

NO. A07-0678

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State of Minnesota  
**In Court of Appeals**

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*In Re:*

*Death Investigation of Jeffrey Alan Skjervold*

Ross E. Arneson, in his capacity as  
Blue Earth County Attorney,

*Respondent,*

vs.

Daniel Edward Nienaber, Joseph Francis Spear,  
Nicholas John Hanson, and *The Free Press,*

*Appellants.*

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**BRIEF AND APPENDIX OF APPELLANTS**

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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## STATEMENT OF ISSUES

1. Should the trial court have summarily dismissed the county attorney's application for subpoenas pursuant to Minn. Stat. §595.024, where the application failed to provide the court with the evidence necessary to present a *prima facie* case under the criteria described in the statute?

*The trial court did not dismiss the application, but proceeded to address it on the merits*

2. In considering the application on the merits, did the trial court properly interpret and apply the criteria found in §595.024, subd. 2?

*The trial court granted the county attorney's application, concluding that the three statutory conditions were satisfied.*

## APPOSITE CASES:

Appellant believes there are no truly apposite cases, and that this appeal presents issues of first impression to the Court.

## STATEMENT OF THE CASE AND FACTS

In late December of last year, an armed stand-off occurred between Jeffrey Skjervold and law enforcement officers at Skjervold's home in rural Blue Earth County. During the course of the confrontation, which lasted for several hours, two officers were wounded. The stand-off ended when Skjervold allegedly took his own life.

As the incident unfolded, reporters for the *Mankato Free Press* sought to obtain information about the circumstances. However, law enforcement officials refused to provide virtually anything that might shed light on what was happening. One of the reporters, Dan Nienaber, then began calling residences in the area where the shooting was evidently taking place. At that time, he did not know of Skjervold's involvement. Eventually one of his calls was answered by a person who identified himself as Skjervold, and who stated that he was engaged in a confrontation with law enforcement personnel. Nienaber had a brief conversation with Skjervold; the conversation was referred to in the newspaper's articles about the incident published the next day.

On January 16, 2007, two reporters (Appellants Nienaber and Nick Hanson) and an editor (Appellant Joe Spear) at *The Free Press* were served by the Blue Earth County Attorney's office with an application pursuant to Minn. Stat. §595.024, asking the district court to authorize the service of subpoenas on the three journalists demanding unpublished information about the Skjervold incident. All objected to the application, arguing that it did not satisfy the conditions specified in Minn. Stat.

§595.024, subd. 2, part of the Minnesota Free Flow of Information Act, Minn. Stat. §§595.021–025. The Act confers on news organizations “a substantial privilege not to reveal sources of information or to disclose unpublished information.” Minn. Stat. §595.022. The privilege can be overcome in criminal cases only if the three conditions listed in §595.024, subd. 2 are satisfied “by clear and convincing evidence,” and the statute requires that this demonstration be made before subpoenas may be served.

The county attorney’s application was succinct. It consisted of only a Notice of Motion and Motion, along with one-page description of the relief requested. The Application was accompanied by a two-and-a-half-page affidavit from Micheal J. Anderson, identified as a special agent with the Minnesota Bureau of Criminal Apprehension (BCA). These documents appear at A–7 to A–13.

A hearing to consider the county attorney’s application and the newspaper’s objections was conducted in Blue Earth County District Court on February 2, 2007. No testimony of any kind was presented at the hearing; the court simply listened to the arguments of counsel. The court also permitted the attorneys for the parties to make post-hearing submissions, and in response to this invitation, the county attorney filed an additional two-page letter that did nothing more than convey to the court copies of three earlier decisions construing the Minnesota Free Flow of Information Act. The letter appears at A–14.

By Order dated February 13, 2007, Judge Norbert P. Smith granted the application, after concluding that all of the conditions found in §595.024, subd. 2 had

been met.<sup>1</sup> Appellants filed this appeal on March 28, 2007, pursuant to Minn. Stat. §595.024, subd. 3, which authorizes an appeal “directly to the Court of Appeals.” The statute provides that an order granting an application for a subpoena “is stayed and nondisclosure shall remain in full force and effect during the pendency of the appeal.”

