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UNDERSTANDING PROTECTION OF SOURCES FOR MEDIA OUTLETS AND JOURNALISTS OPERATING IN GERMANY

This Guide provides an overview of the protection of journalistic sources or journalistic material under German law as well as the case law – i.e. the principles and precedents established in judicial decisions – of the European Court of Human Rights. This information will help journalists and media organisations understand their legal rights and obligations and continue to report on issues of vital public interest.

Freedom of the media is fundamental to a democracy. German Basic Law guarantees freedom rights to persons and organisations active in the field of press and broadcasting.[1] As a result, institutional independence of the press and broadcasting is extensively protected in Germany. The protection also covers the conditions and all activities necessary for the media to fulfill its function adequately. This includes the secrecy of the sources of information and the relationship of trust between the press or broadcasting and the informants.[2] The protection of both is indispensable because the press cannot function without private information, but informants must be able to trust that their identity will remain a secret.[3] This is in line with the European Court of Human Rights (ECtHR), which also sees the protection of journalistic sources as a basic condition for freedom of the press.[4] There are, however, certain circumstances where the protection of journalistic sources can be overcome by an overriding public interest, which are explored further below.

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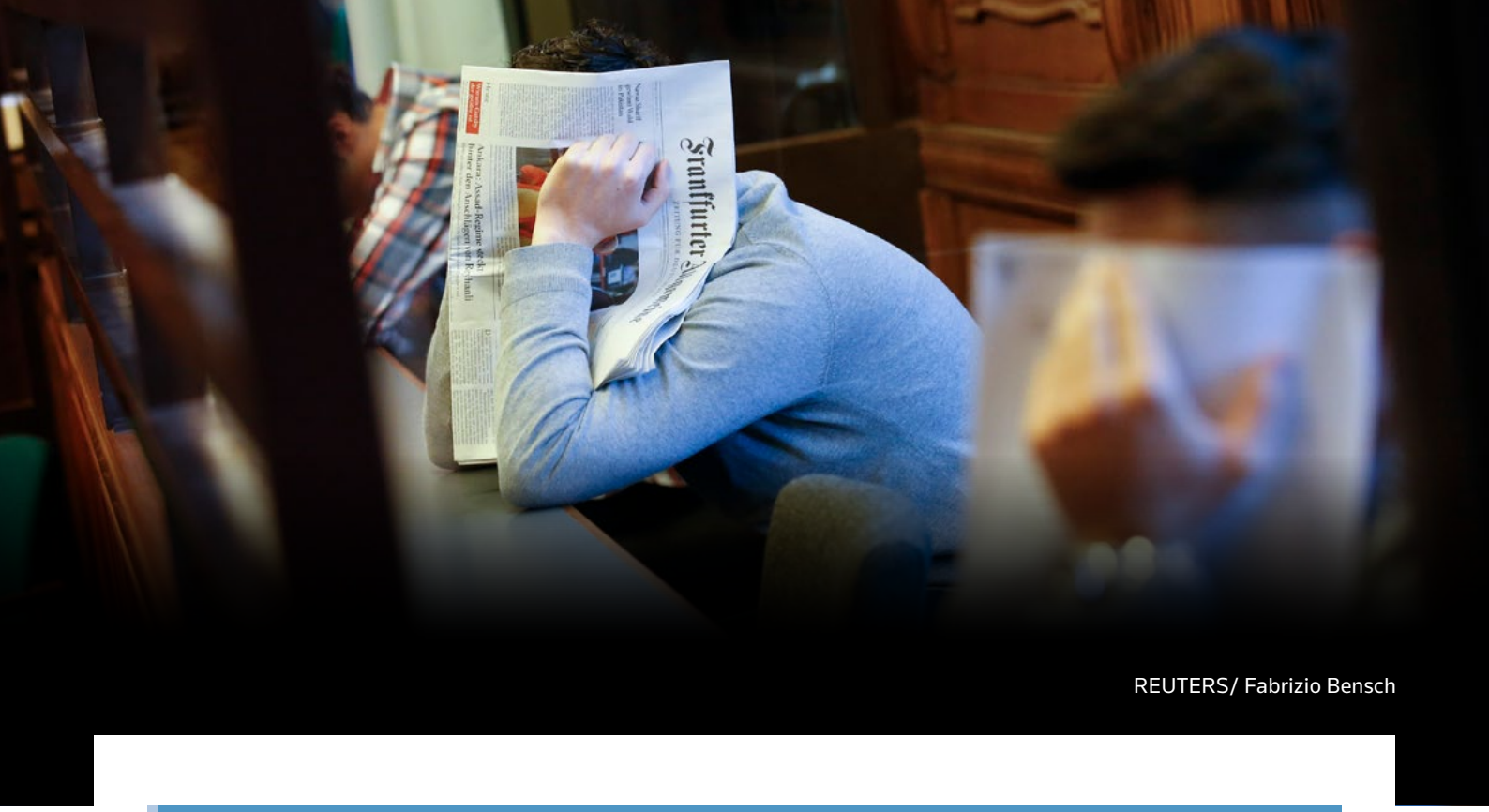

