



**RUTGERS**  
Institute for Information  
Policy and Law

# **NEWS LAW**

# FAQ

**FOR NJ JOURNALISTS**



# RIIPL News Law Project

## The Rutgers Institute for Information Policy & Law News Law Project

Digital startups and citizen journalists are plugging the news hole — getting the public important information and keeping the powerful accountable. If you are providing content for this new information ecosystem, thank you! You’ve probably run into basic legal questions, such as whether you can post video you captured or whether you need to take down video that has bothered someone. These are standard newsgathering law questions.

We thought we could help, while also training a group of legal professionals who can advise journalists. Rutgers law students, under the supervision of Professor Ellen P. Goodman, have tackled some of the most common newsgathering law questions from a New Jersey perspective. They’ve prepared the following FAQs. Our goal is not to give you the answers to particular legal questions. We can’t do that. Instead, we’ve provided a sense of the legal terrain -- ways to think about your question.

**This is not legal advice.** For that, you’ll have to go to a licensed attorney. We are only dealing with generalities and providing basic information about how the law works in these areas. If you have more specific questions, you should consult a lawyer.

### What follows is the FAQ with top line and subsidiary questions.

Thanks to the Geraldine R. Dodge foundation for funding this effort.

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# Identifying anonymous posters

My site allows anonymous comments. I have been asked to reveal the identity of a commenter. Do I have to reveal the name?

## How does the question arise?

If you are operating an online site that hosts content provided by others, you may be protected by a safe harbor for the distribution of third-party content. Providers and users of “interactive computer services” are protected from civil liability for any postings made by others under the Communications Decency Act (CDA) 47 U.S.C.A. § 230. The covered service providers include ISPs (like Verizon) and websites that host third-party material (like review sites or blogs that feature comments). Even sites that make some selections or exercise some editorial judgment fall within the Section 230 safe harbor.

However, the safe harbor does NOT protect an author from liability for his or her content even if the host website is protected. So, while you as a website or blog owner are not liable for what your commenters say, you are still responsible for what YOU write.

Moreover, you may be asked to assist an aggrieved person who wants to sue an anonymous commenter. This request may come in the form of a letter or a subpoena that seeks to obtain information about the commenter’s account registration or an IP address that will help lead to the commenter’s true identity.

## Shield law case or not?

If you are asked to reveal information about a commenter who is a journalistic source or who participated in the journalist’s newsgathering process, then the New Jersey shield law [link to below] probably comes into play. This means that you might be protected from having to divulge any identifying information. However, if the commenter has nothing to do with the journalistic newsgathering process, then the shield law probably does not apply.

## When do you have to provide details to “unmask” an anonymous commenter?

In most cases, you will not have to unmask an anonymous commenter. The standard is quite rigorous; the requesting party has to have a strong case (often defamation) and a claim that there is no other way to find the identity of the commenter.

New Jersey courts apply a four-part test developed in the case of [Dendrite International, Inc. v. John Doe No. 3 \(775 A.2d 756 \(N.J. App. Div. 2001\)\)](#).

1. Plaintiff must undertake efforts to notify the anonymous commenter that s/he is the subject of a subpoena or application for an order of disclosure. These notification efforts should include posting a message of notification of the discovery request to the anonymous user on the ISP’s pertinent message board or using the ISP as a conduit to contact the anonymous commenter. All previous steps taken to locate the anonymous defendant will be considered in order to determine whether the plaintiff made a good-faith effort to comply with the requirements of service of process.

2. Plaintiff should establish a strong prima facie (i.e., initial) case that will be sufficient to survive summary judgment.
3. Plaintiff must prove revealing the anonymous identity is necessary, the information is sought in good faith, and is unavailable by other means.
4. The court balances the defendant's First Amendment right of anonymous free speech against the plaintiff's case.

