

2. The State first contends that because it “does not seek the identity of any source from whom information for the articles was obtained” the shield statute should not apply. However, § 5/8-901 protects “any person” from disclosing “the source of *any information* obtained by a reporter during the course of his or her employment.” § 5/8-901 (emphasis added). “Source,” in turn, is defined as “the person or means from or through which the news or information was obtained.” § 5/8-902(c). The protection provided by the Shield Statute to reporters is therefore not predicated on the information sought actually having been used in a published news article, and, in fact, Illinois courts have expressly held that both published and unpublished material is privileged under the statute. *See, e.g., People v. Slover*, 323 Ill. App. 3d 620 (2001) (applying shield statute to unpublished photographs); *Dunn v. Hunt*, No. 02-L-10310, 2003 WL 22330330, at *3, 31 Media L. Rptr. 2245, 2247 (July 25, 2003) (applying shield statute to unpublished video tapes); *Villeda v. Prairie Material Sales, Inc.*, No. 89-L-10181, 17 Media L. Rptr. 2289, 2292 (July 17, 1990) (applying shield statute to unpublished photographs).

3. The posters whose identities are sought by the State are sources of “unpublished” information to the Telegraph and are therefore protected by the Shield Statute. Indeed, the State does not dispute that the information posted was obtained by The Telegraph “during the course of his [] employment” at the paper, which is all the statute requires in order for the privilege to be triggered. *See, e.g., Beal v. Calobrisi*, No. 08-CA-1075 (1st Circ. Ct., Okaloosa County, Fla., October 9, 2008).

4. The State also asserts that because the individuals who left comments on The Telegraph’s website were never “in direct contact with a reporter or representative of the Telegraph,” the Shield Statute somehow is rendered inapplicable. In fact, the Shield Statute contains no such “direct contact” requirement, and the State points to none. Moreover, the

posters whose identities the State seeks *were*, in fact, in “direct contact” with the newspaper through its website. In this way, a post of information on the Telegraph’s website is no different from the newspaper receiving a letter or email from a writer who requests anonymity. The moment the persons at issue posted comments on The Telegraph’s web site, the newspaper had obtained information from them that it could use however it deemed appropriate in its editorial discretion. As a result, these persons plainly constitute “sources” under the Shield Statute, irrespective of whether The Telegraph ever used or incorporated the information it obtained from them in a separate news story.

5. The State also argues that The Telegraph’s website user agreement and privacy policy suggest the comments at issue were posted with no expectation of confidentiality by the posters. Whether the posters had any expectation of privacy when they provided information to The Telegraph has no bearing on the protection The Telegraph receives from the Shield Statute. In particular, the Shield Statute does not require that the source be confidential in order to trigger the privilege. *See, e.g., Slover*, 323 Ill. App. 3d at 624 (holding that “Section 8-901 protects even nonconfidential sources”); *People v. Arya*, 226 Ill. App. 3d 848, 857 (1992) (holding that the “privilege protects both confidential and nonconfidential sources”). The fact that the posters provided information to The Telegraph suffices to place their identities within the protection of the Shield Statute.

6. In any event, the privilege conferred by the Shield Statute belongs to the newspaper and its reporters, not their source. As the Illinois Appellate Court held in *People v. Silverstein*, 89 Ill. App. 3d 1039, 1043 (1980), *rev’d on other grounds* 87 Ill.2d 167 (1981): “While [other evidentiary privileges] are designed to protect the identity of an informer or confidential communications, the [shield law privilege] protects a reporter” The Telegraph

and Jim Shrader have done nothing to waive the statutory privilege, and certainly none of the language in the user policy or privacy policy amounts to a waiver of that privilege. The privacy policy provides only that the newspaper “*may* also disclose your personal information when we believe the law requires it.” Freedom Communications Privacy Policy, Appendix C to State’s Response (emphasis added). The Telegraph’s objections to the State’s subpoena make clear that The Telegraph does *not* believe the law requires disclosure in this instance.

7. The State also asserts that, even if the Shield Statute applied, it has overcome the privilege under §§ 5/8-906 and 8-907. Under § 5/8-907, the State must establish that: (1) “all other available sources of information have been exhausted” and (2) “disclosure of the information sought is essential to the public interest involved” in order to divest The Telegraph of its statutory privilege. § 5/8-907(2). As explained below, the State has not satisfied either element.

