



Protecting our sources of information

**Why journalists need
to resist legal attacks**

European Federation of Journalists

Protecting our sources of information

Why journalists need to resist legal attacks

Written for the EFJ by
Ronan Brady

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Conference reports can be found on the EFJ website at <http://www.ifj-europe.org/>

European Federation of Journalists

Contents

Preface	1
Introduction	2
Confidence in the truth	
1 Source protection across Europe	4
Confidential sources	12
a health warning	
2 The European Court of Human Rights	14
Keeping ahead of the snoopers	21
3 Go directly to jail — do not pass Go	22
4 Conclusions	24
Guidelines for Journalists	

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Protecting our sources

A handbook for journalists and media freedom groups in Europe

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Preface

In May 2003 the European Federation of Journalists (EFJ) convened a seminar in Prague under the title Protection of Sources under Fire. The seminar was a response to increasing attempts throughout Europe to undermine the principle of confidentiality of sources. Attacks included Danish journalists having their phones illegally tapped, British journalists threatened with prosecution by a beer company and Belgium journalists having their homes and offices searched. Protection of sources by journalists later became a central issue in the row between the BBC and the UK Government following the death of Government scientist Dr David Kelly.

Increasing pressure threatens fundamentally to limit the freedom of journalists to act as watchdogs on the authorities. Legislation under the banner of the ‘War Against Terrorism’ threatens to give police unprecedented powers to monitor journalists, often without the targets being aware that this is happening. E-mails can be intercepted, computer files seized and the movements of journalists can be tracked through mobile phones. States spy on reporters in an effort to uncover their confidential sources of information. However, the protection of sources has rightly been labelled a “cornerstone of press freedom” by the European Court of Human Rights.

In Prague, the European Federation of Journalists launched a campaign to strengthen the ability of journalists to protect sources, and to explain to the public why this is an essential condition for a free press. Speakers included Professor Dirk Vorhoof of Ghent University whose analysis of important European cases has been a principal source for this pamphlet. Another speaker was journalist and campaigner Ronan Brady from the Republic of Ireland, who has seen first hand how police and Governments in both parts of Ireland have tried to undermine the trust between journalists and their sources. In this handbook Ronan Brady explains that protection of sources is not a privilege for journalists, but a necessity for whistleblowers who reveal wrongdoing inside organisations. Without the security of confidentiality, sources will dry up and the media will be muzzled. Ronan examines how national courts have tried to undermine this principle and how the European Court of Human Rights has, so far, attempted to protect it.

Ronan also examines some ethical dilemmas facing journalists. Is the protection of sources an absolute obligation, or are there conditions under which a journalists can and should break this confidence? ■

Introduction

Confidence in the truth

Throughout the world, journalists seek to protect people who give them information on a confidential basis. In doing so we do not seek special rights or status for ourselves. We see it as a duty which we owe to the informant, who may have risked serious consequences in talking to us, to the general public who needs information which would otherwise be hidden and to our colleagues because, if one informant's confidentiality is betrayed, other people with important information will be less likely to approach a journalist.

For the source, the informant, the whistle-blower, confidentiality is of course a right. The primary object of this pamphlet is to examine how far this right is recognised by society and in law. We will then look at what journalists can and should do about source protection.

The promise to keep an informant's identity confidential in all circumstances is a weighty and complex matter. It should not be seen in isolation from other rights, duties and laws. When journalists refuse to name informants in court, the outcome of a trial may be affected. It is every citizen's duty to testify honestly before a court, when required to do so. It is right and proper that judges should seek all relevant evidence.

Against these questions must be balanced broader public concerns. Journalism plays a vital democratic role in exposing wrongdoing. But if journalists must always identify their informants at the demand of a court, will that role be seriously limited? Will valuable information be kept hidden? How can issues of corruption or incompetence be investigated if all informants are forced to undergo publicity and with it the possibility of dismissal or even serious injury?

The issue is a fundamental one for investigative journalism. The more serious the matter, the harder it is for a whistle-blower to come forward. But the mass media depend on a flow of confidential information about much less serious matters as well. The quality of the relationships between reporters and their sources decides the amount of information that gets into the public domain. Undermine those relationships, and the whole system can dry up.

Not only is the public in danger of getting less information, but the infor-

mation it does get is less reliable. Even if an informant contacts a journalist with a story, the journalist is unable to 'run it by' trusted contacts, because they too are afraid of being identified. So the reporter will find it harder to check it for spin, to judge its weight or even to verify it at all.

"News," according to one popular definition attributed variously to newspaper tycoons, Lord Northcliffe and William Randolph Hearst, is "what somebody somewhere wants to suppress". Certainly, embarrassing facts do not appear by chance in the public domain. Someone, usually a reporter, needs to push hard in order to get them there. Only through cultivating sources can the journalist do that.

When reporters are forced to operate as part of the justice system, either by divulging confidences or by producing other forms of evidence like film or documents, they lose their independence. This can pose serious dangers. Disgruntled informants have been known to take out their grievances against journalists, while some potential journalistic sources only divulge information if they regard the journalist as independent of the status quo.

All told, journalists are coming under increased fire for protecting sources. But, at the same time, international law is beginning to recognise the importance of journalistic confidentiality. All this presents a complex shifting picture. But it is one which journalists, acting in the interests of the public can improve. ■

Journalists should not be required...

In February 2000, three of the most senior guardians of free expression in the world agreed the following statement:

"Journalists should never be required to reveal their sources unless this is necessary for a criminal investigation or the defence of a person accused of a criminal offence and they are ordered to do so by a court, after a full opportunity to present their case."

Santiago Canton Organization of American States Special Rapporteur on Freedom of Expression,

Freimut Duve Organization for Security and Co-operation in Europe Representative on Freedom of the Media

Abid Hussain UN Special Rapporteur on Freedom of Opinion and Expression

1 Source protection across Europe

In Europe, there has always been a kind of cold war between journalism and the judiciary over source protection. But three new developments have added to the complexity of that troubled relationship.