Identity revealed	Identity not revealed
<p>A plaintiff proved a prima facie case for breach of contract, breach of duty of loyalty, and negligently revealing confidential information because the anonymous commenter wrote that he was an employee of the plaintiff and the statement violated the confidentiality agreement and Employee Handbook provisions. <u><i>Immunomedics v. Doe</i>, 775 A.2d 773 (N.J. App. Div. 2001)</u>.</p>	<p>A plaintiff failed to produce evidence of a prima facie defamation case because plaintiff did not demonstrate harm from any of the anonymously posted messages. <u><i>Dendrite</i>, 342 N.J. Super. 134 (N.J. App. Div. 2001)</u>. See also <i>Pilchesky v. Gatelli</i>, 12 A.3d 430 (Pa. Super. Ct. 2011) (mere assertion of harm to reputation insufficient; trial court should have sought affidavit as to the fundamental necessity of disclosing Does' identities).</p>

UPDATED SEPTEMBER 2015



## NJ subpoena for confidential sources and newsgathering material

When does the NJ shield law protect me from having to reveal the identity of confidential sources or newsgathering material?

The New Jersey Shield Law — [N.J.S.A. 2A:84A-21](#) — is one of the broadest and strongest in the nation. It protects confidential sources as well as information obtained by reporters and other news media representatives. In order to be protected under the Shield Law it is first important to know whether you fall within the statute’s definition of “news media.”

### Who is protected?

The New Jersey shield law covers a “person engaged in or connected to the news media.” The “news media” is defined as “newspapers, magazines, press associations, news agencies, wire services, radio, television or other similar printed, photographic, mechanical or electronic means of disseminating news to the general public.” [N.J.S.A. 2A:84A-21\(a\)\(b\)](#)

New Jersey courts have interpreted “news media” to include both traditional (that is, professional, whether online or paper) and non-traditional news media.

With respect to traditional media, the privilege covers: reporters, editors and photojournalists who work for newspapers and professional websites. This includes both reporters who are full-time employees of a daily and part-time stringers at a small weekly.

With respect to non-traditional media, the New Jersey Supreme Court in the 2011 case of *Too Much Media v. Hale*, held that claimants must show the following to be considered a “non-traditional news media” and protected by the shield law:

1. They have the requisite connection to news media;
2. They have the necessary purpose to gather or disseminate news; and
3. The materials subpoenaed were obtained in the ordinary course of pursuing professional newsgathering activities.

### What is protected?

The New Jersey shield law protects: “The identity of the source and any news or information obtained in the course of pursuing professional activities, including information from the source.” [N.J.S.A.2A:84A-21](#). You do not have to promise a source confidentiality in order to protect his/her identity under the shield.

Individuals Covered	Individuals Not Covered
<p>In <i>Renna v. Union County Alliance, N.J. Super. App. Div. (2013)</i>, Renna blogged that she knew the identities of sixteen county employees who used county generators for personal use in the aftermath of Hurricane Sandy and claimed protection under the N.J. Shield Law because she was (1) connected to the news media by actively engaging in the news process; (2) her posts were newsworthy and disseminated to a sufficient number of readers/visitors; and (3) the information was obtained in course of her newsgathering because she talked to the sources, attended freeholder meetings, and used the Open Public Records Act. <b>NOTE: court looked to traditional journalistic functions like filing OPRA requests.</b></p>	<p>Hale, a blogger, was sued by a company alleging defamation and seeking the identity of her sources. The N.J. Supreme Court found that Hale was not covered by the N.J. shield law because the forum in which she was engaged was an Internet message board, which is a forum for conversation and not similar to traditional news media. <i>Too Much Media v. Hale</i>, 20 A.3d 364 (N.J. 2011).</p>
	<p>A public relations firm was not considered part of the “news media” under the N.J. Shield Law because the firm was only a spokesperson of the news, rather than reporting news.</p> <p><i>In Re Napp Technologies, Inc. Litigation, 768 A.2d 274 (N.J. Super. 2000).</i></p>

### Is the shield law absolute or can it be “pierced?”

The New Jersey shield law provides absolute protection for **civil proceedings**, meaning that it will be pierced only if there is a conflicting constitutional right. One of the most common circumstances in which a plaintiff will seek to pierce the shield is in a libel action. In the libel case of *Maressa v. New Jersey Monthly, 89 N.J. at 189 (1982)*, the New Jersey Supreme Court found that the newspaper’s privilege was absolute and the plaintiff had no conflicting constitutional right to the protected material.

The New Jersey shield law may be pierced in **criminal proceedings**. The privilege here is not absolute because criminal defendants have a constitutional right to obtain evidence necessary to their defense, including confidential information.

