

NO. A07-0678

STATE OF MINNESOTA
IN THE COURT OF APPEALS

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.

**BRIEF *AMICUS CURIAE* OF THE REPORTERS COMMITTEE
FOR FREEDOM OF THE PRESS, MINNESOTA JOINT
MEDIA COMMITTEE, MINNESOTA NEWSPAPER ASSOCIATION,
MINNESOTA BROADCASTERS ASSOCIATION
AND THE *STAR TRIBUNE***

MARK R. ANFINSON
Lake Calhoun Professional Building
3109 Hennepin Avenue South
Minneapolis, Minnesota 55408
(612) 827-5611

Attorney for Appellants

ROSS E. ARNESON
Blue Earth County Attorney
Patrick R. McDermott
Assistant County Attorney
410 South Fifth Street
P.O. Box 3129
Mankato, Minnesota 56002
(507) 304-4352

Attorneys for Respondent

LUCY A. DALGLISH (#257400)
Attorney of Record for *Amici Curiae*
Gregg P. Leslie (*Of Counsel*)
Elizabeth Soja (*Of Counsel*)
The Reporters Committee for
Freedom of the Press
1101 Wilson Blvd., Suite 1100
Arlington, Virginia 22209
(703) 807-2100

JOHN P. BORGER (#9878)
Faegre & Benson LLP
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, Minnesota 55402
(612) 766-7000

Attorneys for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST OF THE AMICI CURIAE 1

STATEMENT OF THE CASE AND FACTS 2

SUMMARY OF ARGUMENT 2

ARGUMENT 4

 I. In passing the Free Flow of Information Act, the Minnesota Legislature sought to preclude “fishing expeditions” into a journalist’s sources, notes and materials.. 4

 II. The statute’s requirements that the information be “clearly relevant” to a felony and “necessary to prevent injustice” necessitate that the information be used as a means to an end – such as a prosecution – and not simply as an end in itself.... 7

 III. A clear and convincing showing by the subpoenaing party before *any* disclosure can be compelled is procedurally efficient and consistent with the Minnesota Free Flow of Information Act and with the procedure in other states with similar shield laws.. 11

CONCLUSION 15

TABLE OF AUTHORITIES

Cases:

<i>Branzburg v. Hayes</i> , 408 U.S. 665 (1972)	2, 5, 9, 12
<i>In re: Grand Jury Subpoenas (Fainaru-Wada and Williams)</i> , 2006 WL 2734275, (N.D.Cal. 2006)	7
<i>In re: Grand Jury Subpoena (Miller)</i> , 397 F.3d. 964 (D.C. Cir. 2005)	7
<i>State v. Boiardo</i> , 414 A.2d 14, 25 (N.J. 1980)	14
<i>State v. Shaffer</i> , 17 Media L. Rep. 1489 (Tenn. 1990)	12, 13
<i>State v. Turner</i> , 550 N.W.2d 622 (Minn. 1996)	10-12

Statutes:

ALA. CODE § 12-21-142 (2007)	6
ALASKA STAT. § 09.25.300 et seq. (2006)	6
ARIZ. REV. STAT. ANN. §§ 12-2214, 12-2237 (West 2007).....	6
ARK. CODE ANN. § 16-85-510 (2006).....	6
CAL. EVID. CODE § 1070 (West 2007).....	6
COLO. REV. STAT. ANN. §§ 13-90-119, 24-72.5-101 et seq. (West 2005).....	6
Conn. Pub. Act No. 06-140 (2006)	6
DEL. CODE ANN. tit. 10, § 4320 et seq. (2007)	6
D.C. CODE ANN. § 16-4701 et seq. (2007).....	6
FLA. STAT. ANN. § 90.5015 (West 2007).....	6
GA. CODE ANN. § 24-9-30 (2007).....	6
735 ILL. COMP. STAT. ANN. § 5/8-901 et seq. (West 2007).....	6