- the expansion of international legal institutions,
- developments on the internet which challenge our professionalism and
- the escalation of armed conflict and state responses to terrorism, paramilitarism or guerrilla activity.

International judicial bodies, like the International Criminal Tribunal on the former Yugoslavia, face greater problems than national courts in securing viable prosecutions. It is hard to compel witnesses to appear. The issues they confront, such as genocide and race-hatred, also affect journalists in new and sometimes difficult ways. The existence of these courts should be welcomed by journalists. We can only ply our trade where the rule of law applies. Extension of the rule of law internationally in conflict zones means that justice cannot be buried with the bodies, and provides protection for people like us as well as for millions of others. But as these courts assert their new competences, old battles may need to be re-fought, while settled approaches to source-protection may need to be rethought.

The internet as a source of anonymous and unverifiable information sets new problems, as well as obvious opportunities, for society and for us. Rumour and gossip once spread by word-of-mouth. Now they cross the globe in seconds. But lies travel just as fast in cyberspace as the truth and the new medium provides little means of distinguishing between these two.

This adds importance to journalists' role as providers of authentic information. Internet-based information is valueless without some kind of verification by journalists or other professionals. A wise surfer learns which sites to trust and which to treat with scepticism. Because journalists verify the whistle-blower's tale, we distinguish our activities from those of shadowy web-loggers. And when there is so much information and so little credibility, our duty to respect ethical principals becomes even more important.

Journalists, like other people, are vulnerable to terrorist attacks and terror groups are no respecters of press freedom or the right to protect sources. But since September 11 2001, the 'War on Terror' has justified measures by which governments introduce new powers for themselves and restrictions

for us. We find ourselves under fire and international developments suggest that pressure will increase. In the instability following the Iraq War, we must expect authorities to take even more liberties.

State legislation

European countries protect journalistic confidentiality in law, to an extent. In Spain and Portugal a kind of journalistic privilege is guaranteed by the Constitution. In Austria, Denmark, Finland, France, Germany, Italy, Lithuania, Norway, Poland, Sweden and the United Kingdom procedural or criminal law contains some provision for journalists to shield sources. The degree of protection varies enormously among these countries. The legal systems of Belgium and the Netherlands recognise protection of sources to some extent, without any specific legal provisions. Legislation to protect confidentiality is under construction in Georgia, Azerbaijan and Luxembourg. Under the European Convention all the member states must protect journalistic sources in accordance with the case law of the European Court of Human Rights, which we will examine in the next section. The basis of European Court decisions is Article 10 of the European Convention on Human Rights which protects freedom of expression. Some countries live up to these standards but many do not.

Article 10 European Convention on Human Rights

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Western Europe

Before the Prague seminar, the European Federation of Journalists surveyed journalists' unions and associations in Western Europe. From their replies, the following picture of protection of sources issues emerges.

Austria

The 1981 Media Act provides strong protection for journalistic confidentiality. Media workers and publishers have the right to refuse to identify a source of information or to divulge the contents of the information.

Belgium

More infringements of journalistic confidentiality have occurred in Belgium than in almost any other western country. Jose Masschelin, an investigative journalist for the daily *Het Laatste Nieuws*, was arrested on 14 March 2002 and remanded in prison in Ghent for four days. His home in Ypres and the newspaper's offices in Brussels were searched as police tried to discover who leaked extracts from the case file of a man accused of paedophilia. Cases taken to Strasbourg are dealt with in the next section.

Cyprus

The Press Law acknowledges a journalist's right to protect sources. This principle was vindicated when *Politis* newspaper exposed a stock exchange scandal. The company sought to uncover the source of a leaked banking document and asked for a gagging writ forbidding further publication, but the courts refused. Police and courts frequently compel journalists to hand over TV footage or camera negatives of film of demonstrations.

Denmark

The Danish journalist Stig Matthiesen, who works for the daily newspaper *Jyllands-Posten*, suffered from 'post 9/11 hysteria' when he was investigating reports circulating among Muslim and Jewish organisations in 2002. He had come upon rumours that an extreme Muslim organisation had a death-list of prominent Jewish people. The police obtained a court order to tap his phone and another to order him to identify the source of the rumour. On 12 September 2002, the High Court in Copenhagen overruled both orders.

Finland

In Finland there is statutory protection for journalistic source, under legislation dating back to the foundation of the state in 1918. The exception

occurs in criminal cases where the penalty is more than six years in prison and there is no other means of securing the information. However the old legislation covered only press and broadcasting – not book publishing or the internet. A recent case involving a reference to the company Sonora in a book, exposed this loophole, as the company sought to identify the source. To their credit, Finnish legislators moved quickly (by European standards) to plug the loophole and an amendment due to come into effect in 2004 extends protection of sources to books and the internet.

France

Before 1993, investigative magistrates could question journalists about sources and a refusal to reveal them could be punished by a jail sentence. In practice, this seldom happened. In January 1993 the Code of Criminal Procedure was amended, adding Article 109(2) which reads:

Any journalist who appears as a witness concerning information gathered by him in the course of his journalistic activity is free not to disclose its source.

In addition, Article 56-2 of the code of Criminal Procedure states that searches of media premises must neither infringe a journalist's professional freedom nor impede the dissemination of information. Despite these reforms, journalistic confidentiality is not strongly protected in France. In December 2000, for example, the Appeal Court (Cour de Cassation) ruled that searches and seizures at *Prisma Press* and *Agence Agnelli* did not infringe Article 10 of the European Convention.

Germany

The German Code of Criminal Procedure¹ guarantees that anyone involved in the creation or publication of a periodical may refuse to testify to the identity of an informant, even if that informant is suspected of a criminal offence. However, press and media laws are generally in the hands of the Federal States and some have drafted Police Laws to fight terrorism, which would allow the authorities to survey the activities of journalists by optical and acoustic devices. The drafts are still under discussion and have been widely criticised, not only by journalists' organisations. But these are tough times. In 2003, the Federal Constitutional Court ruled against two journalists, whose communication connections were tapped by the public prosecutor. The court decided that the taps were legal. However, the Court also made it clear that tapping communication data would only be legal when investigating major crimes and after a decision by a judge.