In evaluating the Order issued by Judge Smith, it is important to understand that the entire factual record before the trial court consisted only of the BCA agent’s affidavit. Nothing else was offered by the county attorney in support of its application.

## ARGUMENT

### I. INTRODUCTION

Enacted in 1973, and occasionally amended since, the Minnesota Free Flow of Information Act, Minn. Stat. §§595.021–025, springs from the premise that in “order to protect the public interest . . . the news media should have the benefit of a substantial privilege not to reveal sources of information or to disclose unpublished information.” §595.022. The privilege created by the Act, while “substantial,” is a qualified one, meaning it is subject to exceptions.

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<sup>1</sup>The February 13 Order also dealt with an unrelated matter, not at issue on this appeal, that was discussed briefly at the February 2 hearing. While the *Skjervold* application was pending, the county attorney’s office served a subpoena on reporter Daniel Nienaber in a separate criminal prosecution entitled *State v Rodriguez*. The county attorney alleged that Nienaber had spoken with Rodriguez by telephone, and sought unpublished information relating to the conversation that might be in Nienaber’s possession. In his Order of February 13, Judge Smith construed the discussion about the *Rodriguez* subpoena at the February 2 hearing as an “oral motion” by the county attorney under §595.024, denied the motion as inadequately supported, and gave the county attorney leave to renew it “in a procedurally proper manner.”

The Act comprises five relatively short sections. The first (§595.021) simply announces the title, while the second (§595.022) articulates the public policy that the Legislature meant to promote. In §595.023, the contours of the privilege established by the Act are described:

Except as provided in section 595.024, no person who is or has been directly engaged in the gathering, procuring, compiling, editing, or publishing of information for the purpose of transmission, dissemination or publication to the public shall be required . . . to disclose in any proceeding the person or means from or through which information was obtained, or to disclose any unpublished information procured by the person in the course of work or any of the person's notes, memoranda, recording tapes, film or other reportorial data whether or not it would tend to identify the person or means through which the information was obtained.

The remaining sections of the Act set out the two recognized exceptions:

§595.024—the provision at issue on this appeal—establishes a three-part test that those seeking to compel disclosure in criminal cases must satisfy “by clear and convincing evidence”; the final section (§595.025) defines the only other exception to the privilege, permitting disclosures in certain defamation actions. The latter section does not pertain to the present proceeding. See also *Weinberger v. Maplewood Review*, 668 N.W.2d 667, 672 (Minn. 2003): “The legislature created two exceptions to that privilege that require disclosure . . . under certain limited circumstances. The first exception . . . is applicable in *criminal cases*; the second is applicable in ‘any defamation actions.’”

According to §595.024, subd. 2, the privilege can be defeated only where the district court determines, “by clear and convincing evidence,” that all three of the following conditions have been satisfied:

1. There is probable cause to believe that the specific information sought “is clearly relevant” to a misdemeanor, gross misdemeanor, or felony;
2. The information cannot be obtained by alternative means or remedies “less destructive of first amendment rights”; and
3. “[T]here is a compelling and overriding interest requiring the disclosure of the information where the disclosure is necessary to prevent injustice.”

Minnesota is by no means unique in recognizing a statutory privilege for journalists that protects newsgathering materials not already disseminated to the public. Approximately 32 other states and the District of Columbia have done the same. The statutes are commonly referred to as “shield laws.”<sup>2</sup> In addition, virtually all of the federal circuits have recognized the privilege, based not on statutory codifications but rather on the First Amendment. See C. Thomas Dienes, Lee Levine, and Robert C. Lind, *Newsgathering and the Law*, 3d ed., at 1046.

While the various statutory enactments and court formulations of the journalist’s privilege differ in their details, most share important similarities: they describe the privilege as strong though not absolute; they trace their genealogy to Justice Powell’s concurring opinion in *Branzburg v Hayes*, 408 U.S. 665 (1972);<sup>3</sup> and

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<sup>2</sup>See Nancy V. Mate, “Piercing the Shield: Reporter Privilege in Minnesota following *State v. Turner*,” 82 Minn. L. Rev. 1563 (1998); see also Web site of Reporter’s Committee for Freedom of the Press, <[www.rcfp.org](http://www.rcfp.org)>.