IND. CODE ANN. § 34-46-4-1 et seq. (West 2007)	6
KY. REV. STAT. ANN. § 421.100 (Banks-Baldwin 2007).....	6
LA. REV. STAT. ANN. § 45:1451 et seq. (West 2007)	6
MD. CODE ANN., CTS. & JUD. PROC. § 9-112 (2007).....	6
MICH. COMPL. LAWS ANN. §§ 767.5a, 767A.6 (West 2007).....	6
MINN. STAT. § 595.021 et seq. (2007)	passim
MONT. CODE ANN. § 26-1-902 et seq. (2007).....	6
NEB. REV. STAT. § 20-144 et seq. (2006).....	6
NEV. REV. STAT. §§ 49.275, 49.385 (2007)	6
N.J. STAT. ANN. § 2A:84A-21 (West 2007).....	6, 13, 14
N.M.R. EVID. 11-514 (2007).....	6
N.Y. CIV. RIGHTS LAW § 79-h (2007).....	6
N.C. GEN. STAT. § 8-53.11 (2007)	6
N.D. CENT. CODE § 31-01-06.2 (2005)	6
OHIO REV.CODE ANN. §§ 2739.04, 2739.12 (Banks-Baldwin 2007)	6
OKLA. STAT. ANN. TIT. 12, § 2506 (West 2007).....	6
OR. REV. STAT. § 44.510 et seq. (2005).....	6
42 PA. CONS. STAT. § 5942 (2007).....	6
R.I. GEN. LAWS § 9-19.1-1 et seq. (2006).....	6
S.C. CODE ANN. § 19-11-100 (2006)	6
TENN. CODE ANN. § 24-1-208 (2007).....	6, 12
2007 WASH. LAW __ (H.B. 1366, <i>session law citation pending</i>).....	6

Other Authorities:

Order of Feb. 13, 2007, A-22 (Appendix to Appellants' Brief). 8, 9

Lisa Friedman, *Unshielded*, AMER. JOURN. REV., Aug./Sept. 2006 (available at <http://www.ajr.org/Article.asp?id=4165>, last verified May 1, 2007). 6, 7

Joseph Neff, *Call adds mystery to lacrosse case*, THE NEWS & OBSERVER (Raleigh), July 12, 2006. 5

Deborah Potter, *The Journalist's Role*, HANDBOOK OF INDEPENDENT JOURNALISM, April 20, 2006 (available at <http://usinfo.state.gov/dhr/Archive/2006/Apr/21-415804.html>, last verified May 1, 2007). 4

Jeffrey Toobin, *Name That Source: Why Are the Courts Leaning on Journalists*, NEW YORKER, Jan. 16, 2006, at 30 6

STATEMENT OF INTEREST OF THE *AMICI CURIAE*¹

The Reporters Committee for Freedom of the Press (“The Reporters Committee”) is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and freedom of information litigation in state and federal courts since 1970.

The Minnesota Joint Media Committee is a nonprofit corporation organized to foster exchanges among the state’s diverse news media about issues of mutual concern, as well as to seek improvements in law and policy that might be of mutual benefit. Its members include representatives of nearly all the major media trade associations, news organizations, and journalism groups in the state.

The Minnesota Newspaper Association is a voluntary trade association of all of the general-interest newspapers and most of the special-interest newspapers in the state. It is the principal representative of the organized press in Minnesota, with approximately 400 newspaper members.

The Minnesota Broadcasters Association is a trade association representing more than 300 radio and television stations in Minnesota.

The *Star Tribune* is the largest-circulation daily newspaper in Minnesota.

The interest of *amici* in this case is ensuring that Minnesota’s Free Flow of Information Act continues to protect journalists as they engage in robust and effective

¹ Pursuant to Minn. R. Civ. App. P. 129.03, *amici* certify that no counsel for either party in this matter authored any part of this brief. No person or entity, other than *amici* and their members and counsel, made any monetary contribution to the preparation or submission of this brief.

newsgathering. The news media must have the right to monitor the activities of both private and public sector without fear of invasive and time-consuming subpoenas. State reporter's privilege laws, such as Minnesota's Free Flow of Information Act, are intended to prevent such subpoenas where the subpoena proponent has not met all three statutory conditions by clear and convincing evidence. *See* Minn. Stat. §595.024 subd. 2 (2007). Any erosion of these protections threatens the news media's ability to facilitate the free flow of information and to serve the public interest.