1. Paragraph 24(1) of the Press Law reads: "Editors, journalists, publishers, printers and others involved in the production or publication of periodical literature in a professional capacity can refuse to give evidence as to the person or the author, sender or confidant of an item published in the editorial section of the paper or communication intended wholly or partly for such publication or about its contents."

Greece

There is no legal protection for sources. According to the EFJ survey, governments manipulate public opinion through selective leaks. Many journalists feel abused when tit-bits of information are dangled before them, and demand proper access to information.

Republic of Ireland

There is a stand-off between the judiciary, the legislators and the journalists. There is no legislative protection and judges have threatened to jail journalists who refuse to reveal sources; but no journalist has been jailed in recent decades. It would seem that decisions of the Strasbourg Court have influenced Irish judiciary. However, a considerable degree of intimidation remains. In 1997 Barry O'Kelly of the *Daily Star* in Dublin refused to divulge the source of details about a settlement between a police association and an ex-employee. Justice Carroll sent the reporter home after the first day of the case with a threat of prison ringing in his ears. However that night another judge visited Carroll, bringing wiser counsel, and the following day, O'Kelly was allowed to go free. The judge spoke out against the 'tyranny' which ensues when 'the law ends', a phenomenon which evidently occurs when journalists do not obey judges. The judge also complained that if he jailed him, O'Kelly would wear a martyr's crown.

Norway

Journalistic sources receive statutory protection except in very serious cases, where there is no other means for the police to ascertain the identity of a suspect. Recently *Bergens Avisen* newspaper exposed the name of a confidential informant who had tried to manipulate the paper by passing on false information under the cloak of anonymity. Staff at Bergen's second-largest paper were criticised by other journalists for making the contact's name public.

Portugal

In Portugal the constitution, the press law and the journalism law of 1999 all recognise the principle of source protection. In September 2002, José Luis Manso Preto was jailed when he refused to reveal the source of a story on drug trafficking. However, in a recent case, a journalist refused to identify the source of a story about misuse of the public finances, citing professional ethics as his reason. The court recognised the legitimacy of his refusal, and did not compel him to divulge the name.

Sweden

Swedish source-protection is part of a wider system of free speech legislation, involving freedom of information and the absence of prior restraint. Under the Freedom of the Press Act, official documents (ie: documents produced by public bodies, in their final form) are in principle public. They must be kept available for anyone who wishes to see them, except in cases which are strictly limited by law. Thus when civil servants are approached for information contained in such documents, they are duty bound to reveal the information, except in cases involving matters like treason or other serious offences. As a consequence, their right to anonymity is protected. It is important to note that the protection of sources in Sweden is not viewed by jurists or the general public as a protection for the journalist. It is quite correctly seen as protection for the whistle-blower – the source who exposes wrongdoing.

United Kingdom of Great Britain and Northern Ireland

The United Kingdom has one of the most complex source protection regimes in Western Europe. Under the Contempt of Court Act 1981 (Section 10), journalists cannot be forced to divulge confidential information, unless the reporter's silence endangers national security, the detection or prevention of crime or the interests of justice. In practice judges usually cite one of more of these exceptions.

Under the British legal system, higher court judgements form 'precedent' which must be followed by other courts in similar circumstances. A case involving the company Norwich Pharmacal has become a dangerous precedent for the media, even though it had nothing to do with newspapers or broadcasting. It established that a person or company harmed by a leak (for example) can sue an innocent body (like a newspaper) if that body does not divulge the identity of the leaker. When courts cite the Norwich Pharmacal case they turn a serious social question into a business transaction.

An even more complex case concluded before the House of Lords in June 2002. The Daily Mirror published details from the medical records of a notorious murderer in a prison mental hospital. The records had been taken from the hospital by a member of staff and then sold to the paper. The courts ordered the paper to disclose the source, partly because of the nature of the transaction. Judges said there no real public benefit from the information. The Law Lords considered the disclosure order to be in conformity with British legislation and with Article 10 of the European Convention.

But in May 2003, the Court of Appeal overturned a ruling by the High

Court that Robin Ackroyd, a freelance journalist who helped break the story, had to identify his informant. One judge said the threat to Ackroyd sent a "chill of apprehension" down his spine. Ackroyd has been strongly backed by the National Union of Journalists.

Section 11 of the Police and Criminal Evidence Act 1984 (PACE), says that for police to be able to seize journalists' material they must get an order from a Crown Court (intermediate-level) judge. The order can be contested and media companies almost always oppose police applications. Generally, however, once judges grant an order, publishers decide to comply.

Some of the most serious violations of journalists' rights have occurred in Northern Ireland as a fuller story begins to emerge about the years of armed conflict. Northern Ireland has its own police force, laws and court system, although these are subordinate to UK institutions. We will pay particular attention to journalistic confidentiality in this region of the UK, as a kind of laboratory to test the effectiveness of Strasbourg law.

PACE operates under a haphazard system and some warrants have been issued on the say-so of a magistrate — a kind of lay judge. This seriously worries Northern Ireland's Human Rights Commission — a state body set up under the Good Friday (peace) Agreement. The commission is also concerned that neither PACE nor the Official Secrets Acts contain public interest defences. It is not possible to balance the claims of national security against wider considerations of the public good.

A further controversy has occurred at the Saville Inquiry into the Bloody Sunday killings of 1972, after former Paratroopers spoke anonymously to journalists Alex Thompson and Lena Ferguson for a Channel 4 programme. Lord Saville is pressing the two journalists to identify the soldiers.

Central and Eastern Europe

Eastern Europe tells a complex story. Many states still lack fair legal procedures. The elimination of formal government censorship and of corruption and factionalism among the judiciary need to be dealt with before there will be any meaningful improvement in source protection.

Bulgaria

In 1992, the Bulgarian legislature passed an Act on Access to Public Information, which specified the rules for access to sources. Legislation offers freedom of information for journalists but gives access to their sources under certain circumstances.

