How The Privacy Protection Act Shields Journalists from Governmental Overreach – Justin Kelton Article in New York Law Journal

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Justin T. Kelton examines the origins of the Privacy Protection Act, exploring its scope and limitations, and summarizes the remedies it offers for journalists who may be targeted improperly.

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The Privacy Protection Act was designed to shield journalists and media organizations from intrusive government searches. For decades, the statute was invoked only occasionally and rarely tested in high-profile litigation.

Things changed earlier this year, when federal agents executed a search warrant at a Washington Post reporter's home, thrusting the Act back into public view. This raid set the stage for litigation over how the Privacy Protection Act applies in modern leak investigations.

Given the renewed public debate over government searches of members of the press, this article examines the origins of the Privacy Protection Act, explores its scope and limitations, and summarizes the remedies it offers for journalists who may be targeted improperly.

The Act's History and Scope

The Privacy Protection Act was enacted in 1980 in response to the Supreme Court's decision in *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978), in which the Court held that the First Amendment does not provide the press with constitutional protection against police searches.

The Act prohibits the government from searching or seizing work product from reporters or members of the media in criminal investigations. The Act protects both "work product materials" and "documentary materials." 42 USCA § 2000aa; 42 USCA §2000aa-7.

The Act was intended to “afford the press and certain other persons not suspected of committing a crime with protections not provided currently by the Fourth Amendment.” 42 USCA §2000aa.

In *Citicasters v. McCaskill*, the U.S. Court of Appeals for the Eighth Circuit explained that the Act “presents a straightforward statutory scheme for protecting those engaged in information dissemination from government intrusion by prohibiting searches and seizures of documentary materials except where government officials have a reasonable belief that a statutory exception applies.” *Citicasters v. McCaskill*, 89 F.3d 1350 (8th Cir. 1996).

Under the Act, “work product materials” are defined as materials that: (i) are prepared, produced, authored, or created in anticipation of communicating such materials to the public; (ii) are possessed for the purposes of communicating such materials to the public; and (iii) “include mental impressions, conclusions, opinions, or theories of the person who prepared, produced, authored, or created such material.” 42 USCA §2000aa-7.

The Act excludes from its scope “contraband or the fruits of a crime or things otherwise criminally possessed, or property designed or intended for use, or which is or has been used as, the means of committing a criminal offense.” 42 USCA §2000aa-7.

Under the Act, it is unlawful for the government, in conducting a criminal investigation, to search for or seize work product materials from by a person who has a purpose to disseminate to the public a newspaper, book, broadcast, or other public communication.

Exceptions to the Protections

The Privacy Protection Act contains several significant exceptions. *First*, the Act does not bar searches or seizures when “there is probable cause to believe that the person possessing such materials has committed or is committing the criminal offense to which the materials relate,” as long as the “offense” is not the receipt or possession of the materials themselves. 42 USCA 2000aa. *Sennett v. U.S*., 778 F.Supp.2d 655 (E.D.Va. 2011); *Teichberg v. Smith*, 734 F.Supp.2d 744 (D.Minn. 2010).

Second, the Act does not apply when “there is reason to believe that the immediate seizure of such materials is necessary to prevent the death of, or serious bodily injury to, a human being.” 42 USCA § 2000aa.

Third, the Act does not apply “when a private party, rather than a government officer or employee, does the ‘seizing.’” *United States v. Sivanadiyan*, 847 Fed.Appx. 839 (11th Cir. 2021).

Remedies for Violations of the Act

The Privacy Protection Act creates “a private cause of action as the exclusive remedy to ensure that the protections of the Act would be effective.” *Citicasters*, 89 F.3d at 1355. Thus, under 42 U.S.C. § 2000aa-6, a person who is subject to violations of the Act can bring civil litigation for damages. Notably, however, materials obtained in violation of the Act are not excluded as evidence in criminal proceedings. *Citicasters* , 89 F.3d at 1355, n. 8.

Conclusion

The impact of the Privacy Protection Act reaches far beyond journalists and courtrooms. When reporters can gather information without fear of government intrusion, the public is better informed. By safeguarding newsrooms from unnecessary searches and seizures, the Act preserves the independence that meaningful investigative reporting requires. In an era of aggressive governmental investigations and sharp criticism of the media, the Privacy Protection Act remains an important safeguard for both the press and the citizens who rely upon it.

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