Under the New Jersey shield law, a criminal defendant may pierce the shield for confidential information only when “the criminal defendant’s request for testimony is not overbroad, oppressive, or unreasonably burdensome and the value of the material sought outweighs the privilege against disclosure because it bears on innocence or guilt.” [N.J.S.A. 2A:84A-21.3\(b\)](#)

## SHIELD PROTECTED

Unpublished photographs of a burning fire were protected because they did not fall within the eyewitness exception since the photographers did not witness the act, but rather arrived after the act and recorded the results of that action. Matter of Woodhaven Lumber and Mill Work, 589 A.2d 135 (N.J. 1991).

Even though a reporter was present at a scene of physical violence, the reporter's testimony was not compelled because other witnesses were available. State v. Santiago, 250 N.J. Super. 30 (1991).

A student reporter was protected from disclosing her notes and all documents related to her interview with a professor because the interview was not relevant to the heart of the racial discrimination claim of those who had subpoenaed the documents and there were alternative sources for the same information. Behrens v. Rutgers University, Civ. No. 94-358 (D.N.J. Aug. 3, 1995)

The State of New Jersey subpoenaed Schuman, a newspaper reporter, to testify at a kidnapping-murder trial as to the identity of his source and confidential information from his source. Schuman moved to quash subpoena and the court found he was privileged because the source's confession to murder could be attained through less intrusive means, such as through confessions made to detectives. In Re Schuman, 552 A.2d 602 (N.J. 1989).

A hospital patient brought an invasion of privacy claim against a media company that videotaped events in the hospital emergency room for a television program. The court found the media company was protected under the New Jersey shield law because it was part of the "news media" and videotaping the events in the hospital was "newsgathering." Also, the plaintiff did not have a constitutional right to override the protections of the Shield Law.

Kinsella v. Welch, 827 A.2d 325 (N.J. Super. Ct. App. Div. 2003).

## SHIELD DID NOT PROTECT

A reporter's information was not protected because the prosecution proved that the information was material, relevant and otherwise inaccessible to the criminal defendant. Matter of Farber, 394 A.2d 330 (N.J. 1978)

A reporter waived his privilege because he spoke voluntarily with the prosecutor's investigators, quoting the mayor saying that a police officer was let go due to a criminal violation. The reporter was required to testify at a deposition in the police officer's defamation action and he had to provide interview notes and documents relevant to the statements made in the article. In Re Venezia, 922 A.2d 1263 (N.J. 2007).

A suspect in a criminal investigation for internet-related harassment was not protected under the N.J. Shield Law because he published statements on a "gripe site" for the purpose of complaining about a university official, instead of publishing information in the course of ordinary newsgathering activity. J.O. v. Township of Bedminster, 77 A.3d 1242 (N.J. Sup. Ct. App. Div. 2013)

The New Jersey Supreme Court in In re Schuman, 114 N.J. 14 (1989) established the following test for criminal defendants to pierce the shield:

1. The information sought must be relevant, material, and necessary to the defense; and
2. The information cannot be obtained from less intrusive means.

We also note that the NJ shield law's coverage "does not include any situation in which a reporter is an eyewitness to, or participant in, any act involving physical violence or property damage." N.J.S.A. 2A:84A-21a(h).

### **What about other newsgathering materials, like notes and non-confidential materials or confidential materials that are not source-identifying?**

The New Jersey Shield Law protects confidential and non-confidential information as long as it was gathered in the newsgathering process. Specifically, the statute states it protects, "Any news or information obtained in the course of pursuing his professional activities whether or not it is disseminated." N.J.S.A. 2A:84A-21(b).

# Accessing NJ records

I need access to something from public records. How do I obtain records under New Jersey's records law?

## What records are available?

Under New Jersey's Open Public Records Act ("OPRA"), New Jersey citizens may gain access to "any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording" that has been created or received by a government official of a public agency in the course of his/her official duties. [N.J. Stat. § 47:1A-1.1](#). Non-citizens have also been granted access.

If you are requesting a specific record you need to be able to point to the statute or mandate that requires the record to be made or maintained to prove that it is part of an official's duties and therefore subject to OPRA. [Southern New Jersey Newspapers, Inc. v. Township of Mount Laurel, 275 N.J. Super. 465, 478 \(App.Div. 1994\)](#).