Czech Republic

In the Czech Republic, the legal system provides an element of protection for confidential sources under certain limited circumstances, in a statute passed in February 2000. But the legislators rejected an alternative proposal from the journalists' union that the law place an obligation on the journalist to protect the source's anonymity, which could only be lifted under exceptional circumstances.

A recent case shows that the Czech law on source protection is far from clear. Sabina Slonkova and Jiri Kubik of the daily *Mlada Fronta Dnes* exposed some political infighting involving a member of the government. When the government prosecuted them for refusing to divulge their source, the President of the Republic pardoned them. In spite of this the government continued to prosecute until the state attorney intervened to stop the procedure.

Estonia, Macedonia and Slovakia

In Estonia, Macedonia, and Slovakia there is no law protecting sources, but there have been no prosecutions of journalists on this issue either.

Montenegro

In Montenegro, the law regulating access to public information does permit journalists to protect sources.

Romania

Romania is among the countries without legal protection, and the authorities have been active in seeking to force journalists to divulge confidential sources. There were over 20 cases last year. However, courts have, on occasion, been willing to respect the code of ethics. Calin Muresan a radio journalist and Ovidiu Eftimie, a Transylvanian reporter refused in separate cases to divulge their informants and suffered no punishment.

Slovenia

In Slovenia, the Law on the Media of 2001 gives the journalist the right, under certain circumstances to protect a confidential source. However considerable problems remain, especially in cases involving the disclosure of military secrets. ■

Confidential sources: a health warning

Reporters only use confidential sources when they have to. A person who is willing to be named carries much more credibility than an unnamed informant. The public is more likely to believe people who go on the record because they are publicly standing by their allegations. The fact that a source is willing to suffer public scrutiny, strengthens the reporters' story, because it can be tested. A report loses both vitality and authenticity if a reporter substitutes faceless 'sources' for real people.

Reporters and media outlets risk their credibility each time they base a news report on the word of unnamed sources. The vast majority of people who come to reporters with 'confidential' or 'off-the-record' information have no real news to tell. They are often motivated by a grudge, sometimes by paranoia. It's usually the most junior reporter in a workplace who gets the soul-destroying task of listening to their story. But somebody has to, because, ever so rarely, you come upon a real whistle-blower with a significant story to tell. One of the skills of a journalist is to discern when someone, who may not present themselves well, has a story of public interest.

Confidential business sources may try to influence share prices so they can make a quick buck at the expense of your credibility. Security service sources may have a political agenda, while political sources always have their own motives for leaks. Every confidential source is trying to use the journalist. However, the journalist is also using the source. This may sound like mutual exploitation, but the process can lead to nuggets of truth being uncovered.

It is the responsibility of the journalist to discover the motivation of the source and to sift the wheat from the chaff. Credibility is a reporter's most important currency. It should never be squandered on an untrustworthy source. When the libel writs come in, the anonymous source won't be there to back up the journalist's story in court. However, if a politician or official leaks a significant and authentic report, the journalist has a duty to use the material.

To put things bluntly: unnamed sources should only be quoted

- in the last resort,
- when the information is of real public importance,
- when the reporter is sure the source is reliable and
- when there's no other way of getting the truth.

This does not mean reporters should disdain confidential sources. There are many people who are not willing to be quoted but who are willing to provide vital background information and put reporters in touch with people who will go on the record. These sources may be well-motivated — they want you to get things right — and are always worth cultivating.

Individual reporters can promise confidentiality to a source and each journalist has a right (some would say a duty) to tell absolutely no-one else. But it is advisable for journalists to secure in advance the agreement of their editors or other senior staff before making this commitment. Securing the support of one's media company usually means sharing the identity of a source with a senior member of staff. This should be a journalist such as the editor, news editor or producer. This in turn requires a high degree of trust by the reporter that an executive will not break the pledge that the reporter has given.

If an entire media company is behind such a promise, it can help to make it more effective. Also, in certain jurisdictions a reporter's promise of confidentiality can be construed as a contract between the source and the newspaper company. Reporters and media organisations that break such agreements can be held legally liable. The company should also provide advice and legal assistance if it is needed.

Sometimes confidential sources demand conditions as part of the agreement. These might include what tag will be used in describing the source, such as: "Sources close to X told me..." The exact terms are important. Reporters should be careful about what they agree and that they can deliver on the conditions.

2 The European Court of Human Rights

The European Court of Human Rights at Strasbourg guarantees fundamental rights and freedoms under the European Convention on Human Rights, which was drawn up within the Council of Europe and entered into force in September 1953. Judges in countries signatory to the European Convention on Human Rights' need to take note of Human Rights rulings in Strasbourg. When rights conflict, it is the duty of the Court to find the correct balance. In the case of journalistic sources, the Court often has to weigh Article 10 on freedom of expression with Article 6 on the right to a fair trial. The Court has taken a number of decisions to protect journalistic sources under Article 10. But important cases are still pending, and the balance could change in the future.

Article 10

The full text of Article 10 of the European Convention on Human Rights is published on Page 5. Article 10 grants everybody a right to "receive and impart information and ideas without interference by public authority". But it adds that this right carries with it "duties and responsibilities" and it goes on to stipulate conditions where this right may be limited.

- ❑ These limits must first be stated in law. They may not be imposed by an official acting without legal authority.
- ❑ They must conform to what is "necessary in a democratic society". Regulations which prevent democratic debate and decision-making do not meet this condition.

Other possible "formalities, conditions, restrictions or penalties" are:

- ❑ in the interests of national security,
- ❑ territorial integrity or public safety,
- ❑ for the prevention of disorder or crime,
- ❑ for the protection of health or morals,
- ❑ for the protection of the reputation or rights of others,
- ❑ for preventing the disclosure of information received in confidence, or
- ❑ for maintaining the authority and impartiality of the judiciary.

