



By Chad Layton and Emily T. Acosta

When Must Reporters Reveal Their Sources in Illinois?

Reporters' privilege not to reveal their news sources is rooted in the First Amendment and codified in state law. But suppose the information the reporter is withholding is important to, say, a litigant in a libel suit. Can she force the reporter to disclose the source?

The question is usually answered at the state level. Most states, including Illinois, have enacted specific laws designed to protect media sources. The Illinois Reporters' Privilege Act,¹ for which there is no federal statutory counterpart, is the Illinois shield statute.

However, courts can and do require disclosure of confidential sources in some cases. This article takes a look at when and how courts divest reporters of the privilege.

A qualified privilege

In Illinois, there are two classes of privileged statements: absolute and conditional (or qualified).² The privilege granted to reporters³ under the Illinois Reporters' Privilege Act is conditional or qualified, meaning it may be overcome in certain circumstances. The Act prevents a court from compelling any person to disclose the source⁴ of any information obtained

1. 735 ILCS 5/8-901 *et seq.* For a comprehensive, if somewhat dated, review of the Illinois reporter's privilege, see *Reporter's Privilege: Illinois*, published by the Reporter's Committee for Freedom of the Press and available at <http://www.rcfp.org/illinois-privilege-compendium>.

2. *Solaia Technology, LLC v. Specialty Publishing Co.*, 221 Ill. 2d 558, 585 (2006).

3. Notably, the privilege protects only reporters and not the actual source. See, e.g., *People v. Palacio*, 240 Ill. App. 3d 1078, 1092 (4th Dist. 1993).

4. The statute defines the term "source" as the "the person or means from or through which the news or information was obtained." 735 ILCS 5/8-902. The case law, likewise, reflects an expansive understanding of this term. See e.g., *People v. Slover*, 323 Ill. App. 3d 620, 624 (4th Dist. 2001) (photograph considered a "source" of information).

The Illinois Reporters' Privilege Act provides that reporters can refuse to reveal their sources except in "limited circumstances." But what does that mean in practice? The authors give an overview of the statute and key cases.

by a reporter⁵ except in limited circumstances.⁶ The statute does not, however, ban reporters from *ever* being called to testify.⁷

The purpose of the privilege is to "assure reporters access to information, thereby encouraging a free press and a well-informed citizenry."⁸ It can be traced to common law, which recognized that compelling the disclosure of a reporter's sources could compromise the news media's First Amendment right to freely gather and disseminate information.⁹

Courts throughout the state continue to protect the "ability of the news media to maximize the free flow of information to the public."¹⁰ When and how, then, can a court order a reporter to disclose sources?

The procedural mechanism for divesting the privilege

If a reporter claims the privilege, a plaintiff may apply in writing to the court for an order divesting the reporter of the privilege and ordering him or her to disclose the source.¹¹ The application must contain:

1. "the name of the reporter and of the news medium with which he or she was connected at the time the information sought was obtained;"
2. "the specific information sought and its relevancy to the proceedings; and"
3. "either, a specific public interest which would be adversely affected if the factual information sought were not disclosed, or, in libel or slander cases, the necessity of disclosure of the information sought to the proof of plaintiff's case."¹²

Additionally, a libel or slander plaintiff must include in the application a prima facie showing of falsity of the al-

leged defamation and actual harm or injury.

If the court determines the reporter should be divested of the privilege, it can enter an order specifying the information that should be disclosed.¹³ Any order must be final before it requires a reporter to reveal a source – the privilege continues during the pendency of an appeal.¹⁴ But a reporter who refuses to comply with a final order may be held in contempt of court.¹⁵ At least one court has allowed a reporter to "purge" herself of the contempt finding by submitting the allegedly protected information to the court for an in camera review.¹⁶

Key factors for the court to consider

In granting or denying divestiture of the privilege, the court must consider the nature of the proceedings, the merits of the claim or defense, the adequacy of any remedy otherwise available, the relevancy of the source, and whether there are other means the movant can use to establish what the source is expected to prove.¹⁷

Under the statute, the court should only divest the privilege if it finds that 1) the information sought need not be kept secret under state or federal law and 2) all other available sources of information have been exhausted and that disclosure is essential to serving the public interest in question or, in libel or slander cases, the plaintiff's need for disclosure outweighs the public interest in protecting the confidentiality of the reporter's sources.¹⁸

Before it held that reporters should not be required to reveal their sources, the Illinois Supreme Court in *In re Special Grand Jury Investigation of Alleged Violation of Juvenile Court Act* remarked that the language of the statute

'Public interests' that may justify divesting a reporter of his privilege include preventing perjury, furthering a murder investigation, and proving an essential element of the plaintiff's claim.

