



REUTERS/ Thomas Mukoya

UNDERSTANDING THE LAWS ON JOURNALISTIC SOURCES IN KENYA

INTRODUCTION

This Guide provides journalists with a practical understanding of the legal framework on news sources in Kenya. This awareness will empower journalists to understand their legal rights and obligations and continue to report on issues of vital public interest. The Guide assesses the recognition of news sources in law, the protection of news sources as well as search and seizure relating to journalists' gadgets and information.

1. WHO IS DEFINED AS A JOURNALISTIC SOURCE?

There is no formal legal definition of journalistic sources. However, it can be inferred from the [Media Council Act, 2013](#), the [Code of Conduct for the Practice of Journalism](#) and case law that journalistic sources are individuals who have knowledge pertinent to a story. Sources also include documents that contain relevant information for journalistic work.

2. WHICH LAW PROTECTS JOURNALISTIC SOURCES?

Protection of journalistic sources in Kenya is anchored in Article 34 of the [Constitution of Kenya, 2010](#) (the Constitution) that guarantees the freedom and independence of the media in Kenya, including state-owned media, to determine their own editorial content free from external influence and subject only to:

- a. limits to freedom of expression under Article 33(2) of the Constitution which include: propaganda for war, incitement to violence; hate speech; or advocacy of hatred; and
- b. industry standards as determined by an independent regulator.

In particular, protection of journalistic sources is provided for under the Second Schedule of the [Media Council Act, 2013](#) (the Media Council Act) which sets out the [Code of Conduct for the Practice of Journalism](#). The relevant provisions of the Code are as follows:

- a. Clause 1 (2) and (3) of the Code notes that:

"All sides of the story shall be reported, wherever possible."

“Comments shall be sought from anyone who is mentioned in an unfavorable context and evidence of such attempts to seek the comments shall be kept”;

- b. Clause 3 (2) (a) of the Code notes that:

“A person subject to this Act shall identify sources whenever possible. Confidential sources shall be used only when it is clearly in public interest to gather or convey important information or when a person providing information might be harmed”;

- c. Further, clause 6 (1) of the Code provides that:

“Unnamed sources shall not be used unless the pursuit of the truth will best be served by not disclosing the source who shall be known by the editor and reporter.”; and

- d. Lastly, clause 7 of the Code provides that:

“A person subject to this Act has a professional obligation to protect confidential sources of information.”

Additionally, section 27 of the Media Council Act establishes the Complaints Commission which has the mandate to:

- a. mediate or adjudicate in disputes between the government and the media; between the public and the media; and between media houses on ethical issues; in the Code such as accuracy and fairness in reporting;
- b. ensure the adherence to high standards of journalism as provided for in the Code for the practice of journalism in Kenya; and
- c. achieve impartial, speedy and cost-effective settlement of complaints against journalists and media enterprises, without fear or favor in relation to the Act.

Pursuant to section 42(2) of the Media Council Act, appeals from the Complaints Commission are filed at the High Court of Kenya.



3. DOES THE LAW PROTECT ME FROM REVEALING MY SOURCES? IN WHAT INSTANCES MIGHT I BE REQUIRED TO REVEAL A SOURCE?

The law does not protect a journalist from revealing their sources. The [Code of Conduct for the Practice of Journalism](#) requires journalists to identify sources whenever possible. However, it states, “*confidential sources shall be used only when it is clearly in public interest to gather or convey important information or when a person providing information might be harmed*”. An example of a public interest situation is where revealing a source would have a chilling effect particularly when the source provides information that enhances accountability and transparency of public institutions and some private institutions. Nonetheless, only an order of the High Court may compel a journalist to reveal the identity of a confidential source.

The [Bribery Act, 2016](#) (the Bribery Act) and the [Access to Information Act, 2016](#) (the Access to Information Act) only afford protections to persons making disclosures (whistleblowers) to law enforcement institutions or other public entities. The Bribery Act only provides protection to a whistleblower of an offence under the Bribery Act (section 21(1)). The protection under the Bribery Act includes protection by law enforcement agencies and the Witness Protection Agency in addition to the criminalisation of any attempt by any person to intimidate a whistleblower.

The Access to Information Act affords protection to whistleblowers making disclosures in the public interest, and only in respect to disclosures made to law enforcement agencies or other appropriate public entities (section 16).

In this regard, these whistleblower protections are not available to news sources who disclose information to journalists.

A draft [Whistleblower Protection Bill, 2021](#), was introduced in the previous parliament (2017-2022) but did not undergo a First Reading. If re-introduced and passed, this Bill would provide a mechanism for protecting whistleblowers who make disclosures to, among others, a registered newspaper or media house.

4. WHAT RIGHTS DOES A SOURCE HAVE?

A journalistic source has the right to anonymity under the constitutional guarantee of freedom and independence of the media under Article 34 of the Constitution and clause 7 of the Code of Conduct for the Practice of Journalism. This right is, however, not absolute and is subject to other constitutional rights, including the right of access to information. This means the courts will determine whether this right is available depending on the circumstances of the case before the court. For example, public interest may override the right to anonymity.