The penultimate clause "for preventing the disclosure of information received in confidence" is of particular interest to journalists. This is a

restriction on the right to freedom of expression, and it is intended to prevent publication of material that someone has received in confidence. Companies claim that publication of any confidential material must be based on a breach of confidence, and should not therefore be protected by Article 10. However, the clause is double-edged because preventing the disclosure of information received in confidence is exactly what a journalist does when he or she refuses to reveal a source.

The Goodwin Case

Bill Goodwin, a British business journalist, in 1989, was told by a source that a company known as Tetra was suffering financial difficulties. The information came from a confidential corporate plan. When the reporter rang Tetra for confirmation, the company started proceedings to force him to divulge the name of his informant. Under the British Contempt of Court Act (1981), Goodwin was ordered by the High Court to disclose his notes about Tetra on the grounds that it was in the interests of justice. He refused. On appeal, he was ordered to either disclose his notes to Tetra or to deliver them to the court in a sealed envelope. Once again he refused. The case went to the highest British court, the House of Lords, which upheld the order. When he again refused, he was fined £5,000 for contempt of court.

Goodwin, with the assistance of the National Union of Journalists, appealed to Europe. In March 1996, the Strasbourg Court concluded that the order to reveal the source and the £5,000 fine violated Article 10. The Human Rights Court said that action by the British judges was disproportionate and said the restrictions could not be regarded as necessary in a democratic society. The court endorsed the social value of investigative journalism and whistle-blowers. It stated:

"Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected.

"Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 of the Convention, unless it is justifiable by an overriding requirement in the public interest".

1. Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia & Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Netherlands, Macedonia, Norway, Poland, Portugal, Romania, Russia, San Marino, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine and the United Kingdom.

This was strong support for the protection of sources. However, the Court stopped short of absolute protection of journalistic sources. The sting is in the tail, allowing courts to order disclosure if "justifiable by an overriding requirement in the public interest".

De Haes & Gijssels

Article 6 of the Convention, which grants the right of fair trial, is often invoked by judicial authorities to justify ordering journalists to disclose confidential details, so that the court can have full information. But the same Article 6 has also been used to protect journalistic confidentiality. Belgian journalists, Leo De Haes and Hugo Gijssels were convicted in a Brussels court of defaming members of the Belgian judiciary, after making allegations about judges in an Antwerp incest case. These allegations were based partly on testimony in the court case. In other words, their story was backed up by evidence in the hands of another Belgian court.

Rather than identify their informants, De Haes & Gijssels sought to use this evidence in their defence against the defamation case. But the Brussels court chose to see this request as proof that they had not shown enough diligence in researching their story, and refused to allow them to introduce this court evidence instead of revealing their own sources.

The Human Rights Court ruled in 1997 against disclosure of a source, where alternative proof of the journalist's statements is available. The Court believed De Haes and Gijssels' concern for their sources of information was legitimate and that the case involved a breach of Article 6 of the Convention. The court also found that the two journalists' rights under Article 10 were violated.

Moloney

Northern Ireland journalist Ed Moloney faced imprisonment in the summer of 1999, when he refused to hand over to police his notebooks of an interview with a Loyalist informant. Some aspects of his case resemble that of De Haes and Gijssels in that he also argued that the authorities had alternative means of achieving justice without punishing him.

An international campaign led by Moloney's union, the National Union of Journalists of Britain and Ireland, and the International Federation of Journalists (IFJ) brought intense pressure on the authorities and this bore fruit. In October, the High Court in Belfast overturned a lower court's ruling on the matter. Effectively the Northern Ireland High Court ruled that the police had no right to go 'trawling' through a journalist's possessions. They

must first establish a case for needing to see journalistic material. Many observers believe that the notoriously conservative Northern Ireland judicial bench took this radical (in their terms) stance as a result of Strasbourg.

Roire

Light was thrown on the way in which the Human Rights Court weighs up or balances competing rights in a 1999 case from France. In 1989, Peugeot boss Jacques Calvet rejected workers' pay demands during industrial relations conflict at the French car firm. However, Claude Roire, journalist at *Le Canard Enchaîné* obtained photocopies of confidential tax files which showed M Calvet had increased his own salary by 45.9% over two years. Roire and Roger Fressoz, the paper's director of publication were fined a total of 15,000 Francs for breach of professional secrecy.

The Strasbourg court noted that the journalists had duties and responsibilities to obey the law, but "in the particular circumstances" of this case, "the interest in the public's being informed outweighed" any responsibility to remain silent about what had been highly confidential documents.

Although it found that the publication of illegally leaked documents was not sufficient in itself to justify prosecuting journalists, it did rule that:

"journalists cannot, in principle, be released from their duty to obey the ordinary criminal law on the basis that Article 10 affords them protection".

Roemen & Schmit

Robert Roemen, a journalist published an article in the daily Luxembourg newspaper *Lëtzebuurger Journal* in 1998, stating that a government minister had been convicted of tax evasion and that the minister had been fined the equivalent of 2,500 Euro. As a result, an investigative magistrate searched his home, his place of work and the office of his lawyer Anne-Marie Schmit.

When this case came to Strasbourg, the court took a very strong stand against the searches. It ruled¹ that the infringement of the journalist's rights was even more serious than that suffered by Bill Goodwin. The search of Roemen's house and workplace, even if it was unsuccessful, was designed to gain access to all his sources while the British courts had only ordered Goodwin to reveal one source. The Court pointed to the "importance of the protection of journalistic sources for press freedom" and warned of "the potentially chilling effect an order of source disclosure has on the exercise of that freedom". Such a measure could only be justified "by an overriding requirement in the public interest".

¹La Cour juge que des perquisitions ayant pour but de découvrir la source du journaliste - même si elles restent sans résultat - constituent un acte plus grave qu'une sommation de divulgation de l'identité de la source". This had "un effet encore plus conséquent sur la protection des sources que dans l'affaire Goodwin". (ECtHR February 25 2003).