<sup>3</sup>*Branzburg* was decided 5–4, with Justice Powell being the fifth vote. In that case, the Supreme Court declined to recognize a First Amendment-derived journalist’s privilege in the context of subpoenas directing reporters to appear before grand juries. However, in his concurrence, Justice Powell observed that journalists are not “without constitutional rights with respect to the gathering of news or in safeguarding their sources,” and suggested that each “claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony.” 408 U.S. at 709. The balancing test found in most shield laws

they typically employ a multipart balancing test, used to gauge whether the information sought is critical to the maintenance of the claim, highly material and relevant, and unobtainable from other sources. See *J.J.C. v. Fridell*, 165 F.R.D. 513 (D. Minn. 1995). Thus, while Minnesota's Free Flow of Information Act is not identical to any other formulation, it has important parallels to most others that may be useful when attempting to discern its meaning.

In the present proceeding, the trial court concluded that the county attorney had satisfied all three conditions found in §595.024, and it therefore issued an Order authorizing subpoenas against *The Free Press*. The trial court's approach contains two serious flaws, however.

First, even though §595.024 says that before a subpoena may be issued for unpublished information, application must be made to the district court, and the "application shall be granted only if the court determines after hearing the parties that the person making application, by clear and convincing evidence, has met all three of the . . . conditions" specified in subdivision 2, the application submitted by the county attorney's office came nowhere close to meeting this standard. The trial court should therefore have summarily dismissed the application as failing to present even a *prima facie* demonstration.

Instead, Judge Smith proceeded on the merits. In order to do this, he had to assume facts not in the record. He then applied an interpretation of the three statutory conditions plainly at odds with both the language and the policy of the Act, one that

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was proposed by Justice Stewart's dissent in the same case. See 408 U.S. at 742.

significantly dilutes its protections. For these reasons, the decision should be reversed.

## II. STANDARD OF REVIEW

The resolution of this appeal hinges on the proper construction and interpretation of portions of Minn. Stat. §§595.021–025. “We review the construction of statutes *de novo*.” *Weinberger, supra*, 668 N.W.2d at 671-72 (a decision also involving the Free Flow of Information Act). *Cf. State v. Knutson*, 523 N.W.2d 909, 912 (Minn. App. 1994), in which this Court examined the Act: “The construction of a statute is a question of law and therefore fully reviewable by an appellate court.”

## III. DISCUSSION

### A. **The County Attorney Never Presented the Trial Court with a *prima facie* Case in Support of the Application, as Required by Minn. Stat. §595.024, and the Trial Court should have Dismissed the Application on this Basis Alone.**

The determination as to whether the journalist’s privilege can be overcome in a criminal case is governed by §595.024. The procedure imposed by that section reflects the strength of the privilege established by the Act, requiring those who would subpoena unpublished information to first “apply to the district court” for authorization, and to demonstrate that they can satisfy the criteria specified in subdivision 2, rather than obligating journalists to bring a motion to quash after a subpoena has been served.

The extent to which the county attorney's application in the instant case failed to engage the statutory criteria is striking. The pleadings submitted to the trial court (A-7; A-14) did not even include a citation to or description of the three conditions found in §595.024, subd. 2. Furthermore, the only affidavit accompanying the application—that of BCA special agent Micheal J. Anderson—contained nothing whatsoever that could competently address any of those conditions. Because the application came nowhere close to presenting “clear and convincing evidence” suggesting that the county attorney might be able to comply with the three conditions, the trial court should have denied it on this basis alone, without ever proceeding to the merits.

The patent deficiencies in Respondent's application can be summarized as follows:

**Condition 1. Information Clearly Relevant to a Crime.** Section 595.024, subd. 2(1) states that before an application may be granted, the district court must conclude that there is probable cause to believe the specific information sought is “clearly relevant” to a misdemeanor, gross misdemeanor, or felony. Yet nowhere does the application even refer to a crime or possible crime. Furthermore, the affidavit of BCA agent Anderson contains no mention of any suspected crime or criminal behavior that is somehow related to the Skjervold death investigation (other than, as discussed below, the crimes apparently committed by Mr. Skjervold, which cannot be prosecuted since he is deceased). Thus the application provided no “evidence” of any kind by which to satisfy the first condition of subdivision 2.