8. As to the first element, the Illinois Appellate Court has held that “the legislature intended divestiture of a reporter’s privilege to be a *last resort* to get the sought-after information.” *Arya*, 226 Ill. App. 3d at 862 (emphasis added). Accordingly, the State must “satisfy the court that its investigation has been sufficiently thorough and comprehensive that further efforts to obtain the sought-after information would not likely be successful.” *Id.* at 861. In its response, the State attempts to satisfy this element of § 5/8-907 by forecasting testimony from Detective Gary Burns to the effect that law enforcement officials have expended “enormous amount of time and energy” in the investigation of Mr. Price. Such testimony would not established the required showing. The issue for the Court is not how much time and effort has been spent on the investigation as a whole, but rather how much time and effort has been

spent in identifying these potential witnesses and whether they may be ascertained through other means.

9. In fact, the record does not indicate that the State has made *any* effort to ascertain the identity of these individuals other than by serving the Subpoena on The Telegraph. The State admits as much in its response. In contrast, Illinois courts require a “thorough and comprehensive investigation” before divesting a reporter of the privilege. *Arya*, 226 Ill. App. 3d at 860. At the very least, this means the State must show *some* investigative effort put into finding the source of these comments, a showing the State has not even hinted that it could make.

10. The State also attempts to turn the exhaustion requirement on its head by asserting that the only way to know for sure if it has exhausted alternative sources of the information sought is for The Telegraph to give the State the information it seeks. The State—not The Telegraph—bears the burden under the Shield Statute of proving by a preponderance of the evidence that the State has met both elements of § 5/8-907(2) before the privileged may be divested. *See Arya*, 226 Ill. App. 3d at 862. To require a newspaper to reveal its protected sources in order *to disprove* that the State has exhausted alternative sources would eviscerate the privilege entirely.

11. As to the second element of § 5/8-907(2), while The Telegraph acknowledges the seriousness of the underlying proceeding, the State has not carried its burden of showing that the identities of the posters at issue is “essential” to the case it will make against the Defendant in this matter. Tellingly, in its response to the motion to quash the State failed to identify any specific comment, piece of information, or other claim that it contends falls within the *exclusive* knowledge of the posters that rises to the level of “essential.” It is not enough to argue that the sought-after sources *might* have some information that bears in some way on the charges against

the Defendant. Because the State has not established that The Telegraph's sources are the only persons from whom it can obtain information "essential" to its case, the privilege stands as a matter of law. § 5/8-907(2).

12. In short, because the State has failed to meet either of the two required elements under § 5/8-907(2), Mr. Shrader and The Telegraph cannot be divested of their statutory privilege.

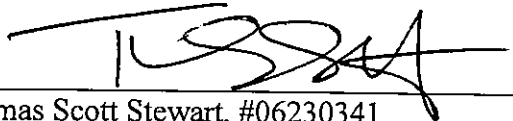
WHEREFORE, for the foregoing reasons, The Telegraph respectfully requests that the Court enter an Order quashing the Subpoena at issue and preventing The Telegraph from being compelled to disclose the identities, names, addresses, and IP addresses of those who provided information anonymously on its website. The Telegraph further requests that it have such other and further relief to which it is justly and equitably entitled.

DATED this 2nd day of December, 2008.

Respectfully submitted,

HEPLER, BROOM, MacDONALD,
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By:


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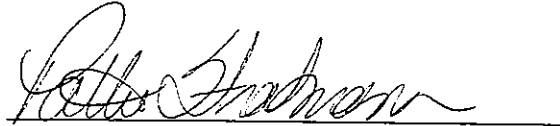
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CERTIFICATE OF SERVICE

The undersigned certifies that a true and complete copy of the Reply to State's Response to Motion to Quash and Renewed Motion to Quash Subpoena to *The Alton Telegraph* was sent U.S. Mail, postage prepaid, first-class in St. Louis, Missouri, and addressed, this 2nd day of December, 2008, to:

William A. Mudge
Madison County State's Attorney
157 North Main Street
Suite 402
Edwardsville, Illinois 62025

The undersigned also certifies that a true and complete copy was sent via facsimile transmission to 618-656-7312.