The Court recognised that there was a legal provision covering the searches at Roemen's home and place of work and accepted that their purpose, maintaining the public order, was legitimate. But the searches did not fulfil the third vital criterion under Article 10; they conflicted with the needs of a democratic society. The article had discussed a matter of public importance and that had to be taken into account. The searches could only be justified if the Luxembourg authorities could show that the leaking of the documents to Roemen did more harm to the public than any good derived from the article he wrote. The Strasbourg court ruled that they did not and that the public would have been better served if the searches had not happened. The judgment also ruled against Luxembourg under Article 8, which protects domestic privacy. The raid on Ms Schmit's office and the seizure of a document was an unacceptable interference with her right to a private life, and a breach of the journalist's confidential relationship with his lawyer.

Police resistance

Such Human Rights Court decisions have a ripple effect through the courts of signatory countries, especially when the country has incorporated the decisions of the court into its own legal system. Almost all the EU member states have incorporated Strasbourg law. For example, in 1998, the United Kingdom did so under the Human Rights Act. Under this procedure, UK judges have to take into account the decisions of the Strasbourg court when administering justice at home. However, although the court made its intentions extremely clear in the Roemen & Schmit case, the implications of Strasbourg law often take some time to permeate resistant layers among the authorities of certain countries.

This is especially true in Northern Ireland. On the evening of May 1 2003, the Police Service of Northern Ireland (PSNI) raided the home of journalists Liam Clarke and Kathryn Johnston, which they share with their 8-year-old daughter. The search lasted 5 hours. Police seized 21 bags of documents and four computers and arrested the two journalists at 2am. Their daughter was left in the hands of a neighbour while they were held in custody.

The PSNI raided the Belfast office of the *Sunday Times*, Liam Clarke's newspaper. The couple were repeatedly questioned about a confidential source, which they refused to identify. Eventually, they were released without charge. The *Sunday Times* is taking legal action to recover 18 bags containing documents, computer disks and photographs, as well as three containing computer equipment, which are still being held by the police at the time of writing.

The PSNI claim that they were inquiring into the identity of a person who leaked secret intelligence tapes of phone conversations, published by Liam Clarke. Both Clarke and Johnston have excellent contacts within the Northern Ireland 'intelligence community'. Among the conversations recorded was an intimate one between Sinn Féin MP Martin McGuinness and the British government's former Northern Ireland Secretary Mo Mowlam. For over 30 years British Prime Ministers have told MPs that their phones will not be tapped by the secret services and there can be no doubt that they took this issue very seriously.

The heavy-handed nature of the raids, the extraordinarily long detention and the retention of documents, all suggest the PSNI's objectives were to identify as many as possible of Clarke and Johnston's confidential contacts and to give the two journalists a good fright. If so it looks as if the lessons of Roemen & Schmit have still to be learned by the PSNI.

Some Belgian cases

Violent events are often used as an excuse for repressive acts by the authorities. The murder of Belgian Socialist leader and government minister André Cools in 1991 is a telling example. Four years later, the investigating magistrate in this case raided the offices of *Le Soir*, *Le Soir Illustré*, *De Morgen* and the French community broadcasting station RTBF, as well as the homes of five journalists. Files, diskettes and computer hard drives were seized. The detectives were seeking the source of leaks from the State legal service at the Liège Court of Appeal which was dealing with the Cools case and some others.

Martine Ernst of RTBF, Walter De Bock of De Morgen, Alain Guillaume and René Haquin of *Le Soir* and Philippe Brewaeys of *Le Soir Illustré* took a court action against the raids. The Belgian Association of Professional Journalists (AGJPB/AVBB) did likewise. They argued that the searches and seizures constituted "an unspeakable interference by the Belgian authorities with ... freedom of expression" and that they amounted to a violation of journalistic confidentiality. In June 2002, the Human Rights court declared that the case taken by the individual journalists was admissible, but that their Associations could not join the case as victims of injustice. As we went to press the journalists are still awaiting the full and final hearing.

Another Belgian case, this time involving NMBS/SNCB, the national railway company, was resolved by the country's own courts, but only after the journalists concerned had to face some ominous threats from the judiciary. Douglas De Coninck and Marc Vandermeir of De Morgen were ordered to

The applicants argued that "les perquisitions massives et les saisies constitueraient une ingérence inqualifiable des autorités belges dans l'exercice de la liberté d'expression. Cette ingérence ne saurait être considéré comme une restriction prévue par la loi, poursuivant un but légitime et nécessaire dans une société démocratique", and that "les perquisitions et saisies qui ont eu lieu à leur domicile et dans certains rédactions sont constitutives d'une violation du secret des sources du journaliste".

submit to the court a copy of an internal document which exposed financial mismanagement in the building of a railway station. They refused because they feared the document might identify their source.

The Court of First Instance in Brussels decided that the document would not betray the identity of the source and imposed a 25 Euro fine on May 29 2002 for each hour they withheld the document. However, on June 7, with the threatened fine at over 5,000 Euro and rising, the Court reversed its decision and recognised its error.

Interbrew

Despite the success of Bill Goodwin in Strasbourg, a shadow still hangs over source protection in Britain. The Belgian company, Interbrew, brewers of Stella Artois, was the victim of an apparently malicious leak in November 2001 when it was considering a bid for South African Breweries (SAB). A document was sent anonymously to the *Financial Times*, the *Times*, *The Guardian* and *The Independent*; and to the news agency Reuters. It had been altered to falsely allege the takeover was imminent. Each carried the story. Interbrew shares fell substantially and SAB shares rose in what looked like a scam.

When Interbrew tried to get its hands on the documents, to identify the perpetrator, the media refused, saying that release of the documents would deter future informants. At one point, Interbrew singled out *The Guardian* and came close to seizing that paper's assets.

The company succeeded in persuading judges at each stage of the legal process to back an order ordering media outlets to hand over documents, despite the Contempt of Court Act, which provides some protection for whistle-blowers. The Court of Appeal noted in March 2002 that such protection was necessary but ruled that the public interest in this case lay in exposing the scam. It stated that there was "no public interest in the dissemination of falsehood", adding that "the public interest in protecting the identity of the source of what they have been told is disinformation may not be great". The House of Lords, the highest British court, agreed.