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1. LEGAL RECOGNITION OF JOURNALISTIC SOURCES

There is no uniform legal definition of the terms "journalistic source" or "journalistic materials" under European or German law; however, there is useful guidance in court decisions. The ECtHR defines the term in a decision relating to the protection of journalistic sources, for example, as "any person who provides information to a journalist".[5] The term "journalistic materials" includes all the information which are the basis for the journalistic publication. A publication is "journalistic" if it is fact-oriented, has a certain degree of timeliness and structure, and is the result of a selection process.[6]

In essence, "journalistic sources" and "journalistic materials" are persons, places, texts, photographs or videos from which information is derived. The following are illustrative examples:

- Interviewed persons who have certain information on a topic, usually not publicly known
- Press agencies, in Germany e.g. the "German Press Agency"; journalists may generally rely on reports from such official agencies
- Archives that have been searched for the purpose of research
- Publications relied upon by the journalist in his or her report
- Unpublished documents or records that the journalist has had access to or even has in his or her possession that contain information
- Photographs and videos, etc.
- If the "journalistic source" is a person, they are usually referred to as an "informant". An "informant" can be any author or sender of contributions and documents that provides suggestions, hints, information or material (pictures, sound or film recordings, written documents etc.).

1 Article 5 para. 1 of the German Basic Law.
2 cf. German Federal Constitutional Court, judgment of 14 July 1999 – 1 BvR 2226/94, 2420/95 and 2437/95 – Telecommunications surveillance by the Federal Intelligence Service.
3 cf. Federal Constitutional Court, partial judgment of 5 August 1966 – 1 BvR 586/62, 610/63, 512/64 – Spiegel; decision of 28 November 1973 – 2 BvL 42/71.
4 *Goodwin v. The United Kingdom*, Case No. 28957/95, 28 May 2002.
5 *Telegraaf Media Nederland Landelijke Media B.V. and Others v. The Netherlands*, Case No. 39315/06, 22 November 2012.
6 In other words, a selection of topics, information, sources etc.

2. RIGHT NOT TO DISCLOSE JOURNALISTIC SOURCES

Under both European law and German law, journalistic sources are widely protected. Basically, the informant has the right to remain anonymous and journalists may not be forced to publish their information material or any information leading to the identity of his/her informants being revealed.

A) RIGHT NOT TO DISCLOSE JOURNALISTIC SOURCES UNDER THE EUROPEAN COURT OF HUMAN RIGHTS

The ECtHR rules on complaints by individuals, groups of individuals or states concerning violations of the rights recognized in the European Convention on Human Rights (ECHR). Citizens can turn to it after domestic legal remedies have been exhausted, i.e. only after they have unsuccessfully appealed to the national courts for the violation of their rights. According to the case law of the ECtHR, the protection of journalistic sources is one of the core elements of the freedom of the press, protected by Article 10 of the ECHR (the right to freedom of expression). The ECtHR has repeatedly emphasised that Article 10 ECHR protects both the content of information, as well as the ways of receiving the information and dissemination of the content. The case law shows that the press is afforded the broadest possible protection regarding the confidentiality of journalistic sources.

In the seminal decision of ***Goodwin v. The United Kingdom*** (see below),[7] the ECtHR stated:

> *"Protection of journalistic sources is one of the basic conditions for press freedom, as is reflected in the laws and the professional codes of conduct in a number of Contracting States and is affirmed in several international instruments on journalistic freedoms ...* ***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 (Article 10) of the Convention unless it is justified by an overriding requirement in the public interest."*

Similarly, the Court has ruled on several occasions that searches of journalists' homes and workplaces for the purpose of identifying informants who have provided confidential information to journalists constitute an interference with their Article 10 rights.[8]

In brief: Journalists have the right not to disclose their source. Courts may not force them to do so unless there is an overriding requirement in the public interest.

In addition to the ECHR, Article 19 of the Universal Declaration of Human Rights (not a legally binding document, but carries political and moral weight) and Article 19 of the International Covenant on Civil and Political Rights also protect freedom of expression, information and the press and thus the protection of sources.

7 *Goodwin v. The United Kingdom*, Case No17488/90, 27 March 1996.
8 *Saint-Paul Luxembourg S.A. v. Luxemborg,* Case No. 26419/10, 18 April 2023.

CASE LAW EXAMPLES

Goodwin v. The United Kingdom[9]

Background: A journalist was ordered, among other things, to reveal the identity of his source of information from which he had obtained a company's confidential business plan. He was also fined £5,000.