Records made available	Records not made available
<p>After a reporter from the Times of Trenton was not permitted to attend a meeting or see the minutes for Lafayette Yard Commercial Development Corporation, the NJ Supreme Court held that, although it was a private company, Lafayette Yard was a public agency for purposes for OPRA, because the City holds a beneficial interest in the company, controls membership on the board, and supports the company through its taxing power. This makes Lafayette an "instrumentality or agency... created by a political subdivision," and subject to OPRA, and therefore the records are accessible. <a href="#">Times of Trenton Publ'g Corp. v. Lafayette Yard Cmty. Dev. Corp.</a>, 183 N.J. 519 (N.J. 2005).</p>	<p>Newspaper sought access to Township's records on applications for firearm permits and identification cards. The Court denied this because it was in violation of a Rule promulgated by the Township's Superintendent, which was tacitly approved by the Legislature, and then explicitly approved by the trial court in this case. <a href="#">Southern New Jersey Newspapers, Inc. v. Township of Mount Laurel, 275 N.J. Super. 465 (App.Div. 1994)</a>.</p>
<p>The Appellate Court held that Bergen Regional Hospital was required to disclose its financial documents to The Reporter and the union under common law, as they had a material interest, and the public benefit of disclosure outweighed the dangers (which Bergen raised as including financial trouble if it were forced to disclose its documents.) <a href="#">Bergen County Imp. Authority v. North Jersey Media Group, Inc.</a>, 370 N.J. Super. 504 (App.Div. 2004).</p>	<p>Newspaper was denied access to criminal investigative reports, because there was no law or mandate requiring the records to be made, and the need for confidentiality trumped the public's right to know. <a href="#">Daily Journal v. Police Dept. of City of Vineland</a>, 351 N.J. Super. 110 (App.Div. 2002).</p>

If what you need does not fall under OPRA, you can try to gain access under common law, which grants access to any written (or recorded) record generated by a public official who is “authorized by law to make it.” Nero v. Hyland, 76 N.J. 213, 222 (N.J. 1978). To determine what gets disclosed, the court balances the public interest in free information against the State’s interest in confidentiality.

### What exceptions are there?

OPRA has the following statutory exceptions:

- Inter- or intra-agency material that is advisory, consultative, or deliberative in nature. See education law center v. New jersey dept of educ., 198 N.J. 274 (N.J. 2009) (Holding that a document consisting of raw factual data does not preclude it from being part of the deliberative process).
- Communications between a member of the legislature and constituents.
- Memoranda and other communications used by a member of the legislature in the course of her duties.
- Medical examiner records concerning the body of a deceased person, unless they are used for law enforcement or research purposes, or if there is good cause for disclosure. See Ausley v. County of Middlesex, 396 N.J. Super. 45 (App.Div. 2007) (Holding that medical specimens do not count as OPRA records).
- Criminal investigatory records. See north jersey media group, inc. V. Township of Lyndhurst, 2015 N.J. Super. Lexis 96 (app.Div. June 11, 2015)(holding that exemption does not apply to documents relating to the identity of the investigating and arresting personnel and agency, length of investigation, use of weapons and ammunition by police).
- Crime victim’s records.
- Trade secrets, commercial or financial information. See Newark Morning Ledger Co. v. New jersey sports & exposition authority, 423 N.J. Super. 140 (App.Div. 2011) (Holding that where the generalities of the information is well known, such as the range of fees a concert venue charges, the specifics charged to each artist will not be held to be confidential or trade secrets subject to exemption).
- Information subject to attorney-client privilege. See O’Boyle v. Borough of Longport, 218 N.J. 168 (N.J. 2014) (Holding that privilege survives the end of the attorney-client relationship, but does not survive revealing the documents to a third party. However, documents shared with interested parties are still exempt under the common interest doctrine).
- Technical or administrative information that may jeopardize computer security.
- Building and infrastructure plans and emergency procedures whose disclosure might create a security risk.
- Information which, if disclosed, would give an advantage to competitors or bidders. See Gill v. New Jersey Dep’t of Banking & Ins., 2013 N.J. Super. Unpub. Lexis 345 (app.Div. Feb. 14, 2013) (Holding that, although another statute required the release of documents regarding insurance rates, the OPRA exemption superseded this).
- Information about sexual harassment complaints or grievances — generally, but not always. See Asbury Park Press v. County of Monmouth, 201 N.J. 5 (2010) (Holding that the settlement in a sexual harassment claim was not exempt, because there was no reasonable expectation of privacy).
- Information about collective negotiations.
- Information between a public body and its insurer.
- Information kept confidential under court order.
- Honorable discharge certificates (disclosure is permitted to the veteran’s spouse). See Rosenblum v. Borough of Closter, 2006 N.J. Super. Unpub. Lexis 1444 (app.Div. Dec. 5, 2006) (Holding that both the certificate of discharge and form dd-214 are exempt).
- Personal information including social security, driver’s license, credit card, and unlisted phone numbers. See Burnett v. County of bergen, 198 N.J. 408 (2009) (Holding that land records were accessible under OPRA, but Social Security number must be redacted to protect privacy interests).
- College and university records covering: incomplete pharmaceutical research; test questions, answers, and scoring keys; identity of anonymous donors; rare books that have limited public access; admission applications; student records (academic and disciplinary).
- Records exempted under another statute.
- Personal firearm records, except for use by government agencies or those authorized by law.
- Files maintained by the public defender in a case that is considered to be confidential.
- Personnel and pension records.<sup>1</sup> See McGee v. Township of East Amwell, 416 N.J. Super. 602 (App.Div. 2010) (Holding that personnel records exemptions are not restriction to documents in an employee’s personnel file).