Having won all its battles in Britain, Interbrew suddenly decided in July 2002 to drop its case, placing the matter in the hands of the British finance industry watchdog, the Financial Services Agency. In September 2003, the FSA also abandoned the case. The newspapers and Reuters however have said they will challenge the decision in Strasbourg.

It is clear that the British courts are more willing to grant disclosure orders against journalists than is the Human Rights court in Strasbourg. Unless the British rulings are overturned, the British public will be denied

vital information, while lawyers and politicians in other European countries will cite Britain as they seek to curtail the rights of their citizens.

The Human Rights Court has set a high standard for the protection of journalistic sources. Confidentiality is "one of the basic conditions for press freedom" and any encroachment would create a 'chill factor', discouraging those who expose wrongdoing. The Court believes source protection outranks the need of a company to identify a disloyal employee or a breach of secrecy. If it rules in favour of the media in the Interbrew case, the Court will protect confidentiality of sources even more strongly. ■

Keeping ahead of the snoopers

Protecting sources today can mean more than remaining silent under questioning. You may have to ensure that the courts cannot get their hands on papers or other physical evidence. Computer documents are also vulnerable.

- If you receive papers or other physical documents, be aware that microscopic searching can reveal who has handled them. Once you've read these documents and extracted relevant information, it is best to send them abroad, outside the jurisdiction of national courts. International orders for discovery take a bit of time — enough usually to move the documents from place to place. The IFJ Office in Brussels can advise you.
- With computer files you need to be more careful, since deleted files are not erased, simply put aside. Until the computer gradually overwrites the contents of these files on the hard disc, they can still be recovered. Mike Holderness of the NUJ has good advice on *The Guardian* website at <http://media.gn.apc.org/fl/0201hide.html#n2> The Massachusetts Institute of Technology distributes free software Pretty Good Privacy (PGP). Its distribution centre is: <http://web.mit.edu/network/pgp.html> You might also want to find out about embedding messages within other messages (steganography). Try <http://www.petitcolas.net/fabien/steganography/>
- You can also copy a sensitive document onto a floppy disk and shred the material on your hard disk. You can download free software from Sami Tolvanen at: <http://www.tolvanen.com/eraser/>

3 Go directly to jail — do not pass Go

In one sense, this is crystal clear. A journalist makes a promise and must abide by it, even if that means going to jail without passing Go, in the famous Monopoly instruction. The whole system of news-gathering depends on the strength of that commitment. If I sell out my confidential source, I also sell out my colleagues and I sell out the wider public. My betrayal makes potential whistle-blowers less likely to come forward.

But, what happens when I discover my source has lied to me, using me for some illegal, immoral, maybe even murderous purpose? Does my promise still hold good? After all, my reason for making the promise was to protect the public by exposing information, which would otherwise have remained secret. If the information was actually a lie, if it caused evil rather than good, does that cancel out my duty to the source?

We may find guidance from our code of conduct. After all commitment to this set of ethical rules is the most important ethical decision any of us may ever make. Some codes make it sound simple. For example, a British journalist will read that there are no exceptions. Section 7 of the NUJ Code of Conduct reads: "A journalist shall protect confidential sources of information." Quite simple - no 'ifs' or 'buts'. However Portuguese journalists from the Sindicato dos Jornalistas will find themselves forbidden to divulge a source's identity except where the reporter is being "used to channel false information". Not so straightforward for them.

Some ethical questions are just so complex that bodies like the EFJ are unable to establish clear, unambiguous answers. Given the plethora of different circumstances and the myriad of potential outcomes, it is impossible to carve unbreakable commandments in stone. As with the best stories, the facts keep preventing simple solutions. Ultimately, each individual journalist must weigh the issues and make a personal decision.

As journalists make that decision, they must remember the implications and take responsibility for the real or possible consequences of their actions. Exposing the source may help prevent an atrocity or bring a culprit to justice — in some cases. It may also silence a potential informant whose information could save lives. It will almost certainly make informants less likely to come forward. Keeping silent may actually save lives.

So the balance for journalists lies strongly on the side of silence. For some

that is quite enough to make silence an absolute rule. However, for many of us there are nagging doubts about grey areas we may never have to see.

Happily, there is one aspect of this matter, about which journalists throughout the world can agree without any difficulty. We don't want judges deciding this matter for us. Putting it bluntly — the issue doesn't belong to them.

Our first commitment is to telling the public, to speaking out. That's our professional burden, which no other group can carry for us. The judiciary must balance a host of different considerations and then must decide for guilt or innocence, with nothing in between. We, however, live in the grey area between those absolutes. If we relax the pressure for openness, no-one else will take it up. The public will simply remain unaware of information.

Does that mean journalists claim exemption from the responsibilities of ordinary citizens? No, it just means we set ourselves particular responsibilities towards the community. That means we press towards openness without opting out of the social contract. We only seek an exemption from the citizen's normal responsibility to testify, so as to protect our sources. To remain honest while living outside the law, we have to keep the exemption as small as possible.

So, if journalists want to set limits to the guarantee of confidentiality, where should these be? We have already said that's a matter for your individual conscience. But it might be worthwhile looking at a couple of examples in order to set some bearings.

In October 1982, as the election campaign to be Governor of Minnesota in the United States was drawing to a close, a Republican campaign worker offered documents to reporters from the state's two leading papers, the *St Paul Pioneer Press* and the *Minneapolis Star & Tribune*. The campaign worker, Dan Cohen, said he would only reveal the documents if his name was kept confidential and the reporters promised him it would be. The documents showed that the Democratic candidate for Lieutenant-Governor, Marlene Johnson had been convicted of shoplifting in 1970.

The next day the two papers published the story, exposing Cohen's dirty trick against Johnson and using his name. Cohen was then fired. Were the papers right to break the bargain made by their reporters? There can be no doubt that Cohen acted very unfairly. Johnson stole \$6 worth of sewing equipment when she was very depressed and the conviction was later annulled. However, Cohen successfully sued the papers for breach of contract. The result fundamentally changed the relationship between US reporters and sources because it invoked contract law rather than ethics.