STATEMENT OF THE CASE AND FACTS

This appeal involves a subpoena, outside the context of an actual criminal prosecution, seeking to compel journalists to testify and produce materials relating to their work as members of the news media. It directly implicates the Minnesota Free Flow of Information Act. *See* Minn. Stat. §595.021 et seq. (2007). *Amici* hereby adopt the statement of the case and facts set forth in Appellants' brief.

SUMMARY OF ARGUMENT

The Minnesota Free Flow of Information Act's rich tradition of safeguarding the free flow of news to the public has flourished for over 30 years by protecting the press from burdensome subpoenas that would strip journalists of their ability to independently cover newsworthy events. *See* Minn. Stat. §595.021 et seq. In passing the Free Flow of Information Act shortly after *Branzburg v. Hayes*, 508 U.S. 665 (1972), the Minnesota Legislature endeavored to prevent unnecessary "fishing expeditions" into a journalist's materials and information. If the lower court's determination is upheld in the present

case, the Legislature's intent – and Minnesota's tradition of protecting the news media's right to gather and disseminate information independently – will be compromised.

Amici respectfully ask this court to look at the plain meaning of the Free Flow of Information Act. *See generally* Minn. Stat. §595.021 et seq. The Act gives absolute protection to a journalist's sources, notes and outtakes in all civil proceedings (with the exception of defamation cases). The exception that exists for criminal proceedings requires, *inter alia*, that "there is probable cause to believe that the specific information sought is clearly relevant to a gross misdemeanor or felony" and that disclosure of the information is "necessary to prevent injustice." Minn. Stat. §§ 595.024 subd. 2(1),(3).

By enacting these statutory requirements, the Minnesota Legislature clearly meant for the exception to apply in cases where a journalist's privileged information would assist in either the prosecution or the defense of a crime. When the perpetrator of a crime is dead, as in this matter, the unfortunate truth is that all injustice has already been done. Allowing the government to compel a journalist's information in a non-prosecutable case so that investigators may more "fully understand" a string of regrettable events cannot serve a compelling public purpose sufficient to overcome the protections provided under the intent of the Legislature and the plain meaning of the Free Flow of Information Act. *See generally* Minn. Stat. §595.021 et seq.

Furthermore, the Free Flow of Information Act requires a clear and convincing showing by the subpoenaing party before *any* disclosure can be compelled. Once a member of the news media properly invokes the privilege, the burden should immediately shift to the subpoenaing party to show why that privilege should be

overcome. Nothing on the face of the statute indicates that the Legislature intended any lesser burden under any circumstances.

ARGUMENT

I. In passing the Free Flow of Information Act, the Minnesota Legislature sought to preclude “fishing expeditions” into a journalist’s sources, notes and materials.

The Minnesota Free Flow of Information Act was enacted so that journalists could properly protect the free flow of information to the public. *See generally* Minn. Stat. §595.021 et seq. Shield statutes give members of the news media a privilege not so they may protect themselves, but rather so they can protect the free flow of information to the public. By the nature of their profession, journalists often find themselves in the midst of crime scenes, civil disputes and other important and noteworthy events. They are there to act as the eyes and ears of the public and to report information accurately. “Unlike other purveyors of information,” observed one member of the news media, “journalists owe their primary allegiance to the public.” *See* Deborah Potter, *The Journalist’s Role*, HANDBOOK OF INDEPENDENT JOURNALISM, April 20, 2006 (available at <http://usinfo.state.gov/dhr/Archive/2006/Apr/21-415804.html>, last verified May 1, 2007). Members of the news media are not bystanders at a crime scene by happenstance; they are drawn to the scene because of an event’s newsworthiness.