Decision of the ECtHR: The ECtHR held that injunctions to prevent the publication of information could be considered "necessary in a democratic society", but that disclosure of the source of that information was not required. In this case, it found that there was no such overriding public interest. The danger that the informant could pass on the data to other persons, as well as the company's desire to identify a disloyal employee, were not sufficient in that regard. According to the ECtHR, there was no reasonable relationship between the legitimate aim pursued by the disclosure order and the means used to achieve that aim. The ECtHR noted the importance of protecting journalistic sources for the freedom of the press and held that disclosure of sources would have a chilling effect in society unless disclosure was justified by the public interest. Both the order requiring the applicant to disclose his source and the fine imposed on him for refusing to do so violated his right to freedom of expression under Article 10 ECHR.

Nordisk Film & TV A/S v. Denmark[10]

Background: A journalist was ordered by a court to disclose research material he had obtained by joining an association consisting of convicted sex offenders that were working "towards developing paedophiles' sense of responsibility towards children".

Decision of the ECtHR: It is one of the few judgments in which the ECtHR found no violation of Article 10 ECHR. The national court had the right to interfere with the journalist's freedom of expression because it was justified to prevent criminal offences, including a serious case of child abuse. The ECtHR found that the persons talking to the journalist could not be regarded as sources of journalistic information in the traditional sense, since the journalist worked undercover and they were unaware that they were being recorded.

In brief: Journalists are more likely to be required to disclose research material when the sources did not contact the press of their own accord and do not know that they are sources because the journalists are acting undercover. A person who is not aware that he or she is acting as a source is not considered by case law to be worthy of the same protections as an informant.

Voskuil v. The Netherlands[11]

Background: A journalist was ordered by a court to reveal his source for two articles on criminal investigations into arms deals he had written for a newspaper.

Decision of the ECtHR: The Court held that the Dutch government's interest in knowing the identity of the source did not outweigh the journalist's interest in keeping it secret. The Dutch court had held that the journalist had to disclose his source so that the authorities could detect irregularities within the police and ensure that the accused could be given a fair trial. The ECtHR did not consider these interests to be more important. The Dutch court could have obtained the evidence it was trying to get from the journalist through testimony from other witnesses. The ECtHR therefore found a violation of Article 10 ECHR.

9 *Goodwin v. The United Kingdom*, Case No17488/90, 27 March 1996.
10 *Nordisk Film & TV A/S v. Denmark,* Case No. 40485/02, 12 December 2005.
11 *Voskuil v. The Netherlands,* Case No. 64752/01, 22 November 2007.

Becker v. Norway[12]

Background: The plaintiff – a journalist – was asked to testify in criminal proceedings against one of her informants for market manipulation. This informant had confirmed to the police that he was her source for an article she had written in 2007 about the allegedly difficult financial situation of a Norwegian oil company. He was subsequently charged with using the journalist to manipulate the financial market. The journalist refused to testify against the informant at any stage of the proceedings. The courts therefore ordered her to testify about her contacts with him. They considered that there was no source to protect as the informant had already come forward. They also felt that her testimony could significantly help the courts in solving the case. The journalist filed a complaint against the decision ordering her to testify about her contacts with her source, claiming that this would most likely have led to other sources being identified as well. She also argued that her testimony in the proceedings against her source had not really been necessary anyway, as the informant was convicted as charged before the final decision on their obligation to testify had been made.

Decision of the ECtHR: The Court found that it would not have been justified to compel the journalist to testify. The journalist's evidence had not been needed during the criminal investigation and subsequent court proceedings against her informant. Her refusal to disclose her source(s) had at no time impeded the investigation or the proceedings against the informant. Her journalistic methods had never been questioned and she had not been accused of any unlawful activity. Moreover, her right as a journalist to keep her sources confidential could not automatically be overridden by the conduct of a source or by the identity of that source becoming known. The Court therefore held that there had been a violation of Article 10 ECHR.

Jecker v. Switzerland[13]

Background: The complainant – a journalist of the Swiss newspaper 'Basler Zeitung' – reported on a hashish and cannabis dealer, whereupon the Swiss public prosecutor's office opened criminal proceedings and demanded information from the journalist about the identity of her informant.

Decision of the ECtHR: The Court considered this to be a violation of freedom of the press under Article 10 ECHR, because the Federal Supreme Court may not base the rejection of the right to refuse to testify abstractly on the criminal offence of drug trafficking but must also take into account the seriousness of the criminal offence that gave rise to the criminal investigation. In the present case, the drug trafficking charge against the dealer was only of minor importance, therefore, the interest in prosecution did not outweigh the interest of the journalist concerned in not disclosing her sources.

Standard Verlagsgesellschaft mbH v. Austria No. 3[14]

Background: The plaintiff – a media company – was ordered by courts to disclose the login details of users who had posted comments on the newspaper's website. Previously, comments had linked politicians to corruption or neo-Nazis, among others. The plaintiff had removed the comments but refused to disclose the data of the commentators.