A handwritten signature in cursive script, appearing to read "William A. Mudge", is written over a horizontal line.

FILED

SEP 29 2008

CLERK OF CIRCUIT COURT # 82
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

**IN THE CIRCUIT COURT
FOR THE THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS**

The Alton Telegraph,

Petitioner,

v.

The People of the State of Illinois,

Respondent.

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Cause No. 08-MR- 548

**IN RE GRAND JURY SUBPOENA
DIRECTED TO THE ALTON
TELEGRAPH**

MOTION TO QUASH SUBPOENA TO THE ALTON TELEGRAPH

Petitioner *The Alton Telegraph* ("The Telegraph"), pursuant to 735 Ill. Comp. Stat. 5/8-901 (2007), hereby objects to and moves to quash the grand jury subpoena (the "Subpoena") that was issued by the Madison County Third Judicial Circuit Court on September 18, 2008 and received by The Telegraph on September 22, 2008. A copy of the Subpoena is attached hereto as Exhibit A. In support of this Motion, The Telegraph shows the following:

1. The Subpoena commands that "The Alton Telegraph, Attn: Jim Shrader" appear at 9:00 a.m. on October 2, 2008, before the Grand Jury to be held at the Madison County Criminal Justice Center in Edwardsville, Illinois, and produce at that time the following: "Any records leading to the full identity, including name, address and IP address of the following bloggers that have left messages and comments on the Alton Telegraph Web Page: john3418, puplebutterfly, mrssully, cstyle and pnbcmr."

2. The Subpoena was issued in connection with a criminal investigation that does not involve The Telegraph.

3. The Telegraph is a daily newspaper of general circulation that is distributed in Alton, Illinois and the surrounding area, and it is engaged in newsgathering activities. The Telegraph distributes news in traditional form and through the electronic media.



4. The Subpoena should be quashed because it violates the statutory privilege newspapers and their editors and reporters have under Illinois law not to disclose newsgathering information, including the identity of confidential sources and other source material. See 735 Ill. Comp. Stat. 5/8-901.

5. Section 5/8-901 provides reporters with a qualified privilege from being compelled to testify as to “the source of any information obtained by a reporter during the course of his or her employment.” *Id.* (emphasis added). According to the Illinois Supreme Court, “[t]he purpose of the privilege is to assure reporters access to information, thereby encouraging a free press and a well-informed citizenry.” *People v. Pawlaczyk*, 189 Ill. 2d 177, 187 (2000). Section 5/8-901 applies to both confidential and non-confidential sources. See, e.g., *People v. Slover*, 323 Ill. App. 3d 620, 624 (2001); *People v. Arya*, 226 Ill. App. 3d 848, 857 (1992).

6. The Telegraph and its publisher, Jim Shrader, clearly fall within the scope of the statute’s protection. Section 5/8-902(a) provides that a “reporter” is “any person regularly engaged in the business of collecting, writing, or editing news for publication through a news medium on a full-time or part-time basis.” “News medium,” in turn, is defined as “any newspaper or other periodical,” a definition that plainly covers The Telegraph.

7. The Subpoena triggers the protection afforded by Section 5/8-901 because it seeks to compel The Telegraph to disclose the “source[s]” of information it obtained over the Internet. Section 5/8-902(c) defines a “source” as “the person or means from or through which the news or information was obtained.” The court in *Slover* read the term “source” broadly, holding that “[b]y defining ‘source’ to include a ‘means,’ the legislature clearly intended the privilege to protect more than simply the names and identities of witnesses, informants, and other persons providing news to a reporter.” *Slover*, 323 Ill. App. 3d at 624.

8. By providing information anonymously on The Telegraph's website about a newsworthy topic and in response to an article published by the Telegraph, the anonymous persons at issue are both "persons" and a "means" by which The Telegraph obtained information and therefore constitute protected "source[s]" under Section 5/8-901. Indeed, in the digital age a newspaper or reporter receiving information in this fashion is no different from anonymous tips provided to newspaper reporters telephonically or in written form.