Often, journalists conduct their own investigations into newsworthy matters. When news media investigations focus on criminal acts, these inquiries can function as

an important check on the government investigations.² As Justice Potter Stewart wrote in his dissent in the landmark U.S. Supreme Court case *Branzburg v. Hayes*: “If it is to perform its constitutional mission, the press must do far more than merely print public statements or publish prepared handouts.” *Branzburg v. Hayes*, 408 U.S. 665, 729 (Stewart, J. dissenting). The news media must be able to pursue independent investigations of newsworthy events – especially alleged crimes. If the government is able to simply subpoena a journalist and obtain the fruits of his or her investigation, the government itself may have less incentive to perform a thorough investigation and the news media will come to be seen as an investigative arm of the government instead of an independent check on the government.

Often, strong state shield laws crafted by legislatures – like Minnesota’s Free Flow of Information Act – are a reporter’s first line of defense against subpoenas that would otherwise succeed in discouraging the intrepid news reporting that is so vital to a healthy democracy. *See* Minn. Stat. §595.021 et seq. Thirty-three states and the District of Columbia have enacted “shield laws,” and several more state legislatures – as well as the United States Congress on the Federal level – are considering enacting similar legislation

² In a recent example, journalists’ skeptical coverage of the Duke University lacrosse team rape scandal in 2006 called attention to the flaws in the case of a district attorney who has since been labeled a “rogue prosecutor” by the North Carolina Attorney General. *See, e.g.,* Joseph Neff, *Call adds mystery to lacrosse case*, THE NEWS & OBSERVER (Raleigh), July 12, 2006 (reporting that the newspaper reviewed phone records from the night of the alleged crime and noting that the accuser made a phone call during the time she alleged the crime was taking place. The article notes that “[t]here is nothing in evidence reviewed by [The News & Observer] or filed in court to indicate that Durham police investigated the call...”).

in the near future.³ It is a precarious time to be a journalist, and members of the news media must be able to rely on the protections afforded them by their state's legislature.

Nationally, prosecutors, plaintiffs and defendants are already seeking journalists' testimony and work product for use in the courtroom on a scale that is unprecedented in modern times. *See, e.g.,* Jeffrey Toobin, *Name That Source: Why Are the Courts Leaning on Journalists*, *NEW YORKER*, Jan. 16, 2006, at 30. Reporters and publishers who cover important controversial stories in both the public and private sector are the most susceptible to burdensome subpoenas from zealous prosecutors, angry corporations and eager plaintiffs and defendants. Apart from subpoenas, many reporters have sensed that "antagonism toward the media... certainly is rising," causing an "inflamed atmosphere" in which journalists are pitted against the government. *See* Lisa Friedman, *Unshielded*, *AMER. JOURN. REV.*, Aug./Sept. 2006 (available at <http://www.ajr.org/Article.asp?id=4165>, last verified May 1, 2007).