12 *Becker v. Norway*, Case No. 21272/12, 5 October 2017.
13 Jecker v. Switzerland, Case No. 35449/14, 6 November 2020.
14 *Standard Verlagsgesellschaft mbH v. Austria No. 3,* Case No. 39378/15, 7 December 2021.

Decision of the ECtHR: The ECtHR found that the court orders were not necessary in a democratic society. The ECtHR did note that user data does not enjoy the protection of "journalistic sources" and that there is no absolute right to online anonymity. However, it found that the interest in the disclosure of the data did not override the interests of anonymity of its users in order to promote the free exchange of ideas and information. The domestic courts had not based their decision on any balancing between these interests. Therefore, Article 10 ECHR had been violated.

B) RIGHT NOT TO DISCLOSE JOURNALISTIC SOURCES UNDER GERMAN CONSTITUTIONAL LAW

The constitutional protection of the press guaranteed in Article 5 of the Basic Law extends from the procurement of information to the dissemination of news and opinions.[15] According to the case law of the Federal Constitutional Court, this includes the secrecy of the press's sources of information and the protection of the relationship of trust between the press and the informant.[16] Ensuring the confidentiality of a press organisation's editorial work is indispensable for the functioning of the free press. Accordingly, the Federal Constitutional Court states the following with regard to the constitutionally guaranteed protection of the press and, in particular, the institutional framework and functional conditions of journalistic activity:

> *"(...) These indispensable functional conditions of free press and broadcasting activities also include, in particular, the fundamental accessibility of the information required for this activity. Only unhindered access to information in principle enables the media to fulfil their function in a free democracy... This also implies the need for special protection of the sources needed to obtain information, of the relationship of trust presupposed in this context and of the confidentiality of editorial work (...)"*[17]

Demonstrator holds a "Freedom of press" sign. REUTERS/ Fabrizio Bensch

15 Federal Constitutional Court, decision of 6 October 1959 – 1 BvL 118/53.
16 Federal Constitutional Court, judgment of 27 February 2007 – 1 BvR 538/06.
17 Federal Constitutional Court, decision of 30 March 2022 – 1 BvR 2821/16.

CASE LAW EXAMPLES

Federal Constitutional Court, decision of 28 May 1999 – 1 BvR 77/99

Background: In July 1997, the complainant – a press publisher from Hamburg – had published in its magazine three photographs of the civil marriage ceremony of a prisoner sentenced to life imprisonment ("Heidemörder") with his former therapist. The city of Hamburg had excluded media representatives from the wedding ceremony, which took place in a Hamburg prison, and only allowed a prison employee to take three Polaroid photos. These had been given to the prisoner as private souvenir photos. The pictures published by the complainant are copies of these Polaroid photographs. In response to the City of Hamburg's lawsuit, the Regional Court ordered the complainant to pay damages and to provide information about who she had received the three photographs from. This judgment was upheld by the Higher Regional Court on appeal.

Decision of the Court: The Federal Constitutional Court (BVerfG) upheld the complainant's claim. In its reasoning, it stated, among other things, that the protection of freedom of the press in the interest of a broad flow of information also included confidentiality between the press and its informants. Any compulsion to provide information nullified confidentiality and was thus likely to impede the flow of information which was indispensable for the function of the press. This protection of press freedom also applied to photojournalism. The courts did not weigh the importance of the freedom of the press on the one hand against the interest in pursuing possible copyright infringements on the other.

In brief: The protection of sources, in principle, also applies to illegally obtained information.

Federal Constitutional Court, judgment of 12 March 2003 – 1 BvR 330/96, 1 BvR 348/99

Background: At the request of the Public Prosecutor's Office, a court ordered a telecommunications company to disclose telecommunication data of two journalists. One of the journalists had handed over a tape cassette to the Public Prosecutor's Office with statements by a fugitive. The Public Prosecutor's Office hoped that the information about the communication would provide them with information about the whereabouts of the accused, who was wanted on a warrant for his arrest. A second journalist was in contact with a suspected terrorist. The collection of data for her mobile phone connection and two landline connections led to the arrest of the accused.

Decision of the Court: The Court assumed that the provision of information interfered with the journalists' freedom of the press. It stated that the court order was not aimed at disclosing an informant, but at determining the whereabouts of a known criminal suspect who also acted as an informant for the media. Nevertheless, the free flow of information between the media and informants was already endangered if the informant had to fear difficulties (such as the disclosure of the identity or the possibility for law enforcement agencies to discover the informant's whereabouts) by informing the journalist. In addition, the information could also lead to the discovery of the identity of previously unknown sources of information. However, the Court found that the interference had been permissible, as in this case there had been a considerable interest in the prosecution of a criminal offence for which there was already a concrete suspicion. A decisive factor in this case was also that it was not about uncovering the identity of a typical informant, but about determining the whereabouts of a known accused.