5. The statute liberally defines "news reporter," "news medium," and "source," and, thus, applies to most forms of print and electronic media as well as radio. See 735 ILCS 5/8-902. An interesting question is whether bloggers and other new-media purveyors of information are protected by the privilege. See, e.g., Jonathan Randles, *Blogger Not Protected By Ill. Reporter's Privilege: Judge*, Law360 (January 13, 2012), at <http://www.law360.com/articles/300247/blogger-not-protected-by-ill-reporter-s-privilege-judge>.

6. 735 ILCS 5/8-901.

7. *Palacio*, 240 Ill. App. 3d at 1092 (holding that the privilege did not prevent a criminal defendant from questioning a reporter concerning a conversation with a source where the reporter had named the source in a previously published article).

8. *Cukier v. American Medical Ass'n*, 259 Ill. App. 3d 159, 163 (5th Dist. 1994).

9. See, e.g., *In re Special Grand Jury Investigation of Alleged Violation of Juvenile Court Act*, 104 Ill. 2d 419, 428-29 (1984).

10. *Johns-Byrne Co. v. Technobuffalo LLC*, 2012 WL 7746968, 4 (Cook County Cir. Ct.).

11. 735 ILCS 5/8-903.

12. *Id.* § 5/8-904.

13. *Id.* § 5/8-907.

14. *Id.* § 5/8-908.

15. *Id.* § 5/8-909.

16. See *People v. Slover*, 323 Ill. App. 3d 620, 622 (4th Dist. 2001).

17. 735 ILCS 5/8-905.

18. *Id.* § 5/8-907.

“reflect[s] a clear legislative intent to create a standard which balances the reporter’s first amendment rights against the public interest in the information sought and the practical difficulties in obtaining the information elsewhere.”¹⁹

The court found that whether the reporters’ privilege should be divested could not be reduced to any precise for-

tain evidence from witnesses who did not wish to speak to the police.²²

A public interest must warrant disclosure. The Act does not specify particular “public interests” that may justify divesting a reporter of his privilege.²³ Also, the specific public interest need not be “compelling” to justify disclosure, particularly in the criminal context.²⁴ Commonly recognized “public interests”

include preventing perjury,²⁵ furthering a murder investigation,²⁶ proving an essential element of the plaintiff’s claim,²⁷ and, perhaps, impeaching a witness.²⁸

The dispute must, however, have some sort of “public” aspect. For instance, in *Horstman v. Hoffman*, the court held that divestment of a newspaper

reporter’s privilege under the Illinois Reporters’ Privilege Act was not warranted in a private civil dispute between two neighbors.²⁹

The information sought must be relevant. Of course, a court will only divest the privilege to allow disclosure of relevant information. A fact is “relevant” if it tends to make the existence of any fact important to deciding the action more or less probable.³⁰

In *People v. Pawlaczyk*, for example, a perjury prosecution, the accused testified at a grand jury proceeding that they did not speak with reporters prior to the publication of a story about them. The Illinois Supreme Court held that the sources’ identity was directly relevant to whether they lied under oath.³¹ The court also rejected the defendant’s argument that divestiture required proof that the privileged facts were “critically relevant” to the proceedings at issue.³²

Where the information sought is ancillary to the plaintiff’s claims, courts are also reluctant to divest a reporter of her privilege. For instance, in the recent case *People v. McKee*, the appellate court reversed the lower court’s decision requiring a reporter to reveal a source.³³ In holding that the information was irrelevant to McKee’s murder trial, the appellate court found that it applied instead to whether the “leak” violated Illinois Supreme Court Rules or other Illinois law – in other words, to collateral matters.³⁴

Likewise, where the information would establish an essential element of the plaintiff’s claim, courts will often di-

vest a reporter of her privilege. For example, in the *Garland* case, the identity of the CBS executive was relevant because, as a public figure, Garland needed to demonstrate that the statement was made with malice. Without the identity of the speaker, it would be impossible for Garland to make a prima facie case.

Finally, the privilege may be divested for the purposes of eliciting impeachment testimony. For example, in *People v. Palacio*, the defendant attempted to get a reporter to confirm a conversation he had with a prosecutor. The reporter refused, asserting the privilege.³⁵ The court rejected the reporter’s argument.

Waiver. In *People ex rel. Scott v. Silverstein*, the court rejected the argument that by revealing some of his sources the reporter had waived the privilege as to all of them.³⁶ The appellate court held that the privilege had only been waived as to the sources he had already disclosed, not those that he declined to name.

Selected cases

The privilege arises in a variety of contexts, in both civil and criminal suits. For instance, in *Baker v. F & F Investment*, a New York-based federal case that predates the Illinois privilege law, the plaintiffs filed a class action suit based on charges of racial discrimination in Chicago housing sales.³⁷ An article

19. 104 Ill. 2d 419, 428 (1984).

20. Compare *In re Arya*, 226 Ill. App. 3d 848, 859, with *Horstman v. Hoffman*, 2010 WL 8742553 (motion to compel denied where defendant made no showing that evidence sought could not be obtained by alternative means or that the testimony was essential to a specific public interest in a dispute between neighbors).