## Record Exempt (Not accessible)

Following the Bridgegate scandal, the Court found that the personnel record exception applied to government employee records and nongovernment employee records that were in the possession of a government official. Therefore, the records did not have to be disclosed. North Jersey Media Group v. State, 2013 N.J. Super. Unpub. LEXIS 1008, \*9 (App.Div. May 1, 2013),

Plaintiff sought records and information regarding a police investigation against him, including any statements, investigation theory, and opinions. The records custodian denied this, because plaintiff had already been given a copy of the police report, and the statements, theories, and opinions are exempt under OPRA. Similarly, records custodians are not expected to do research or fulfill requests for general information. Bent v. Township of Stafford Police Dept., Custodian of Records, 381 N.J. Super. 30 (App.Div. 2005).

Plaintiff sought health insurance information on City employees. He was denied under OPRA, because this falls under the exemption for personnel files. But the court came to a compromise on his common law claim, balancing his right to know with the employees' interest in privacy by disclosing the information without revealing any employee names. Michelson v. Wyatt, 379 N.J. Super. 611 (App.Div. 2005).

Plaintiffs requested records including of local, county, and state law enforcement agencies pertaining to the fatal police shooting of a criminal suspect. Plaintiff was partially denied under OPRA, because some of the information requested was not required by law to be made, filed, or maintained. Additionally, some information requested was properly denied because it was exempt from OPRA by virtue of such information pertaining to any criminal investigation. The Court remanded on Plaintiffs' common law claim, with orders to trial court to balance the right of the public to know with the government employees', and witnesses' interests in privacy. North Jersey Media Group, Inc. v. Township of Lyndhurst, 2015 N.J. Super. LEXIS 96 (App.Div. June 11, 2015).

## How do I submit a records request?

Records requests must be written. N.J.S.A. 47:1A-5.g. The records custodian is required to provide a form which will ask for your name, address, and phone number, as well as the record requested. N.J.S.A. 47:1A-5.f. However, if you submit a written statement containing the required information, the records custodian is required to accept this in place of the form. Renna v. County of Union, 407 N.J. Super. 230, 232 (App.Div. 2009). The request can be hand delivered, mailed, or submitted electronically, as long as it is sent to the appropriate custodian. N.J.S.A. 47:1A-5.f.

## Record Not Exempt (Accessible)

Defendant Township was required to grant access to the police force's Use of Force records after the Court ruled that they were not sufficiently related to the criminal investigatory records to be exempt. O'Shea v. Township of West Milford, 410 N.J. Super. 371 (App.Div. 2009).

Plaintiff newspaper requested documents including federal Grand Jury subpoenas and County Clerk's notes from the County. The subpoenas were denied, as they are exempt under federal statute and disclosure could have harmed a criminal proceeding. The clerk's handwritten notes were not exempt, but they did have to be reviewed to see what constituted deliberative material that needed to be redacted. Gannett N.J. Partners, LP v. County of Middlesex, 379 N.J. Super. 205 (App.Div. 2005).