**Condition 2. No Alternatives.** Similarly, there is nothing either in the application itself or in Agent Anderson's affidavit that could remotely satisfy the second condition of subdivision 2. Both the application and the affidavit fail to include as much as a bare representation that the information requested cannot be obtained by alternative means. Thus the county attorney presented *no* evidence to satisfy this condition, to say nothing of describing "clear and convincing evidence," as the statute requires. The application therefore did not provide the trial court with even a token demonstration addressing condition two.

**Condition 3. Compelling and Overriding Interest.** Finally (and most damaging to its viability), the application and the Anderson affidavit are both completely silent on whether some sort of "compelling and overriding interest" exists that requires the production of the information requested from *The Free Press* journalists. Identification of such an interest by the applicant is an essential element in satisfying the third condition, and where an applicant makes no effort to do so, the court should dismiss the application, not fill in the blanks that the applicant has left empty.

In sum, the threadbare presentation offered by the county attorney completely failed to satisfy the mandates of §595.024, subd. 2, regardless of what evidentiary standard might apply. Given that the statute calls for the applicant to make a demonstration by means of "clear and convincing evidence," the county attorney's request should have been rejected out of hand by the trial court. No matter how construed, the important values that are advanced by the Free Flow of Information Act, as well as the

express statutory language, plainly require a far more specific and factually grounded showing than was submitted by the county attorney.

Compelling journalists who are protected by the privilege to defend against an application that does not even make out a *prima facie* case can seriously burden the newsgathering process, because of the significant expense and time that may be required to do so. This itself implicates the protections extended by the Free Flow of Information Act.

**B. The Trial Court Misinterpreted and Misapplied the Conditions Expressed in Minn. Stat. §595.024, subd. 2.**

Instead of dismissing the application when confronted with its pervasive deficiencies, Judge Smith allowed the county attorney to proceed on the merits, then granted the application after employing erroneous interpretations of the three statutory conditions while inventing facts never presented by the county attorney and existing nowhere in the record.

The three conditions found in §595.024, subd. 2, are not randomly compiled, and their function cannot be analyzed in isolation from the rest of the Act, any more than a physiologist could intelligibly examine a bodily organ without considering its role. Because the three conditions are used to determine if the protections of the Act apply or not, they are obviously critical to its operation, and must therefore be interpreted in a manner that serves the Act's express policy—"to protect the public interest

in the free flow of information” by establishing “a substantial privilege not to reveal sources of information or to disclose unpublished information.” Minn. Stat. §595.022.

This interpretive approach is especially important where, as here, the meaning of some of the statutory language is hardly self-evident. The central flaw in the trial court’s Order granting Respondent’s application for the subpoenas is that, instead of construing §595.024, subd. 2 in a manner reasonably consistent with the statute’s terminology, purpose, and policy, it employed an interpretation that fundamentally conflicts with them.

**Condition 1. Information Clearly Relevant to a Crime.** This conflict is especially apparent with respect to the first of the three conditions found in §595.024, subd. 2. According to Judge Smith, that condition was satisfied because “[t]here is no doubt that felony violations of law were committed by Skjervold” and “that [the unpublished] information would be clearly relevant to such crimes.” Order of February 13, 2007, A–19, A–20.

In so ruling, Judge Smith brushed aside the newspaper’s argument that the first condition “must be interpreted to apply only where there is an actual crime being prosecuted or potentially prosecuted against a potential defendant,” contending that he was “compelled to give the language of a legislative act due deference.”

Where the words of a statute are clear and free from ambiguity, judges have no right to construe or manipulate the words of a statute to reach a particular interpretation. The duty of a judge is to give effect to the statute’s plain meaning.

