what it says. Maybe that means post it on the bulletin board so you can easily refer to it.

Be aware this applies not only to your newsroom but also anywhere a journalist works. How many of you work at home? In your cars? Even if you are sitting in the neighborhood coffee shop and law enforcement shows up, you need to know this law covers you at that spot where you are working.

Beyond that, if they are at your office door, you may cite the law but cannot refuse entry. The next step is probably to call your lawyer, advise law enforcement you are doing that and ask them to wait until your lawyer can discuss this with them. A tidy desk is not a bad idea, because if law enforcement chooses to ignore this law, you have no reason to make it easy for them.

Phones should be kept secured and computers, also, — both always good ideas but especially if you are working on a controversial project. Of course,

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as we've seen in Marion, Kansas, they may just confiscate those items.

If you are present while this is ongoing, your lawyer would find it helpful if you would record it on your phone. Take detailed notes about what

was said. What documents were disturbed by law enforcement and what documents were taken. Make it clear that they are examining confidential reporter's records.

Some sources suggest you find out what they are looking for and surrender those documents in order to protect other materials from being disturbed in your office, but that is a judgment call only you can make and I would not necessarily recommend anyone voluntarily do that — if you do, make it clear you are not surrendering the document voluntarily but under protest.

And if the search warrant doesn't specify specific evidence, point out to law enforcement that the warrant may be defective.

While one hopes that will never happen to a media entity in Missouri, it has happened at least once in the past. Claire McCaskill, while a prosecuting attorney, violated the law in 1994 in seeking a videotape of a broadcast station that allegedly showed a kidnap victim being taken, and was subsequently found liable for damages.

So be prepared and forewarned!



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