9. The Subpoena should be quashed because the State's Attorney has failed to meet the high standard required to overcome the protection afforded by Section 5/8-901.

10. For example, there has been no showing whatever that the State's Attorney and local law enforcement have exhausted all other potential avenues for the information sought—alleged *past* criminal activity by the subject of the investigation. The State's Attorney must employ traditional methods of investigation, such as reviewing criminal and court records and speaking with friends, neighbors, colleagues and other persons who know the defendant, before conscripting the news media in conducting the investigation. Plainly there are means other than The Telegraph to seek further background information about the defendant, and the State's Attorney must exhaust those other means before he may overcome the statutory privilege under Section 5/8-901.

11. The Illinois Appellate Court has held that "the legislature intended divestiture of a reporter's privilege to be a last resort to get the sought-after information." *Arya*, 226 Ill. App. 3d at 862. Accordingly, the State's Attorney must "satisfy the court that its investigation has been sufficiently thorough and comprehensive that further efforts to obtain the sought-after information would not likely be successful." *Id.* at 861. In so doing, he must make "more than a showing of inconvenience to the investigator before a reporter can be compelled to disclose his

sources." *People v. Warden*, 104 Ill. 2d 419, 428 (1984). The State's Attorney has not even approached such a showing here.

12. For these reasons, Section 5/8-901 protects the information sought from The Telegraph from disclosure, which warrants entry of an order quashing the Subpoena.

13. In addition to violating Section 5/8-901, the Subpoena also violates The Telegraph's rights as secured by the First and Fourteenth Amendments to the United States Constitution, which further precludes the State's Attorney from compelling The Telegraph to disclose the sought-after information.

14. In *Branzburg v. Hayes*, 408 U.S. 665 (1972), the Supreme Court considered in three separate cases a newspaper reporter's constitutional privilege from giving grand jury testimony. In discussing the interplay between a grand jury's power to obtain or compel testimony and the free press protections of the First Amendment, the Court held:

Finally, as we have earlier indicated, news gathering is not without its First Amendment protections . . . Grand juries are subject to judicial control and subpoenas to motions to quash.

Id., 408 U.S. at 707-08.

15. Justice Powell wrote a concurring opinion in *Branzburg*, and his vote was necessary to achieve the five-member majority. See *Branzburg*, 408 U.S. at 709. In his concurrence, Justice Powell amplified the foregoing discussion, writing that:

If a newsman believes that the grand jury investigation is not being conducted in good faith he is not without remedy. Indeed, if the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe that his testimony implicates confidential source relationship without a legitimate need of law enforcement, he will have access to the court on a motion to quash and an appropriate protective order may be entered.

Id., 408 U.S. at 710 (Powell, J., concurring).

16. This case presents the dangers to free press rights highlighted by Justice Powell in *Branzburg*. Here, Detective Burns of the Madison County Sheriff's Department contacted The Telegraph informally, asking for the identity of those who posted information about the defendant anonymously on The Telegraph's website. When informed by the newspaper's publisher that such a request had to be made formally, Detective Burns responded not by making a formal request but rather by attempting to hale Jim Shrader and The Telegraph before a grand jury.

17. The tenuous connection between the information sought and the pending investigation, as well as the ample alternative means the State's Attorney has for securing information about other criminal activity by the defendant, raise significant questions about the "legitimate need" for the information sought in the Subpoena. The Subpoena relates to information posted anonymously about *other* crimes allegedly committed in the past by the defendant, who is currently charged with murder.

18. Given the suggestion from the State's Attorney that he may seek information on the defendant's alleged past criminal conduct from The Telegraph before looking elsewhere for that same information, the constitutional balance tips even more heavily in favor of protecting The Telegraph from being forced to disclose its sources. *See Branzburg*, 408 U.S. at 710 ("The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions.") (Powell, J., concurring). This further warrants entry of an order quashing the Subpoena.

19. To do otherwise would chill the First Amendment rights of The Telegraph, Jim Shrader, and those who provided information anonymously on The Telegraph's website. As the Seventh Circuit recently held, "[w]e do not expect courts will forget that grand juries must

operate within the limits of the First Amendment as well as the Fifth.” *McKevitt v. Pallasch*, 339 F.3d 530, 533 (7th Cir. 2003).