Regional Court Munich I, judgment of 11 September 2003 – 7 O 20974/02

Background: The defendant, a publishing company, published a picture of a naked woman in the daily newspaper it published, allegedly showing the actress and singer Marlene Dietrich. The plaintiff, Marlene Dietrich's daughter, then brought an action for damages. She demanded that the defendant provide information on various aspects of the publication, including the names and addresses of the suppliers and other previous owners of the picture. The defendant refused to provide this information and invoked the protection of its sources.

Decision of the Court: The Regional Court ordered the defendant to provide information on the names and addresses of the suppliers and other previous owners of the nude picture. The protection of the press against the discovery of its sources did not preclude this. The court acknowledged that the protection extends from the procurement of information to the dissemination of the news and applies to images, too. This protection is also in principle an indispensable prerequisite for an independent, functioning press to ensure a sphere of confidentiality between suppliers, previous owners and purchasers. However, this protection of sources in turn requires limits in the case of predominantly conflicting interests of third parties. In the present case, the picture represented a serious encroachment on the intimate sphere of Marlene Dietrich, which is also posthumously protected by Article 1.1 of the Basic Law. According to the court, this encroachment was not justified by a public information interest or any other interest. It argued that the publication of a nude photograph against the (posthumous) will of the person deprives him or her of his or her personality and individuality and degrades him or her to a mere object of display and pleasure.

In brief: Suppliers of pictures, e.g. picture agencies or photographers, also count as sources. However, the limit of protection under press law may be reached if the publication interferes with the intimate sphere of a person without there being a public interest in it.

Higher Regional Court Stuttgart, judgment of 8 February 2017 – 4 U 166/16 – *Panama Papers*

Background: The German newspaper "Süddeutsche Zeitung" published a report on the "Panama Papers", which contained documents on shell companies that an anonymous informant had leaked to the newspaper. The report also dealt with the plaintiff, a private investigator and secret agent. The newspaper expressed the suspicion that the plaintiff had used shell companies and accounts to be able to collect commissions or to move ransoms for the release of hostages. Because of this and a number of other statements, including an image of his passport with one of his cover identities, the plaintiff felt violated by the reporting and sued the newspaper and three journalists for injunctive relief. He claimed that the journalists had obtained the documents illegally.

Decision of the Court: The Court upheld the case only in part. Among other things, it ruled that the plaintiff bore the burden of proving that the way in which the data had been obtained was unlawful. The journalists, on the other hand, were not required to provide further details on their informant and on the procurement and transmission of the information resulting from the "leak", because this would be contrary to the protection of informants, which is recognised and acknowledged by the legal system and required by the freedom of the press.

In brief: Due to the protection of sources, the press does not have a burden of proof as to how information was obtained if a plaintiff claims that it was obtained unlawfully.

3. PROTECTION OF SOURCES BASED IN GERMANY AND ELSEWHERE

A) DOES GERMAN LAW OFFER PROTECTION OF SOURCES? IF SO, WHAT IS THE SCOPE OF THIS PROTECTION?

The protection of informants is not regulated uniformly by law in Germany. Article 5 of the Basic Law protects the secrecy of the press's sources of information and the protection of the relationship of trust between the press and the informant. Procedurally, it is implemented in all German procedural codes by the media's right to refuse to testify, the prohibitions on seizures and searches that are added to protect it (see below Section 4) and limits to third parties' claims for internal editorial information.

It should be noted that the law only offers the media the opportunity to protect the anonymity of their informants in official or judicial proceedings. The informants themselves are not directly protected. Moreover, the right to refuse to testify and the protection against seizure are only available to those who can be witnesses in the concrete criminal proceedings; if the editor is being investigated, he or she cannot be considered as a witness and therefore does not enjoy any protection against seizure.[18] Informants regularly seek protection through contractual agreements with the media. However, such an agreement is only effective between the informant and the journalist/publisher and does not bind the court.