21. *Garland v. Torre*, 259 F.2d 545, 547 (2d Cir. 1958).

22. *In re Arya*, 226 Ill. App. 3d at 859.

23. See, e.g., *id.*

24. See, e.g., *United States v. Smith*, 135 F.3d 963, 971 (5th Cir. 1998).

25. See, e.g., *People v. Pawlaczyk*, 189 Ill. 2d 177 (2000).

26. See, e.g., *In re Arya*, 226 Ill. App. 3d at 848.

27. See, e.g., *Garland v. Torre*, 259 F.2d 545 (2d Cir. 1958).

28. Compare *Baker v. F & F Investment*, 339 F. Supp. 942 (S.D.N.Y. 1972), with *Pawlaczyk*, 189 Ill. 2d at 178-83.

29. *Horstman v. Hoffman*, 2010 WL 8742553.

30. *Pawlaczyk*, 189 Ill. 2d at 193.

31. *Id.*

32. *Id.* at 195 (“[b]y its terms, the Act only requires proof that the privileged information is ‘relevant’ to the proceedings in which they are sought.”)

33. *People v. McKee*, 2014 IL App (3d) 130696, ¶ 7.

34. *Id.* ¶ 14.

35. *People v. Palacio*, 240 Ill. App. 3d 1078 (4th Dist. 1993).

36. *People ex rel. Scott v. Silverstein*, 89 Ill. App. 3d 1039 (1980).

37. *Baker v. F & F Investment*, 339 F. Supp. 942 (S.D.N.Y. 1972).

Where the information sought is ancillary to the plaintiff’s claims, courts are reluctant to divest the privilege.

mula but depends on the facts of the case. In reaching its decision, the court noted that multiple corroborating witnesses were available but that the special prosecutor chose not to subpoena them, instead seeking to divest the reporter of his privilege.

Ultimately, this case stands for the proposition that the statute requires more than a showing of mere inconvenience to the party seeking to divest the reporter before disclosure may be compelled.

Exhaustion of other sources: what is required? While generally a party need not prove that he or she exhausted specific alternative methods of obtaining the sought-after information, the movant does need to offer some evidence that the information is not otherwise obtainable.²⁰

For example, in *Garland v. Torre*, a New York-based federal defamation case that predates the privilege statute, the plaintiff sought to compel the reporter to disclose her source only after deposing both Lester Gottlieb and Hubbell Robinson, two CBS executives at the time, both of whom denied making the allegedly defamatory statements.²¹ In ruling that disclosure was warranted, the court noted that both CBS executives had already denied the statements and that the identity of the executive went to the heart of Garland’s claims.

However, the court in *In re Arya* specifically rejected the argument that the state needed to conduct an undercover investigation or use informants to ob-

about blockbusting based on an interview with an anonymous Chicago-area real estate agent became the subject matter of a discovery dispute in New York.

The plaintiffs questioned the author of the article about his anonymous news source. The author vouched for his accuracy but refused to identify his confidential source. The plaintiffs filed a motion to compel disclosure. The district court (which analyzed both the Illinois and New York reporters' privileges) weighed the competing public and private interests and denied the motion to divest. The decision was affirmed on appeal.

Similarly, in *Pawlaczyk*, a special prosecutor initiated a proceeding to divest the defendant news reporters of their reporters' privilege. The objective was to elicit testimony about city officials who had allegedly perjured themselves in civil depositions.³⁸

The reporters had previously reported that Robert Hurst, a former chief of the police department, was named by a victim as her attacker. After being cleared of all charges, Hurst brought a civil suit against the reporters asserting libel, slander, and false light claims. In connection with this case, city officials were deposed and denied allegations that they were sources for the stories about Hurst. However, one of the reporters produced an affidavit naming one of the officials as her source.

Given this contradictory testimony, the circuit court appointed a special prosecutor to investigate the officials' suspected perjury. The Illinois Supreme Court, in affirming the decision to divest the reporters of their privilege, agreed that the special prosecutor had made the requisite showings required under the Act.

These two cases highlight what seems to be a crucial distinction between named and anonymous sources. While courts appear to give less protection to reporters who refuse to name and discuss sources whose identities have already been widely circulated, they give greater protection to unnamed sources.

Conclusion

The relevant statutes and cases embody the tension between two competing interests: the freedom of the press and the pursuit of justice in both civil and criminal lawsuits. While the default position of the law is to uphold the reporters' privilege, courts are obviously ready to divest the privilege when necessary to promote justice. ■

38. *People v. Pawlaczyk*, 189 Ill. 2d 177, 178-83 (2000).

Reprinted with permission of the *Illinois Bar Journal*,
Vol. 103 #3, March 2015.
Copyright by the Illinois State Bar Association.
www.isba.org