Government entities were required to release information required by law. Such information includes: the identity of the investigating and arresting personnel and agency, length of investigation, use of weapons and ammunition by police, and a brief statement which explains any omissions from such information. Such justification for omissions must meet the requirements under Section 3(b) to fall under the Criminal Investigatory Records Exception. North Jersey Media Group, Inc. v. Township of Lyndhurst, 2015 N.J. Super. LEXIS 96 (App.Div. June 11, 2015).

## How long will it take?

The records custodian is required to respond to your request in no more than 7 business days. The custodian can respond by providing you with the record, informing you that it is in storage and will take extra time to retrieve, or denying your request. Additionally, if the custodian fails to respond to your request within 7 business days, that should be considered a denial of your request, unless you failed to include a name, address, telephone number, or other preferred means of contact on the request form. N.J.S.A. 47:1A-5.i.

Immediate access is usually granted to "budgets, bills, vouchers, contracts, including collective negotiations agreements and individual employment contracts, and public employee salary and overtime information." N.J.S.A. 47:1A-5.e.

## What can I do if I'm ignored or denied?

"If the public body is relying on an exemption, ask the custodian to release the nonexempt portions of the record with the exempt portions removed or redacted."<sup>2</sup> If the custodian does not cooperate or this does not work for

your purposes, you have three options available.

1. Ask the Government Records Council for an informal mediation, which can be done upon written request. See N.J. Stat. Ann. § 47:1A-7
2. File a formal action with the Government Records Council. See N.J. Stat. Ann. § 47:1A-6.
3. File a lawsuit with the New Jersey Superior Court, which requires a \$200 filing fee and following court procedure. *Id.*<sup>3</sup>

If you are going to file a lawsuit, it must be done within 45 days of the request denial. *Mason v. City of Hoboken*, 196 N.J. 51, 68 (N.J. 2008).

UPDATED SEPTEMBER 2015



## Accessing NJ & Federal courts and court records

## How do I get into a New Jersey trial or other court proceeding?

Under ordinary circumstances, you don't need to do anything other than show up. There is a First Amendment right to attend criminal trials including preliminary hearings and jury selection. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580(1980). There is also a presumption of public trials under New Jersey court rules. N.J. Ct. R. 1:2-1. This includes civil and family court proceedings.<sup>4</sup>

However, the court may deny access if there is an overriding interest in keeping the trial closed. NJ courts have closed to observers, for example, in order to protect a jury from potential media influence and to shield the identity of a domestic violence victim.<sup>5</sup> Grand Jury proceedings are always closed.<sup>6</sup> All juvenile proceedings are presumptively closed, but you can ask the judge for permission to sit in on them, provided you don't reveal the juvenile's name.<sup>7</sup>

If you have bona fide press credentials, you can also bring cameras and other recording devices into New Jersey courtrooms.<sup>8</sup>

Court Access Permitted	Court Access Denied
<p>Two newspapers appealed the denial of press access to post-verdict voir dire (to investigate the possibility of juror misconduct). The Appellate Court held that concern about media influence on juror testimony "did not constitute an overriding government interest" sufficient to deny access. <u>Barber v. Shop-Rite of Englewood &amp; Associates, Inc.</u>, 393 N.J. Super. 292 (App.Div. 2007).</p>	<p>A domestic violence victim sought to have a closed proceeding for a name change to protect herself from her abuser, who had violated a restraining order. The Appellate Court held that it would be "an injustice" to allow press access. <u>In re E.F.G.</u>, 398 N.J. Super. 539 (App.Div. 2008).</p>
<p>Parents, concerned about allegations brought against them in their daughter's divorce, moved to have parts of the proceedings closed to the public. The Chancery Court held that potential embarrassment was an insufficient reason for closure, especially considering the fact that they were not from New Jersey, making it unlikely that people they knew would be at the trial. <u>Smith v. Smith</u>, 379 N.J. Super. 447 (Ch.Div. 2004).</p>	

## What do I do if the New Jersey proceeding is closed?

If you are in the courtroom when a judge closes the proceeding, you can ask to speak and object on the record.<sup>9</sup> If you find out about the closure after the fact, you can ask the clerk's office for an explanation and file a challenge to the closure.

## How do I access New Jersey court records?

You submit a Records Request Form to the local courthouse where the proceeding is taking place, or did take place in the past. If the proceeding is over and archived, you submit the Records Request Form to the Superior Clerks Office in Trenton, by email at [SCCOMailbox@judiciary.state.nj.us](mailto:SCCOMailbox@judiciary.state.nj.us) or by mail at: P.O. Box 971, Trenton, NJ 08625 – 0971.