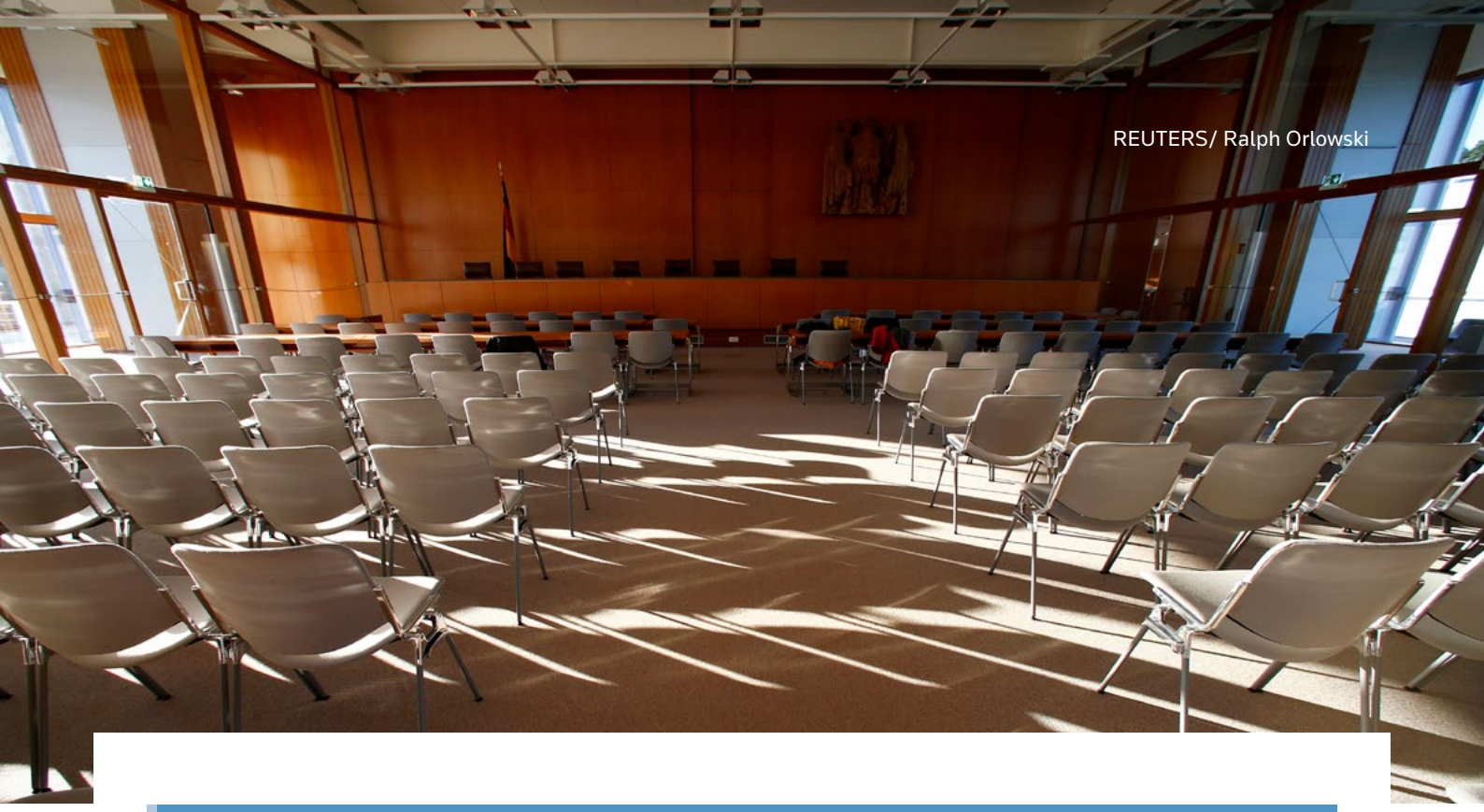
Irrespective of the fact that the national regulations apply in the end anyway, the European Convention on Human Rights, as interpreted by the ECtHR (which has to be taken into account) also contains regulations that protect journalists. The fact that journalists (except in overridingly important interests) do not have to disclose their sources and materials has an indirect effect on the sources themselves.

B) DOES GERMAN LAW OFFER PROTECTION TO SOURCES LOCATED OUTSIDE OF GERMANY?

The protection of the press does, in principle, apply beyond Germany. This follows from the German state's obligation to respect fundamental rights under Article 1.3 of the Basic Law, which is not limited to the territory of the Federal Republic of Germany. The Federal Constitutional Court has held, for instance, that foreign journalists abroad are protected by the freedom of the press against telecommunications surveillance by German state authorities.[19] The court argued that the German authority is bound by the fundamental rights of the Basic Law, regardless of whether it is surveillance of journalists at home or abroad. This is, in part, because of the close link between fundamental rights and international human rights protection, in which the protection of freedom of the press applies to foreigners abroad with no restriction to German territory.

However, the courts may assess cases abroad differently. The protection of individual fundamental rights may differ within Germany and abroad. The Federal Constitutional Court has emphasised that the legislature can take into account the special conditions abroad, such as how the press in other countries may be organised and function differently. It could then limit the protection to persons and situations that are actually deemed worthy of protection.

18 Federal Constitutional Court, partial judgment of 5 August 1966 – 1 BvR 586/62, 610/63, 512/54 – *Spiegel*.
19 Federal Constitutional Court, judgment of 19 May 2020 – 1 BvR 2835/17.



