



COMMITTEE REPORT

Points for Discussion on
Journalistic Use of Anonymous Sources

**Prepared by the Newsgathering Committee
Defense Counsel Section
Media Law Resource Center**

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Points for Discussion on Journalistic Use of Anonymous Sources

The Newsgathering Committee of the Media Law Resource Center

By Douglas F. Curtis and Stephen L. Bero*

I. Introduction

The question of how journalists and news organizations should use and effectively protect the confidentiality of journalistic sources has acquired renewed urgency in recent years, as a result of the push/pull of transparency concerns and journalistic credibility and subpoenas and discovery demands. Added to these sometimes conflicting pressures is the current state of legal uncertainty in certain federal courts. As a result, journalists and news organizations are grappling with difficult questions concerning how to treat prospective sources, how to conduct communications with sources, how to store and maintain notes, emails, and other records, and how to report information derived from anonymous sources.

The Newsgathering Committee of the MLRC offers this memorandum as a resource to inform journalists' and news organizations' deliberations concerning use and protection of the confidentiality of sources.

Part II below highlights some pertinent features of the published policies of selected major news organizations on the use of confidential sources, and Part III proposes some issues for further consideration. The MLRC does not endorse any particular answer to the questions that are raised here, and indeed there likely is no single "right" answer to many of the questions that are raised. Nevertheless, each journalist or news organization may want to consider these questions in crafting an approach that is best suited to its organization and its objectives, while taking into account such other values as transparency, good record-keeping, journalistic efficiency, and so on.

The Committee recognizes that a given practice that may enhance confidentiality considerations might undermine an organization's efforts to defend its newsgathering and reporting processes. These are matters that need to be considered on an organization-by-organization, case-by-case basis.

This memorandum is intended for discussion purposes only, and does not constitute legal advice. Journalists and news organizations should consult the laws of all relevant jurisdictions on questions relating to source confidentiality, spoliation of evidence, obstruction of justice, and other legal topics that might arise.

II. Major News Organizations' Existing Policies on Anonymous Sources

A. Common features of anonymous source policies

- Use of anonymous sources is discouraged; anonymous source material should be verified by other means where possible.

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- Anonymous source material may be used only if:
 - (1) the material is vital information (not opinion or speculation);
 - (2) the information is not otherwise available; and
 - (3) the source is reliable and in a position to have accurate, direct knowledge.
- Anonymity should not generally be granted for speculation, personal or partisan attacks, or trivial or obvious comments.
- The reasons for anonymity should be given in the story, and the source's position should be described.

B. *Notable features of certain anonymous source policies*

1. *Associated Press*, "Statement of News Values and Principles" (Feb. 1, 2006)
 - Use of anonymous source material must be approved by a manager, who must also know the identity of the source.
 - The default is that interviews are on the record; conditions of anonymity should be negotiated at the start of an interview; at the end of the interview, the interviewer should try to get as much as possible back on the record.
2. *Washington Post*, "Policy on Sources" (April 13, 2004)
 - Editors must know the names of sources; information from sources who refuse to be identified to an editor cannot be published.
3. *New York Times*, "Confidential News Sources" (Feb. 24, 2004)
 - A commitment to anonymity is undertaken by the newspaper, not the individual journalist alone; department heads must know the names of sources, and executive and managing editors are entitled to know upon request, except in extraordinary circumstances. Only the executive editor may approve a request for total anonymity.
 - Anonymity should not be actively offered to a source except in highly sensitive stories; reporters should negotiate terms that allow as much as possible to be said about the placement and motivation of the source.
4. *Los Angeles Times*, "Ethics Guidelines"
 - Reporters should consult with editors where possible regarding use of anonymous source material; in some cases, an editor may insist on knowing the identity of the source to assess its reliability.
 - Reporters should consult a masthead editor before agreeing to resist subpoenas to protect anonymity.
 - Reporters should be careful about where they store identifying information, particularly with respect to electronic records, which may be subpoenaed.
 - Promises of anonymity should be kept except under extraordinary circumstances, e.g. where a source in bad faith uses the newspaper to spread misinformation.
5. Some organizations have extensive written editorial policies that make only brief or no mention of use of anonymous sources.