There is a fee for copying and authenticating the records.<sup>10</sup>

Alternatively, some records are available online through the New Jersey Courts website. These include arrest records, motions filed with the court, and sentencing.<sup>11</sup>

## Which New Jersey records are available?

Accessible court records include "pleadings, motions, briefs and their respective attachments, evidentiary exhibits, indices, calendars, and dockets," as well as orders, judgments, and opinions relating to judicial proceedings, official transcripts or recordings thereof, and any information in electronic case management systems prepared by the court in connection with a judicial proceeding.<sup>12</sup>

## When are New Jersey records unavailable?

Although there is a presumption of open records, there is a long list of statutory exceptions. These include:

- Internal records, including deliberative records and notes and draft opinions of judges or judiciary staff members not otherwise required by statute to be included on the record;
- Discovery materials provided to the Criminal Division Manager's office by the prosecutor pursuant to R. 3:9-1 and R. 3:13-3;
- Writs to produce prisoners pending execution of the writ;
- Sealed indictments;
- Records relating to grand jury proceedings;
- Records relating to participants in drug court programs and programs approved for Pre-trial Intervention, and reports made for a court or prosecuting attorney pertaining to persons enrolled in or applications

for enrollment in such programs, but not the fact of enrollment and the enrollment conditions imposed by the court;

- Victim statements unless placed on the record at a public proceeding;
- Expunged records;
- Reports of the Diagnostic Center;
- Records relating to child victims of sexual assault or abuse;
- Search warrants and the affidavit or testimony upon which a warrant is based;
- Documents, records and transcripts related to proceedings and hearings required by the Supreme Court pursuant to *Doe v. Poritz*, 142 N.J. 1, 39 (1995), or subsequent orders of the Court;
- Names and addresses of victims or alleged victims of domestic violence or sexual offenses;
- Family Case Information Statements and Financial Statements in Summary Support Actions, including all attachments;
- Confidential Litigant Information Sheets;
- Medical, psychiatric, psychological, and alcohol and drug dependency records, reports, and evaluations in matters related to child support, child custody, or parenting time determinations;
- Juvenile delinquency records and reports;
- Records of Juvenile Conference Committees;
- Expunged juvenile records;
- Sealed juvenile records;
- Domestic violence records and reports;
- Names and addresses of victims or alleged victims of domestic violence or sexual offenses;
- Records relating to child victims of sexual assault or abuse;
- Records relating to Division of Child Protection and Permanency proceedings;
- Child custody evaluations, reports, and records;
- Paternity records and reports, except for the final judgments or birth certificates;
- Records and reports relating to child placement matters;

- Adoption records and reports;
- Records of hearings on the welfare or status of a child;
- Records pertaining to mediation sessions and complementary dispute resolution proceedings, but not the fact that mediation has occurred;
- Records and transcripts of civil commitment proceedings, civil commitment expungement petitions and proceedings, and expunged civil commitment records;
- Police investigative reports, unless admitted into evidence or submitted to the court in support of a motion, brief, or other pleading;
- Records that are impounded, sealed, or subject to a protective order;
- Criminal, Family, Municipal and Probation Division records pertaining to any investigations and reports made by court staff or pursuant to court order for a court or pertaining to persons on probation;
- Family, Finance and Probation Division records containing information pertaining to persons receiving or ordered to pay child support, including the child(ren); custodial parents; non-custodial parents; legal guardians; putative fathers; family members and any other individuals for whom information may be collected and retained by the court in connection with child support cases subject to Title IV-D of the Social Security Act, 42 U.S.C. § 651 et seq. and applicable state and federal statutes, but not the complaint or orders in such cases;
- Records maintained by the Judiciary that contain identifying information about a person who has or is suspected of having AIDS or HIV infection;
- Records of appeals from the Division of Developmental Disabilities;
- Written requests by a crime victim, or if such a person is deceased or incapacitated, a member of that person's immediate family, for a record to which the victim is entitled.