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4. DISCLOSURE AND NON-DISCLOSURE OF SOURCES UNDER GERMAN LAW

A) RIGHT TO REFUSE TO TESTIFY

Journalists are frequently called as witnesses in court proceedings. In principle, witnesses are obliged to appear before the judge on the date set for their examination. They are obliged to testify. Journalists, however, are entitled to refuse to testify in court. This is found in all procedural codes.[20]

The right to refuse to testify applies to anyone who professionally participates or has participated in the preparation, production or dissemination of (periodical) printed works or radio broadcasts. Employees of online media are also protected.[21]

Informants are entitled to refuse to testify in certain circumstances; namely, under the condition that the activity is carried out professionally and thus with the intention of having a permanent or at least recurring occupation. Remuneration is not required. The intention of repeated participation is taken into account, and ongoing cooperation in an individual case may be sufficient. One-time informants are not entitled to refuse to testify.[22]

In brief: Informants are only entitled to refuse to testify themselves in special cases, which are very limited.

The right to refuse to testify is supposed to protect the identity of the informants and the content of the communications made by them. The identity of the informant that is the subject of protection includes not only his or her name, but all other information that may indirectly lead to his or her exposure as circumstantial evidence. Additionally, self-researched materials and observations made by the journalist independently of

20 For civil proceedings this right is standardized in Para. 383 Section 1 No. 5 of the Code of Civil Procedure and for criminal proceedings in Para. 53 Section 1 No. 5 of the Code of Criminal Procedure.
21 Para. 53 Section 1 No. 5 of the Code of Criminal Procedure.
22 Cf. Bader, in: KK-stop, 9. Ed. 2023, StPO Para. 53 marginal no. 31.

the informant are protected. This includes the journalist's own notes or photos as well as observations that the journalist claims he made in connection with his work.

A prerequisite for the right to refuse to testify is, however, that the press preserves the anonymity of the informant. If it discloses the identity of the informant itself, the protective purpose ceases to apply and the witness may not, as a rule, refuse to testify about circumstances that could lead to the informant's discovery.[23] Therefore, if the press reveals the identity of the informant itself and makes it public, only questions about the content of the communications made may be concealed. Also, the right to refuse to testify does not apply if a journalist has testified in an earlier legal dispute and did so without invoking his or her right to refuse to testify.[24]

In brief: The anonymity of a source can only be protected if its identity has not previously been made known by the source themself or the journalist.

Moreover, the member of the press only has the right to refuse to testify insofar as it concerns information for the editorial section or editorially prepared information and communication services. Thus, in principle, there is no right to refuse to give evidence for the advertising section of a newspaper, but there is a right to refuse to give evidence for letters to the editor and for forum contributions if these are prepared editorially.[25]

B) PROHIBITION OF SEIZURES AND SEARCHES

It is prohibited to seize documents, sound, image and data carriers, images and other representations in the custody of the aforementioned journalists and media employees or of the editorial office, publisher, printer or broadcaster.[26] A seizure contrary to this prohibition leads to the inadmissibility of the evidence in the criminal proceedings.

The prohibition of seizure is meant to correspond with the right to refuse to testify for journalists. This prevents authorities from circumventing the right to refuse to testify and, instead of inadmissibly investigating editorial staff, simply searching their editorial offices and confiscating research documents and materials.

The prohibition of seizure does not apply when the person entitled to testify is urgently suspected of being involved in a crime. In this case too, however, the seizure is only permissible after a strict proportionality test. Furthermore, the journalist may be obliged to hand over the researched material for law enforcement purposes, if it is not a matter of journalistic sources in the narrower sense, i.e. if the "sources" had not contacted the press on their own initiative, but did not know that they were serving as sources because the journalists were acting undercover.

Searches in editorial offices for the purpose of finding evidence are inadmissible if the measures are specifically directed at materials and information protected by the aforementioned law.[27] If this is not the case, searches are in principle permissible, but must always be measured against the principle of proportionality, to which high standards must be applied due to the special importance of the freedom of the press and broadcasting.[28] Seizures and searches may only be ordered by the court.

23 Federal Constitutional Court, decision of 12 March 1982 – 2 BvR 1112/81; Federal Court of Justice, judgement of 13 January 1999 – 2 Bfs 71/93 – 2 StB 14/98.
24 Federal Court of Justice, decision of 4 December 2012 – VI ZB 2/12.
25 Federal Constitutional Court, judgment of 10 May 1983 – 1 BvR 385/82.
26 Para. 97 Section 5 of the Code of Criminal Procedure.
27 cf. Regional Court Augsburg, decision of 19 March 2013 - x Qs 151/13.
28 Federal Constitutional Court, judgement of 10 December 2010 – 1 BvR 1739/04.

CASE LAW EXAMPLES:

Federal Constitutional Court, partial judgment of 5 August 1966 – 1 BvR 586/62, 1 BvR 610/63, 1 BvR 512/64 – Spiegel

Background: In 1962, the magazine "Der Spiegel" reported on the military situation in Germany. An arrest warrant and a search warrant were then issued against Rudolf Augstein as publisher and against the responsible editor and other editors on suspicion of treason. The premises of the publishing company in Hamburg and Bonn were searched and extensive material was confiscated. The publishing company then filed a constitutional complaint against the search and seizure order.