³ *See* ALA. CODE § 12-21-142 (2007); ALASKA STAT. § 09.25.300 et seq. (2006); ARIZ. REV. STAT. ANN. §§ 12-2214, 12-2237 (West 2007); ARK. CODE ANN. § 16-85-510 (2006); CAL. EVID. CODE § 1070 (West 2007); COLO. REV. STAT. ANN. §§ 13-90-119, 24-72.5-101 et seq. (West 2005); Conn. Pub. Act No. 06-140; DEL. CODE ANN. tit. 10, § 4320 et seq. (2007); D.C. CODE ANN. § 16-4701 et seq. (2007); FLA. STAT. ANN. § 90.5015 (West 2007); GA. CODE ANN. § 24-9-30 (2007); 735 ILL. COMP. STAT. ANN. § 5/8-901 et seq. (West 2007); IND. CODE ANN. § 34-46-4-1 et seq. (West 2007); KY. REV. STAT. ANN. § 421.100 (Banks-Baldwin 2007); LA. REV. STAT. ANN. § 45:1451 et seq. (West 2007); MD. CODE ANN., CTS. & JUD. PROC. § 9-112 (2007); MICH. COMPL. LAWS ANN. §§ 767.5a, 767A.6 (West 2007); MINN. STAT. ANN. § 595.021 et seq.; MONT. CODE ANN. § 26-1-902 et seq. (2007); NEB. REV. STAT. § 20-144 et seq. (2006); NEV. REV. STAT. §§ 49.275, 49.385 (2007); N.J. STAT. ANN. § 2A:84A-21 et seq. (West 2007); N.M.R. EVID. 11-514 (2007); N.Y. CIV. RIGHTS LAW § 79-h (2007); N.C. GEN. STAT. § 8-53.11 (2007); N.D. CENT. CODE § 31-01-06.2 (2005); OHIO REV. CODE ANN. §§ 2739.04, 2739.12 (Banks-Baldwin 2007); OKLA. STAT. ANN. TIT. 12, § 2506 (West 2007); OR. REV. STAT. § 44.510 et seq. (2005); 42 PA. CONS. STAT. § 5942 (2007); R.I. GEN. LAWS § 9-19.1-1 et seq. (2006); S.C. CODE ANN. § 19-11-100 (2006); TENN. CODE ANN. § 24-1-208 (2007); 2007 WASH. LAW __ (H.B. 1366, *session law citation pending*).

The news media has seen several high-profile cases in recent years that have demonstrated the lengths to which some parties will go to compel disclosure of a journalist's information. Most recently, two *San Francisco Chronicle* reporters who uncovered a steroids scandal in Major League Baseball and helped deter young athletes from using dangerous drugs faced jail time for refusing to divulge their source. *See In re: Grand Jury Subpoenas (Fainaru-Wada and Williams)*, 2006 WL 2734275, (N.D.Cal., Sept. 25, 2006). Perhaps more infamously, former *New York Times* journalist Judith Miller spent 85 days behind bars for refusing to comply with a subpoena. *See In re: Grand Jury Subpoena (Miller)*, 397 F.3d. 964 (D.C. Cir. 2005). This dangerous trend stands to weaken the vitality of a press that has served the country – and the state of Minnesota – so competently for so many years.

II. The statute's requirements that the information be "clearly relevant" to a felony and "necessary to prevent injustice" necessitate that the information be used as a means to an end – such as a prosecution – and not simply as an end in itself.

The Minnesota Free Flow of Information Act requires, among other conditions, that a member of the news media may only be compelled to disclose information if "there is probable cause to believe that the specific information sought is clearly relevant to a gross misdemeanor or felony." Minn. Stat. § 595.024 subd. 2(2). While Appellants' information is technically relevant to the felony that Jeffrey Skjervold committed on Dec. 23, 2006, it is clear that this part of the statute is meant to aid the government in effectively prosecuting cases against criminals and to aid criminal defendants in asserting

their innocence. The district court decision does not indicate that anyone other than Skjervold is being investigated for committing a crime, and the underlying proceeding at hand is referred to as "In re: Death Investigation of Skjervold." Authorities do not purport to be investigating any of Skjervold's victims, or even Appellants' actions. While the sought-after information may be relevant to the felonies that Skjervold committed, Skjervold himself can never be investigated, tried or convicted for these violent crimes. Simply put, that case is over.

A close reading of the statute demonstrates that the impossibility of any prosecution is a fatal flaw in Respondent's stance. In addition to the requirement of relevance to a crime, Minn. Stat. § 595.024 subd. 2) requires "a compelling and overriding interest" in the disclosure that is "necessary to prevent injustice." Future "injustice" cannot be prevented when the person who committed these unfortunate acts is deceased. A tragic injustice undoubtedly occurred when Skjervold harmed others and ultimately himself, but there is no further injustice to be suffered by anyone in this unfortunate situation. This is not a case in which a guilty man might go free, and this is not a case where an innocent man might be wrongly convicted. There are no future victims who might suffer injury or injustice at the hands of Jeffrey Skjervold.