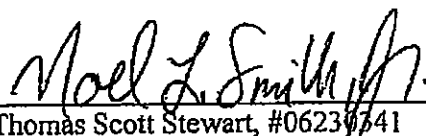
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DATED this 29th day of September, 2008.

Respectfully submitted,

HEPLER, BROOM, MACDONALD,
HEBRANK, TRUE & NOCE, LLC

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CERTIFICATE OF SERVICE

The undersigned certifies that a true and complete copy of the Petitioner The Alton Telegraph's Motion to Quash Subpoena was sent U.S. Mail, postage prepaid, first-class in Edwardsville, Illinois, 62025, and addressed, this 29th day of September, 2008, to:

William A. Mudge
Madison County State's Attorney
157 North Main Street
Suite 402
Edwardsville, Illinois 62025

The undersigned also certifies that a true and complete copy was sent via facsimile transmission to 618-656-7312.





OFFICE OF THE STATE'S ATTORNEY
MADISON COUNTY, ILLINOIS

William A. Mudge
State's Attorney

157 North Main Street
Suite 402
Edwardsville, Illinois 62025

Voice: 618 692-6280
Facsimile: 618 656-7312

September 18th, 2008

The Alton Telegraph
ATTN: Jim Shrader
111 East Broadway
Alton, IL 62002

RE: 08-18924
Madison County Sheriff's Department- Detective Burns

Dear Keeper of Records:

Enclosed please find a Grand Jury Subpoena Duces Tecum issued by the Madison County Third Judicial Circuit Court regarding the above-captioned investigation. Please note the return date on the subpoena is October 2nd, 2008.

Pursuant to current Illinois law, you **MUST APPEAR IN PERSON** before the Grand Jury bearing the records requested in the attached Subpoena Duces Tecum. The Grand Jury meets in the Madison County Criminal Justice Center located at 509 Ramey Street in Edwardsville, Illinois. Please appear in court promptly at 9:00 AM with the requested records.

Thank you in advance for your cooperation.

Very truly yours,

William A. Mudge
Madison County State's Attorney

WAM:jeh



8 of 9
08-MR-548

SUBPOENA DUCES TECUM

IN THE CIRCUIT COURT FOR THE THIRD JUDICIAL CIRCUIT OF ILLINOIS,
MADISON COUNTY, EDWARDSVILLE, ILLINOIS

STATE OF ILLINOIS,)
) SS.
COUNTY OF Madison)

THE PEOPLE OF THE STATE OF ILLINOIS
to the Sheriff of said County - GREETING:

WE COMMAND YOU TO SUMMON The Alton Telegraph, Attn: Jim Shrader, 111 East Broadway, Alton, IL 62002

if _____ he _____ shall be found in your County, personally to be and appear on the _____ 2nd _____ day of September, AD 20 08, before the _____ Grand Jury _____ Court of said County, to be holden at the Courthouse in _____ Edwardsville _____ in said County, and to bring with _____ h _____ and produce at the time and place aforesaid, to be used as evidence _____ for The People _____ certain instrument _____ Of writing purporting to be Any records leading to the full identity, including name, address and IP address of the following bloggers that have left messages and comments on the Alton Telegraph Web Page: john3418, puplebutterfly, mrssully, cstyle and pnbcm.

bearing date on or about the _____ day of _____ in the year of our lord two thousand and _____ then and there to testify, and the truth to speak, concerning all and singular those things of which _____ he _____ may have knowledge, or said instrument _____ of writing doth import of, and concerning a certain suit now pending and undetermined in the said _____ Grand Jury _____ Court wherein

The People of The State of Illinois

Plaintiff _____, in an MCSD/Det. Burns pending investigation/08-18924/CH/jh

Defendant _____, in the plea of _____ on the part of the said _____ And this _____ he _____ shall in nowise omit, under penalty of what the law directs; and have you then and there this writ, with an endorsement thereon in what manner you shall have executed the same.



WITNESS, _____, Clerk of our Said Third Judicial Circuit Court, and the Seal thereof. At Edwardsville this 18th day of September, AD 20 08 _____ Clerk