Decision of the Court: The Court stated that the search of the premises constitutes a restriction of press freedom. However, it found that in this case, the suspicion of treason carried a greater weight. In the interest of the security of the state, it found the searches to be lawful.

Federal Constitutional Court, judgment of 14 July 1999 – 1 BvR 2226/94, 1 BvR 2420/95, 1 BvR 2437/95

Background: In 1994, a new Law to combat crime ("Verbrechensbekämpfungsgesetz") entered into force, giving the Federal Intelligence Service the power to monitor, record and evaluate telecommunications traffic and to transmit data to other authorities for the prevention, investigation and prosecution of criminal offences. A group of publishers and journalists who focused on the activities that were the subject of the newly regulated surveillance filed a constitutional complaint against certain provisions of the law.

Decision of the Court: The Court stated that not only the telecommunications between journalists and their sources are protected, but also the circumstances of the communication, including traffic data. By storing the data, the relationship of trust between journalist and source could be interfered with. Against this background, the Court declared some regulations unconstitutional which did not sufficiently take into account the protection of informants and the confidentiality of editorial work.

Federal Constitutional Court, judgment of 27 February 2007 – 1 BvR 538/06, 1 BvR 2045/06 – Cicero

Background: In 2005, the political magazine "Cicero" published an article about a terrorist, citing from an internal classified report from the Federal Criminal Police Office. Afterwards, the Public Prosecutor's Office started an investigation against the chief editor of the magazine and the journalist who wrote the article because of a violation of official secrets. The premises of the magazine were searched and material confiscated with the aim to find clues to the unidentified employee of the Federal Criminal Police Office who had passed on the official secrets to the journalist.

Decision of the Court: The Court found that the searches and seizures were unlawful. Seizures and searches of editorial offices or private rooms of members of the press are inadmissible if they serve exclusively or predominantly the purpose of establishing the identity of an informant.

C) ARE DISCLOSURE REQUESTS AGAINST THE MEDIA LIMITED?

Claims for information against the media are generally limited to reflect the need to protect journalistic sources.

When journalistic publications infringe on personality rights, the persons whose rights are being affected are generally allowed to request further information relating to the disclosure through the courts, in advance of seeking other judicial remedies such as injunction, revocation or damages. This claim can be used, for example, to find out the extent of distribution and the circulation of a newspaper. However, with regard to the freedom of the press, case law sets limits to a request for information when it comes to the origin of information (see Section 2). Thus, there is no right to information regarding the disclosure of the name of an informant.[29]

D) IS THERE A PENALTY FOR NON-DISCLOSURE OF JOURNALISTIC MATERIALS, AND IN WHAT CIRCUMSTANCES WOULD SUCH A PENALTY APPLY?

It is possible, depending on the circumstances of the case, for journalists to be ordered by courts to disclose journalistic materials and provide information. If they fail to do so, they may be subject to disciplinary proceedings.[30] This means that an administrative fine or imprisonment may be incurred. But without a court order, the journalist faces no sanction for not disclosing his or her materials.

In brief:

- Under both European law and German law, journalistic sources are widely protected. Basically, the informant has the right to remain anonymous and journalists may not be forced to publish their information material or any information leading to the identity of his/her informants being revealed.
- Journalists have the right not to disclose their source. Courts may not force them to do so unless there is an overriding requirement in the public interest. This, in principle, also applies to illegally obtained information.
- Moreover, journalists have the right to refuse to testify in criminal proceedings. Correspondingly, seizures and searches of journalistic material or in editorial offices are prohibited.
- Furthermore, disclosure requests against the media are limited. There is no right to information regarding the disclosure of the name of an informant.
- The regulations allow journalists to protect the anonymity of their sources. This has an indirect effect on the sources themselves. However, informants regularly feel the need to draw up a contract with the media to ensure that their identity is protected.

29 Higher Regional Court Munich, judgement of 18 January 2002 – 21 U 3164/01.
30 see Para. 88 of the German Code of Civil Procedure, "ZPO"; Para. 9 of the German Administrative Enforcement Act "VwVG").

REUTERS/ Pascal Lauener

ABOUT US

The Thomson Reuters Foundation is the corporate foundation of Thomson Reuters, the global news and information services company. The organisation works to advance media freedom, raise awareness of human rights issues, and foster more inclusive economies. Through news, media development, free legal assistance, and convening initiatives, the Foundation combines its unique services to drive systemic change. Its mission is to inspire collective leadership, empowering people to shape free, fair, and informed societies.

TrustLaw is the Thomson Reuters Foundation's global pro bono legal programme, connecting high-impact NGOs and social enterprises working to create social and environmental change with the best law firms and corporate legal teams to provide them with free legal assistance in order to produce ground-breaking legal research and offer innovative training courses worldwide.

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