The trial court in this case has opined that only after disclosure by Appellants "can the unfortunate and traumatic events leading up to the death of Skjervold by his own hand be fully understood." *See* Order of Feb. 13, 2007, A-22 (Appendix to Appellants' Brief). The court added, "Only then can injustice be prevented, if not now then we can only hope, in the future." *Id.* The Free Flow of Information Act does not allow

compelled disclosure so that someone's actions may be "fully understood," as the trial court put it, and Appellants themselves have not been charged with any crime. *Amici* respectfully contend that the trial court's application of the exception contained in Minn. Stat. § 595.024 subd. 2(3) is misguided, since disclosure on the part of Appellants clearly cannot be considered "necessary to prevent injustice." While it may be interesting to more fully investigate this incident, the Free Flow of Information Act prevents the news media from participating in this academic exercise.

This specific wording of Minnesota's statute indicates that the drafters desired a narrow application of the exception to the privilege. Like several other states, Minnesota passed the Free Flow of Information Act partially in response to the majority's holding in *Branzburg v. Hayes* that no such privilege existed under the First Amendment.⁴ See generally *Branzburg v. Hayes*, 408 U.S. 665 (1972). Many states' shield laws echo Justice Potter Stewart's dissenting opinion in *Branzburg*. Based on previous courts' application of a constitutional privilege, Justice Stewart wrote that subpoena proponents should be required to:

1) [S]how that there is probable cause to believe that the newsman has information that is clearly relevant to a specific probable violation of law; (2) demonstrate that the information sought cannot be obtained by alternative means less destructive of First Amendment rights; and (3) demonstrate a compelling and overriding interest in the information." *Id.* at 742.

⁴ Other states that passed shield laws (or substantially amended an existing law) shortly after and in response to *Branzburg* were Nebraska, New Mexico, North Dakota, Oklahoma and Tennessee.

In 1998, as part of the process of explicitly extending protection to all unpublished information as well as to confidential sources,⁵ the Legislature changed § 595.024 subd. 2(1) to read:

that there is probable cause to believe that the specific information sought (i) is clearly relevant to a gross misdemeanor, or (ii) is clearly relevant to a misdemeanor so long as the information would not tend to identify the source of the information or the means through which it was obtained,

instead of:

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.

The attorneys who prepared this brief include two who testified on behalf of the 1998 amendment and who are intimately acquainted with that legislative process. The history of this legislation clearly shows that the change from “clearly relevant to a specific violation of the law” was not intended to diminish the level of prior protection under the Act, as the district court in this case seemed to suggest (“If that [‘specific violation of the law’] were still the language of the statute, then the argument of the Free Press would have greater weight.”). Rather, the new language simply reflected the distinction, for purposes of protection in criminal prosecutions, between confidential sources (whose disclosure could never be compelled in misdemeanor cases) and all other unpublished information (whose disclosure could be compelled in misdemeanor as well as other criminal prosecutions if all three elements of the exception were satisfied).

⁵ The 1998 Legislature was reacting to the Minnesota Supreme Court’s decision in *State v. Turner*, 550 N.W.2d 622 (Minn. 1996), that interpreted the original law as protecting only information that would tend to reveal the identity of a confidential source.

III. A clear and convincing showing by the subpoenaing party before *any* disclosure can be compelled is procedurally efficient and consistent with the Minnesota Free Flow of Information Act and with the procedure in other states with similar shield laws.

Amici stress that before *any* review of Appellants' information or materials is allowed, the state must be required to make a clear and convincing showing that, as required by the Free Flow of Information Act, the information sought is "clearly relevant" to the prosecution of some crime, "cannot be obtained by alternative sources," and "that there is a compelling and overriding interest" in disclosure that is "necessary to prevent injustice." See Minn. Stat. § 595.024 subd. 2. On its face, the Act does not any permit disclosure – either *in camera* or to a subpoena proponent – to "any court, grand jury, agency, department or branch of the state, or any of its political subdivisions or other public body, or by either house of the legislature or any committee, officer, member, or employee thereof" unless the proponent has made a "clear and convincing" showing as to the factors set forth in the Act. *Id*; see also Minn. Stat. §595.021 et seq.