III. Issues for Discussion

A. *How far may a journalist go in guaranteeing anonymity?*

1. What may a journalist promise?
 - That the journalist will resist a subpoena?
 - That the news organization will resist a subpoena or assist the journalist in resisting a subpoena? That the organization is willing to pursue legal proceedings to the appellate level, or to the Supreme Court?
 - That the journalist or others inside the organization will go to jail or pay fines once judicial means have been exhausted?
 - That the journalist will not reveal the source's identity even inside the news organization?
 - How much can be assumed and how much must be discussed with a source up front? How detailed does the journalist's discussion of the terms of an interview need to be?
 - Should the journalist obtain a written agreement from the source, or ask the source to agree to sign an affidavit if a subpoena is issued and survives legal challenges?
2. Are there necessary exceptions that apply to any promise of confidentiality?
 - Where the source intentionally or unintentionally gives misleading or false information, or otherwise acts in bad faith?
 - Where the source is trying to smear someone?
 - Where the information could affect national security?
3. Under what circumstances should a promise of confidentiality be deemed to have been waived?
 - Is anonymity more like a privilege, or more like a contract between reporter and source that may be renegotiated at will?
 - Under what circumstances may a waiver be deemed to be voluntary?
 - Is a signed waiver or a waiver communicated between attorneys sufficient? Or must the waiver be direct and in person?
 - May the reporter seek a waiver, or must the source initiate the waiver?
 - Is a blanket waiver sufficient, or is specific permission required?
 - If the source goes public with the information, or reveals it to a prosecutor, does this waive the privilege? What if the source lies publicly or to the prosecutor?

B. *What practical procedures should be followed to maintain anonymity?*

1. Notes and files
 - How should notes be used, stored and retained? In what format (written/electronic) should notes be taken?
 - Should there be an organization-wide policy regarding file retention, or should it be left to individual journalists?
 - Who should own and control journalists' notes?

- Should journalists use their organization's electronic storage systems? Should they be provided with external disks or drives that they control?
 - Should electronic files be encrypted?
2. Phones, email, and other electronic records
 - Should journalists use company phones, personal phones, disposable phones, prepaid phones, pay phones, or VOIP phones?
 - Should the organization's phone service be structured or "bundled" so that records do not reflect individual journalists' calls?
 - Should the organization secure a commitment from its phone service provider to notify the news organization if records are subpoenaed?
 - Should journalists use email to communicate with sources?
 - Should journalists send emails within the news organization containing identifying information?
 - Should journalists use identifying information in other electronic records, such as address books or calendar entries?
 - How should email and other electronic records be stored and retained? Should such records be automatically deleted after a certain period of time?
 3. Other records
 - Should expense reports such as travel and entertainment records identify sources journalists meet with?
 - How should records of visits to the news organization's offices be dealt with?
 - Should journalists avoid leaving messages that include their names with receptionists or secretaries at outside organizations?
 - Should journalists avoid visiting a source at the source's place of work, so as not to have to sign a visitor log or be videotaped by a security camera?
- C. *Under what circumstances should material from anonymous sources be used?*
1. When should a journalist promise anonymity?
 - How should the reliability of the source and the information be assessed?
 - How should the value of the story be weighed against the undesirability of using an anonymous source?
 - Should anonymity be granted only to sources that face certain kinds of threats (e.g. personal safety, reputation, employment)? Should a distinction be made between vulnerable sources/whistleblowers and powerful sources?
 2. What procedures should be followed to ensure proper use of anonymous sources?
 - Should there be a "two source" rule?
 - Should senior editors be required to know sources' identities or sign off on the use of anonymous source material?
 - How should an anonymous source be described in a story?
 - Should the source's reason for seeking anonymity be given? Should the journalist state the reason the source offers, or the motivation the journalist attributes to the source?
 - Is it permissible to disguise the use of an anonymous source when writing a story?