*Id.* In other words, the trial court concluded that the first condition could be satisfied in *any* situation where a crime may have been committed, regardless of whether there was a relationship between the unpublished information sought from the journalist and prosecuting, defending against, or solving the crime.

It requires little analytical effort to reveal how profoundly this interpretation runs counter to the entire function of the Free Flow of Information Act. Subpoenas could be authorized in a far broader range of matters than just criminal cases, so long as the information sought merely had some nexus to an alleged crime. Once the crime had occurred, subpoenas used to launch nothing more than fishing expeditions would be readily permitted, involving issues having little or nothing to do with prosecution or defense of the crime itself. Subpoenas emanating from civil lawsuits, administrative investigations, and other non-criminal actions would be allowed, so long as they shared some common facts with an alleged criminal incident.

Thus Judge Smith construed §595.024, subd. 2(1) as if it stated only that the unpublished information must somehow relate to a criminal act. Yet the actual language of the statute provides that the information must be “clearly relevant” to a crime. “Relevancy” has a distinct legal meaning, referring to particular evidence that may assist in establishing or disproving a legal claim.<sup>4</sup> By mandating that the first

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<sup>4</sup>Minn. R. Evid. 401 defines “relevant evidence” as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Applying this definition to §595.024, subd. 2(1) strongly suggests that information “clearly relevant” to a crime would consist only of information tending to make the fact that a *crime* had been committed more or less probable; the information could therefore not be subpoenaed for other purposes, such as tort claims. For the reasons discussed further below, it is indisputable that Mr. Skjervold committed crimes and that he cannot be prosecuted. Consequently, the information from *The Free Press* is not needed to prove they occurred.

condition of subdivision 2 could be satisfied *only* if the specific information sought was “clearly relevant” to a felony, gross misdemeanor, or misdemeanor, the Legislature almost certainly meant to restrict the exception to cases where there was “probable cause” to believe that the information held by the journalist might directly and materially assist in proving or disproving that a crime had been committed.

This conclusion is corroborated in the Supreme Court’s recent *Weinberger* decision, where the Court stated that “the legislature created two exceptions to th[e] privilege that require disclosure . . . under certain *limited* circumstances. The first exception . . . is applicable in criminal *cases*; the second is applicable in ‘any defamation actions.’” 668 N.W.2d at 672 (emphasis added). But Judge Smith basically ignored the “clearly relevant” element of clause (1) in deciding that the county attorney’s application satisfied the first condition.

Appellants’ argument is further sustained if the first condition of subdivision 2 is construed together with the second and third. Clause (2) expressly recognizes that “First Amendment rights” are implicated by the privilege, while clause (3) demands that the applicant identify “a compelling and overriding interest requiring the disclosure” that is “necessary to prevent injustice.” Only a few interests have been recognized as possessing sufficient stature to counterbalance First Amendment rights, or to be considered “compelling and overriding.” One such interest might be a criminal defendant’s Sixth Amendment right to a fair trial, or possibly the state’s need to promote the public interest by successfully prosecuting serious crimes. Those

interests would hardly ever be present where the subpoena seeking unpublished information related to civil or administrative proceedings.<sup>5</sup>

In his Order of February 13, A-20, Judge Smith acknowledged that because Mr. “Skjervold is deceased, no charges will be forthcoming against him.” The court also correctly observed that the county attorney “does not identify others who may be potentially prosecuted for any potential crimes.” *Id.* In Appellant’s view, these conclusions necessarily terminate the inquiry under §595.024, subd. 2(1), because once they are established, there is no way the statutory criteria, if properly interpreted, can be satisfied.