Although the Minnesota Supreme Court said in *State v. Turner*, 550 N.W.2d 622 (1996) that "concerns of overburdening the news media justify the implementation of an *in camera* procedure for reviewing unpublished information... before forcing a news organization to disclose information in its possession," the need for such review has disappeared in light of the 1998 amendments to the Free Flow of Information Act. *Turner*, 550 N.W.2d at 629; see also Minn. Stat. §595.021 et seq. The Court in *Turner* encouraged a preliminary review of unpublished materials because it construed the Free Flow of Information Act at the time as providing no protection for information that would

not disclose the identity of a confidential source. Despite its narrow interpretation of the Act, the Court recognized that balancing the subpoena proponent's need for the information "against the public's interest in a free and independent press" was important and proper. *Id.*

In the wake of *Turner*, the Minnesota Legislature recognized this need as well and went a step further. The Legislature recognized that the *Turner* court narrowed the privilege too drastically by holding that the statute did not cover non-confidential unpublished materials. In 1998, the Free Flow of Information Act was amended to protect unpublished, non-confidential information "whether or not it would tend to identify a source." *See* Minn. Stat. § 595.023. The Legislature's actions nullified the *Turner* Court's analysis of the appropriateness of any preliminary review before the statutory criteria have been met, *in camera* or otherwise.

Other states with similar shield laws have recognized the dangers of allowing some kind of preliminary review of a journalist's materials when the subpoena proponent has not met the statutory burden. For example, Tennessee's shield law is similar to Minnesota's law in many respects, and the two statutes were enacted around the same time in response to *Branzburg*, 408 U.S. 665 (1972). *See* Tenn. Gen. Stat. § 24-1-208 (2007). In 1990, the Tennessee Court of Appeals was asked to determine whether or not *in camera* review was proper to determine whether the factors set out in the shield statute were met. In a unanimous panel decision, the court wrote that there was nothing on the face of the statute or otherwise that allowed a court to "conduct an *in camera* inspection

to determine of the newperson's protection against disclosure should be divested." *State v. Shaffer*, 17 Media L. Rep. 1489 (Tenn. 1990).

The court cautioned that if the standard for a preliminary *in camera* review was lower than that set out by the statute, "a person seeking the information" would merely have "to file his petition to divest and request the court to make an *in camera* review. The statute clearly does not so provide." *Id.* Further, the court cautioned that allowing "the trial court to conduct an *in camera* review... would, in essence, allow the court to conduct a 'fishing expedition' in an attempt to aid the State in finding 'clear and convincing evidence.'" *Id.*

The Tennessee Court of Appeals properly recognized that if the legislature had intended that a subpoena proponent meet a lesser burden to secure some kind of preliminary review, the legislature would have incorporated that difference into either the original statute or an amendment. Furthermore, the court properly foresaw the danger of allowing *in camera* review to function as a method for "fishing expeditions" into a journalist's arsenal of information – exactly the kind of inquiry that the Minnesota Legislature sought to prevent when it enacted the Free Flow of Information Act. Anything less that a full showing on the part of the proponent for *any* compelled disclosure weakens the Act and erodes the privilege, goes against the Legislature's intent, and creates more procedural hoops for both journalists and courts.⁶

⁶ In a truly close case on the factor of "clearly relevant" information, *in camera* review might be appropriate as an intermediate step, prior to general production of information to the subpoenaing party, to determine *only* whether the information actually possessed by the journalist in fact is relevant and admissible in the criminal prosecution.