5. WHAT SHOULD I BE WARY OF WHEN DEALING WITH A JOURNALISTIC SOURCE?

When interacting with sources, journalists should be mindful of their responsibilities under the Code of Conduct for the Practice of Journalism, in particular:

- a. establishing the factual accuracy of information presented by a source;
- b. resisting any incentives or undue influence from sources of information for a story in the form of threats, gifts, favours or compensation; and
- c. where relevant, establishing the reasons behind a source seeking confidentiality.



6. CAN I FACE LEGAL ACTION IN MY INTERACTIONS WITH A SOURCE, AND IN WHAT CIRCUMSTANCES?

Journalists are liable, upon conviction, to a fine of up to Ksh. 200,000 (approximately 2,000 USD), or to imprisonment for a term of up to six months, or both for breach of the Code of Conduct for the Practice of Journalism.

7. IN WHAT INSTANCES CAN I RECORD A SOURCE?

A journalist may only record a person without their knowledge if the recording is necessary to protect the journalist in a legal action or for some other compelling reason (Clause 12, Code of Conduct for the Practice of Journalism).

A journalist may record a telephone conversation for broadcast or broadcast a telephone conversation live after informing the party to the call of their intention to broadcast the conversation. This requirement may, however, be waived where the broadcast can reasonably be presumed, like telephone conversations to programmes where the station customarily broadcasts calls (Clause 12, Code of Conduct for the Practice of Journalism).

A journalist may use *"surreptitious news gathering techniques including hidden cameras or microphones, only if there is no other way of obtaining stories of significant public importance, and if the technique is explained to the audience"* (Clause 3 (2) (d) of the Code of Conduct for the Practice of Journalism).

8. CAN THE POLICE CONFISCATE MY DOCUMENTS/ GADGETS FOR INVESTIGATION? IN WHAT INSTANCES CAN THEY DO SO?

Law enforcement officers have the power to search and seize property while conducting criminal investigations or when there is reasonable belief that the property is going to be used in the commission of a crime. However, any police powers of search and seizure are subject to the limitations in a search warrant issued under section 118 of the [Criminal Procedure Code](#) or any special circumstances that may require a search without a warrant under section 60 of the [National Police Service Act](#) (the NPS Act).

The special circumstances under section 60 of the NPS Act are where a police officer in charge of a police station or an officer investigating an alleged offence has reasonable grounds to believe that the delay in obtaining a search warrant will significantly compromise an ongoing investigation. The relevant police officer must record the grounds for such a belief in writing and also describe what is to be searched for with the information available to them, before conducting the search. Any item or object seized during a search without a warrant must be taken before a magistrate in whose jurisdiction the item/object was found without undue delay.

9. CAN THE POLICE CONFISCATE MY DOCUMENTS ONLINE? CAN THE POLICE INTERCEPT MY COMMUNICATIONS WITH SOURCES, INCLUDING VIA SECURE/ENCRYPTED PLATFORMS?

Section 48 of the [Computer Misuse and Cybercrime Act](#) (CMCA) allows the police and other authorised persons to search and seize stored computer data and these powers include online content under sections 51, 52 and 53 of the CMCA.

Section 49 of the CMCA allows the police to withhold any access to a computer system or data seized pursuant to section 48 of the CMCA from any person, including a person who should ordinarily have use of the computer system or has a right to the information or data seized. Police may only withhold such access where they have reasonable grounds to believe that granting access may jeopardise the investigation that initiated the search or any other ongoing investigation. Such restriction of access may be rescinded by a court order in relation to persons who should have custody of or a right to the computer system or information or data in question.

Further, section 56 of the [Kenya Information and Communication Act](#), 1998 (KICA) grants the Cabinet Secretary in charge of internal security the power to authorise the interception and seizure of any item(s) relayed by post, in the interest of public security or tranquillity. The scope of this provision allows the police or any other authorised officials to seize any items in transit by post on the grounds of national security.

Collectively, the above provisions of the CMCA and KICA allow the police or other authorised person to monitor, intercept and seize any communication that is reasonably considered material to a criminal investigation or proceeding.

10. WHEN CAN THE POLICE INTERCEPT MY COMMUNICATION ONLINE?

Section 52 of the CMCA allows the police and other authorized persons to collect real time traffic data associated with specified communications and related to a person under a specified criminal investigation, provided that a court order to that effect has been obtained beforehand.