Contrary to what he asserts in his Order, Judge Smith did not “give the language of the legislative act due deference.” *Id.* Instead, he distorted it, in a manner that would dramatically diminish the protections intended by the Legislature. The trial court attempted to defend its construction of clause (1) by contending that it was buttressed by the 1998 statutory amendments:

In this regard, the Court is aware that the statute has been amended. The previous clause required that the information be clearly relevant to a

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<sup>5</sup>The legislative history of the 1998 amendments further supports Appellants’ position. The 1998 amendments were enacted as Laws 1998, c. 357, which originated as Senate File 1480. When that bill reached the Senate floor on February 2, 1998, Sen. Neuville sought to amend it so that “the bill [could be] applied to civil cases as well as criminal.” Sen. Neuville continued, “The effect of this bill is to absolutely and totally preclude any access to information which might be gathered by the media in any type of civil case.” Sen. Cohen, the chief author of the bill, then responded as follows: “I would oppose the amendment and just pose a couple of questions. The first is, what is the need?” Sen. Cohen continued,

The law worked very well up until very recently and nobody has looked to provide the change that you’re suggesting with this amendment. . . . The concerns raised have been the concerns in terms of the criminal side. . . . I think it’s striking in this instance that there’s been no suggestion that this is a need on the part of the civil courts and the state, and certainly it’s not something that’s been needed over the last 25 years.

When the vote on the Neuville amendment was taken, it was defeated 45-16.

*specific violation of the law.* MS 595.024 (1991) (amended 1998). If that were still the language of the statute, then the argument of the *Free Press* would have greater weight.

Order, A-20. This interpretation seems decidedly peculiar, however.

Before it was modified by the 1998 amendments, clause (1) of subdivision 2 read as follows: “(1) that there is probable cause to believe that the source has information clearly relevant to a specific violation of the law other than a misdemeanor.” See Historical and Statutory Notes following §594.024, Minnesota Statutes Annotated. It is hard to see how the Legislature’s 1998 replacement of the clause “specific violation of the law” with “gross misdemeanor or felony, or . . . misdemeanor” materially changed the statute, except to include misdemeanors. It may actually have narrowed the scope of the first condition, since a “specific violation of law other than a misdemeanor” could possibly extend beyond misdemeanors, gross misdemeanors, and felonies. In other words, the 1998 amendments do not in any way make the trial court’s construction of the first clause more plausible.<sup>6</sup>

**Condition 2. No Alternatives.** Judge Smith invested little time in analyzing the second clause of §595.024, subd. 2 (requiring the court to find “that the information cannot be obtained by alternative means or remedies less destructive of First Amendment rights”), ruling that because Mr. Skjervold was dead and so “not available for interview,” and since there was no indication “that the phone company or

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<sup>6</sup>In its discussion of the first condition, the trial court also commented that “counsel for the *Free Press* offers no appellate case in direct support of his client’s position.” *Id.* at A-20. While this statement is accurate, it is considerably more noteworthy that Appellant has been unable to find any case construing the journalist’s privilege anywhere in the country holding that the privilege may be overcome except where the information sought is directly relevant and material to a particular, identified charge, claim, or cause of action.

any other agency recorded the conversation between Skjervold and the *Free Press* reporter. . . that leads to just one rather obvious conclusion: If we want the information, it has to come from the *Free Press* reporter.” Order, A–21.

Considered completely in isolation, the language of the second condition probably supports Judge Smith’s conclusion—it is unlikely that the information in question could be procured by other means. There are nonetheless reasons to question the rigorousness of the court’s analysis on this issue. For instance, the Order states that “[i]f *we want* the information, it has to come from the” newspaper reporter. *Id.* (emphasis added). However, it is not the court (“we”) that has requested the information, nor does “want” approximate the legal standard that must be applied.

**Condition 3. Compelling and Overriding Interest.** Of the three conditions found in §595.024, subd. 2, the third is plainly most important. While the first (clear relevancy) and second (alternative sources) play an important role in narrowing the exception to the privilege, the third goes to the heart of the matter: is there “a compelling and overriding interest requiring the disclosure of the information where the disclosure is necessary to prevent injustice”? Only an interest of this magnitude is sufficient to overcome the privilege.

It is, however, simply impossible to answer that question where the applicant for a subpoena provides no description whatsoever of the interest that is at stake, or why the information is needed. This is especially true because the key terms found in the third clause—“compelling and overriding interest” and “necessary to prevent injustice”—are hardly clear or self-defining.