How should reporters respond when the major human rights tribunals seek testimony? This question was highlighted in 2002 when Jonathan Randal refused to obey a subpoena to attend the International Criminal Tribunal on former Yugoslavia at The Hague. Randal was a reporter with the *Washington Post* when he interviewed Radoslav Brdjanin, a high-ranking official in the Bosnian Serb administration in Banja Luka. During the interview, Brdjanin made admissions which the Court wanted to hear. At the time of the interview, Brdjanin did not request confidentiality.

Randal refused because he feared that if reporters testified at The Hague, people in Brdjanin's position would cease to talk to journalists and that such warlords might target reporters. However many other foreign journalists did testify, such as Jackie Rowland of the BBC in the Milosevic case and Ed Vulliamy of the Observer in the Blaskic case. In addition, journalists from the former Yugoslavia, Serb as well as Bosnian, gave evidence. So Randal's stand probably had less effect than it might have. Randal did not speak Serb, and had depended upon an interpreter, which limited the value of his testimony. The subpoena was eventually withdrawn.

While defending Randal's right to refuse on conscientious grounds, it would be inadvisable to criticise journalists who did testify. Journalists from the Serb community, such as Dejan Anastasijevic and Jovan Dulovic, who risked condemnation at home for testifying deserve our support.

It is interesting to note that the Hague Tribunal has not pressed journalists to divulge confidential sources. Anastasijevic, for example, was "politely asked" to reveal a source. But his refusal was accepted.

However, it is important that the ICTY quashed its own subpoena on Randal. In doing so, it noted that to compel journalists to testify could have "a significant impact on their ability to obtain information". However it did not rule out compulsion if the testimony was of direct value in determining a core issue and could not reasonably be obtained elsewhere. This approach is significantly more sensitive to the needs of journalism than the one taken by the Saville Inquiry into Bloody Sunday.

Most journalists would agree that it is possible to draw different conclusions about the issues above, without bringing journalism into disrepute. The case of Nick Martin-Clarke is quite different. Martin-Clarke started out by dabbling in journalism and many Northern Ireland journalists believe he ended up by endangering them.

He posed as a researcher for a member of parliament to get into a Northern Ireland jail to visit a dying sectarian murderer. He then forged credentials to obtain another visit, during which he persuaded the killer to

confess to a particularly callous killing. He obtained the information while acting under false pretences and he later obtained temporary journalistic credentials to sell an article about this interview to a newspaper.

There was considerable disquiet at this among journalists in Northern Ireland. They worried that if it was believed by some of the more violent elements that journalists were likely to go to the authorities, their lives would be in danger, and they have reason. The NUJ had a member shot dead by loyalists two years ago and at least seven others are currently under threat.

The issue has been discussed widely in the union and in April the National Executive Council declared Nick Martin-Clarke "not a fit and proper person" for membership. In other words, were he to apply for membership again, he would be refused, for breach of the Code of Conduct.

Action needed

It is vital for journalists to realise that our rights and duties depend on ourselves. We can sit passively by and let others decide our future. Or we can enter into the fray and help carve out a future that has some place for investigative journalism in it. Journalists are trained to observe — but we can't observe our own funerals. Sooner or later we have to influence the course of legislation, if the public is to continue to receive the information it needs. Journalism is coming under renewed pressure on the issue of source protection. But there are opportunities for us as well. There are parts of the legal establishment where our considerations are well received. It's up to journalists to avail of these.

In almost every European country, there is a need for legislative reform to allow protection of sources. And where that protection is present, there's still a need to supervise the forces of law, order and surveillance because they are increasingly coming to menace our privacy and therefore our ability to promise confidentiality.

At the European level we also have to continue to press for reform. The parliamentary assembly of the Council of Europe is an important ally and has already gone much further than many national parliaments. But we are always going to have to fight our corner to ensure the balance of rights protects the whistle-blower.

Our national unions and professional bodies and the EFJ and the IFJ exist to press for rights like these. But ultimately we depend on solidarity by journalists in support of those who come under pressure. Each journalist has to be ready to go to jail if necessary to defend this principle. In this sense, protection of sources is a democratic issue. ■

4 Conclusions & tips

Key arguments in support of source protection.

Journalists *depend* on their sources to inform the public - their ability to do so is compromised when forced to reveal confidential sources.

- ❑ Journalists have a *duty* to protect confidential sources as part of the protection to whistleblowers and to defend the *public's right to know* and access to information.
- ❑ The *independent* status of journalists is compromised when their sources and material becomes readily available to the police.

The principle of source protection is under increasing pressure from governments and companies and will continue to be so due to:

- ❑ *weaknesses* in national legislation that fail to meet standards set by the European Court of Human Rights,
- ❑ *poor awareness* by police officers and the judiciary about European and national legislation,
- ❑ *new legislation* introduced as part of the security response to terrorism.

Warning to journalists:

New strategies have been adopted by the police and authorities to circumvent source protection. They include:

- ❑ phone tapping, monitoring internet traffic and mobile telecommunications,
- ❑ seizures of journalists' material including computer files, etc.,
- ❑ requiring media to provide film as evidence - eg. following violent demonstration,
- ❑ turning a journalist witness into a defendant — journalists' are increasingly prosecuted for possession of 'stolen property' received from whistleblowers.

Recommendations and campaign tips for unions

1. Defend individual cases — pursue them to the ECHR if necessary.
2. Raise public awareness — winning the public debate can have a significant impact on the progress of individual cases.
3. Campaign on the basis of the journalist's duty to protect confidential sources and the public 'right to know'.
4. Don't forget the journalist in the dock — provide on-going moral support.
5. Don't rely on media owners to pursue cases - take on the case yourself.

Key websites

European Federation of Journalists
<http://www.ifj-europe.org/>

International Federation of Journalists
<http://www.ifj.org/>

Council of Europe
<http://www.coe.int/>

European Court of Human Rights
<http://www.echr.coe.int/>



International Federation of Journalists
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