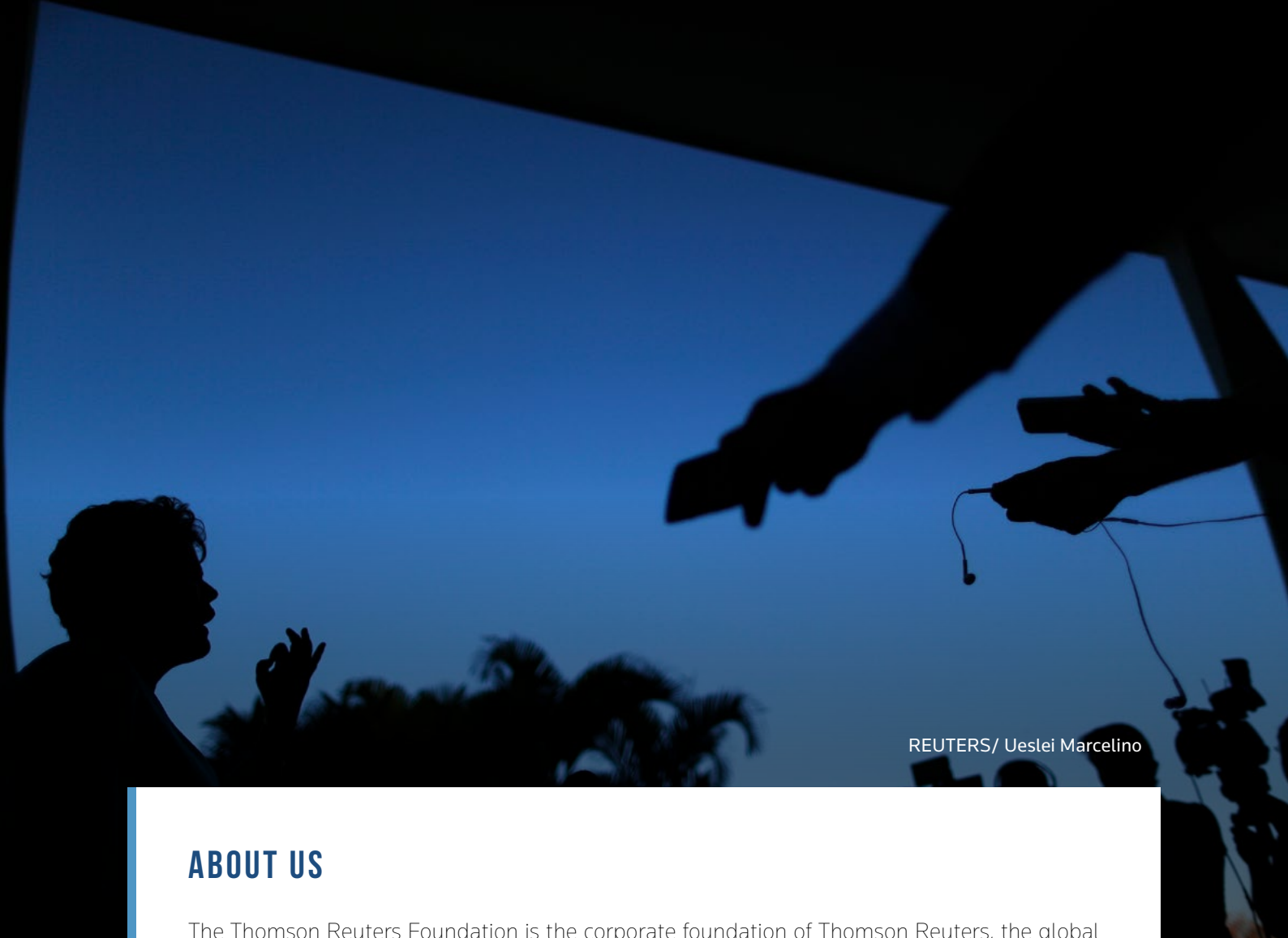
Significantly, section 51(2)(b) of the [Data Protection Act, 2019 \(DPA\)](#) exempts any processing of personal data that is necessary for national security or public interest from regulation by the DPA. Therefore, processing of personal data by law enforcement officials in the course of duty would not necessarily constitute unlawful data processing under the DPA. The DPA allows law enforcement officers to process journalists' or journalistic sources' personal data if this is done during a criminal investigation by the relevant law enforcement officer. However, the law enforcement officer must comply with the general requirement to comply with data protection principles relating to lawful processing, minimisation of collection, data quality, and adopting security safeguards to protect personal data (section 51 of the DPA).

11. WHEN CAN THE POLICE CONFISCATE MY JOURNALISTIC DOCUMENTS OR INTERCEPT MY COMMUNICATIONS?

As discussed above, communication surveillance or police power of search and seizure can only be exercised after a court order authorizing it has been granted. The only instance where a police officer or other authorised person may act without a prior authorising order is pursuant to section 60 of the NPS Act and section 51 of the CMCA where a notice may be issued to any person in possession or control of a computer system requiring that:

- (i) specified traffic data pertinent to a criminal investigation be preserved; or
- (ii) they disclose sufficient traffic data concerning any communication in order to identify the service providers and the path through which such communication was transmitted.

The exercise of this power is subject to there being a risk or vulnerability that the specified traffic data may be modified, lost, destroyed or rendered inaccessible. Additionally, such a notice will only be valid for a period of 30 days, with the requirement that any extension to this period be authorised by a court of law.



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