As described above, the county attorney's application offered no indication of any compelling or overriding interest that might exist. But instead of dismissing the application, the trial court attempted to fill this void itself, contending that only if the journalists at *The Free Press* disgorged their unpublished information could "the unfortunate and traumatic events leading up to the death of Skjervold by his own hand be fully understood." *Id.* at A-22. Nothing in the trial court's Order furnishes an explanation as to why this would qualify as a compelling and overriding interest, however, nor is it by any means obvious that it does.

With respect to the other key element of clause (3)—that disclosure must be "necessary to prevent injustice"—the trial court again ignores the fact that the county attorney never even addressed this issue and provides its own rationale, one similarly lacking support in the language of the Act, the facts actually existing in the record, or precedent. Notably, the trial court concedes that while compelling the disclosure of the unpublished information might not prevent any *current* injustice, it might possibly help *prospectively*: "Only then can the unfortunate and traumatic events leading up to the death of Skjervold by his own hand be fully understood. Only then can injustice be prevented, *if not now then we can only hope, in the future.*" A-22 (emphasis added). Appellants submit that this analysis falls far short of satisfying the demanding language in which the third condition of subdivision 2 is framed. If countenanced, such sheer speculation, unanchored to established facts, would nearly demolish the effectiveness of the third condition in protecting the privilege.

The trial court's approach also demonstrates how important it is, in evaluating whether the privilege can be overcome in a particular case, for the applicant to identify with some reasonable specificity just what the requested information will be used for and whether it could constitute a compelling and overriding interest, because that evaluation will be heavily dependent on the facts peculiar to each situation. For example, if Mr. Skjervold were still alive and being prosecuted for crimes which—according to the trial court—“[t]here is no doubt that [he] committed” *id.* at A-19, the unpublished information from the journalists would have been entirely cumulative, and therefore unnecessary. Thus the third condition could not have been satisfied. But since Mr. Skjervold is deceased and cannot be prosecuted, and because the county attorney provided no explanation of why the unpublished materials are needed, it is impossible to properly assess whether the third condition can be met. The trial court is left to speculation and the journalists to shadow-boxing.

Finally, the trial court's discussion of whether the second and third conditions were satisfied by the county attorney invites some level of question about Judge Smith's detachment. While his comment (quoted earlier) that “[i]f we want the information, it has to come from the *Free Press* reporter,” Order, A-21, may have been due to simple inadvertence in selecting a pronoun, shortly thereafter the Order states that “freedom of the press is not quite as sacrosanct or absolute as the *Free Press* would like it to be,” and that this “is especially true where the actions of a reporter interfere with the efforts of police negotiators to entice a distraught man out of his barricaded house while he is still alive.” *Id.* There is, however, nothing

whatsoever in the record presented to the trial court that would support the latter comment, a grave and damaging accusation that the reporter's actions interfered with the efforts of law enforcement and contributed to Mr. Skjervold's death.

Yet Judge Smith offered the proposition as if it were incontrovertible, and part of his analysis of the third statutory condition is linked to the claim.<sup>7</sup> He compounds this transgression in the next sentence of the Order, when he states that the "right claimed by the *Free Press* to seek the 'truth' must never be allowed to take precedent [*sic*] over the compelling and overriding interest of law enforcement authority to maintain human life." *Id.* at A-21 to A-22. Again, there was no factual foundation of any kind supporting such an assertion in the record before the trial court.

The trial court's central function, when examining an application for a subpoena brought under §595.024, is to determine whether "clear and convincing evidence" has been identified by which the three listed conditions can be satisfied, not to find "facts" never placed before the court, nor to blindly defer to the demands of law enforcement agencies. Because Judge Smith failed to perform this function, the Order should be reversed.

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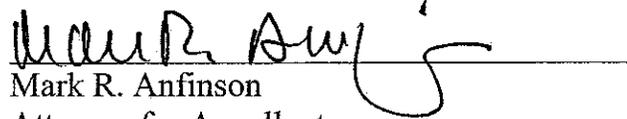
<sup>7</sup>It should be noted that Appellants have never claimed that freedom of the press is absolute. From the outset of this proceeding, the newspaper has acknowledged that the reporter's privilege is a qualified one.

**CONCLUSION**

For the reasons described above, the Order of the district court should be reversed.

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Respectfully submitted,



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