Tennessee is not the only state to have recognized the value of precluding any preliminary review of a journalist's information without a proper showing by the opposing party. In New Jersey, for example, the shield statute states that a subpoena proponent must show by a preponderance of the evidence that the information is "relevant, material and necessary to the defense," that there is no other "less intrusive source" for the information, and that the information "bears upon the issue of guilt or innocence." *See* N.J.S.A. 2A:84A-21.3(b) (2006). Finally, the request must not be "overbroad, oppressive, or unreasonably burdensome." *Id.* Accordingly, the New Jersey Supreme Court opined that:

[D]isclosure to a trial judge *in camera* represents precisely the same threat to the interests protected by the privilege as disclosure to counsel or to the world. Precisely the same findings are required by the statute when the procedure is to compel disclosure *in camera* as when it is to compel a turnover by the court to counsel for use at trial."
State v. Boiardo, 414 A.2d 14, 25 (N.J. 1980).

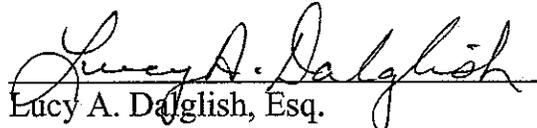
Once a journalist properly invokes a privilege, the burden should immediately shift to the subpoenaing party to show why that privilege should be overcome. This procedure, adopted and successfully implemented in other states, eliminates unnecessary procedural steps and lessens the time burden on courts and members of the news media. In cases such as this, where the party seeking a reporter's information simply cannot meet the Free Flow of Information Act's requirements, *any* compelled disclosure offends the purpose of the statute and unnecessarily burdens both the court and the free flow of information to the public.

CONCLUSION

For these and the foregoing reasons, *amici* respectfully contend that the Order of the district court should be reversed.

Dated: May 4, 2007

Respectfully submitted,



Lucy A. Dalglish, Esq.
Minn. Atty. Reg. No. 257400

Counsel of Record for Amici

Gregg P. Leslie, Esq.

Elizabeth Soja, Esq.

The Reporters Committee

For Freedom of the Press

1101 Wilson Blvd., Suite 1100

Arlington, VA 22209

(703) 807-2100

Of Counsel

John P. Borger, Esq.

Atty. Reg. No. 0009878

Attorney for the *Star-Tribune*

Faegre & Benson LLP

2200 Wells Fargo Center

90 South Seventh Street

Minneapolis, MN 55402

(612) 766-7000

CERTIFICATE OF SERVICE

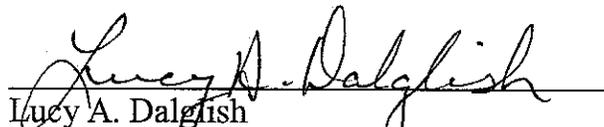
The undersigned attorney certifies that on this 4th day of May, 2007, she caused to be served by U.S. first-class mail, postage prepaid, two copies of the foregoing Brief *Amicus Curiae* on the following:

Attorneys for Respondents:

Ross E. Arneson
Patrick R. McDermott
410 South Fifth Street
Post Office Box 3129
Mankato, MN 56002
(507) 304-4352

Attorney for Appellants:

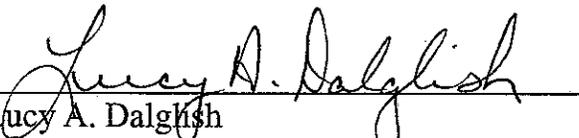
Mark R. Anfinson
Lake Calhoun Professional Building
3109 Hennepin Ave. South
Minneapolis, MN 55408
(612) 827-5611



Lucy A. Dalglish
Minn. Atty. Reg. No. 257400

**CERTIFICATE OF COMPLIANCE WITH
Minn. Civ. App. R. 132.01(3)**

I hereby certify that pursuant to Minn. Civ. App. R. 132.01(3), the foregoing brief is proportionally spaced, has a typeface of 13-point Times New Roman, and contains 3,526 words according to the word count of the word processing system (Microsoft Office Word 2003) used to prepare this brief.



Lucy A. Dalglisch
Minn. Atty. Reg. No. 257400