### **What if the New Jersey records have been sealed?**

The State can overcome the presumption of open records if society's interest in secrecy is greater than the need to access the records.<sup>13</sup> The State must demonstrate the need for secrecy with specificity as to *each document*.<sup>14</sup> If a trial court makes a determination that court records should be sealed, you will have to bring a lawsuit to have them unsealed, claiming that the need for access is greater than the need for secrecy. There are few recorded cases, and as of now they all go in the plaintiff's favor.

## Records Accessible

A contractual interest in confidentiality (between employer and employee in bribery and fraud suit) was insufficient to justify sealing records. [Lederman v. Prudential Life Ins. Co. of America, Inc.](#), 385 N.J. Super. 307 (App.Div. 2006).

The trial court erred in sealing a record to prevent an abusive father from learning that child and mother had settled a personal injury suit. [Verni ex rel. Burstein v. Lanzaro](#), 404 N.J. Super. 16 (App.Div. 2008).

A Township failed in its effort to get the court to seal internal affairs documents attached to a summary judgment motion. The redaction of personal information was enough. [Spinks v. Township of Clinton](#), 402 N.J. Super. 454 (App.Div. 2008).

## How do I access Federal court proceedings?

You also have a right to attend federal civil and criminal court proceedings.<sup>15</sup> This applies to most court proceedings, not just trials.<sup>16</sup> However, federal grand juries are closed to the public.<sup>17</sup> The court may also choose to close a proceeding to protect the jury pool from prejudice, out of respect for national security concerns, or to protect juveniles, among other reasons.<sup>18</sup> A federal judge has the discretion, but not the obligation, to close a juvenile proceeding, according to the Federal Juvenile Delinquency Act, 18 USC §§ 5031-42 as interpreted by [United States v. A.D.](#), 28 F.3d 1353 (3d Cir. Pa. 1994).

## What do I do if the Federal proceeding is closed?

If a federal court closes a proceeding, the closure must be as narrow as possible while still protecting the interests of the moving party.<sup>19</sup> The court must also consider alternatives to closure. After the proceeding has been closed, you can challenge it.

### Federal proceeding open

The 3rd Circuit overturned an order by a court to ensure juror anonymity during voir dire for a criminal trial for a public figure. The First Amendment right to the names of trial jurors and prospective jurors outweighed juror privacy interests. [United States v. Wecht](#), 537 F.3d 222 (3d Cir. Pa. 2008).

### Federal proceeding closed

Deportation hearings, although presumptively open, can be closed in the face of national security concerns. [N. Jersey Media Group v. Ashcroft](#), 308 F.3d 198 (3d Cir. N.J. 2002).

## How do I access Federal court records?

The federal judiciary provides an online service called PACER for court documents. The federal district, appellate, and bankruptcy courts make their documents available through this site. To access the documents, you need to make an account, and there is a fee of \$0.10 per page, capped at \$3.00 per record. The records become available on PACER as soon as they are electronically filed with the court. You can expect to find things such as:

- The names of all the parties and participants, including judges, attorneys, and trustees;
- A compilation of case-related information, such as cause of action, nature of suit, and dollar demand;
- The docket listing the case events by date;
- A claims registry;
- A listing of new cases each day;
- Appellate court opinions;
- Judgments or case status;
- Types of documents filed for certain cases;
- Images of documents.<sup>20</sup>

## What if the Federal records have been sealed?

You can challenge an order sealing records.

### Records Sealed

Briefs and a hearing relating to a grand jury were closely enough connected to the grand jury proceeding under USCS Fed Rules Crim Proc R 6(e) to be closed to the public. [United States v. Smith](#), 123 F.3d 140 (3d Cir. N.J. 1997).

### Records Accessible

Documents relating to a criminal defendant's conviction on charges from KKK activity ordered unsealed on First Amendment grounds. [U.S. v. Porter](#), 988 F. Supp. 519 (M.D. Penn. 1997).

UPDATED SEPTEMBER 2015



MIKE PETERS

## Do I have to worry about privacy when I post videos of people online?

Recording and uploading videos to the internet may raise two concerns: (1) Whether the recording process violated someone's protected privacy interest, and (2) Whether the distribution of the video violated a protected interest in keeping information private.

Journalists are subject to the same laws as everyone else when it comes to respecting privacy. New Jersey recognizes the four types of invasion of privacy recognized by most states: intrusion upon seclusion, publication of private facts, false light, and appropriation. The last three torts are generally more applicable to posting and distributing video online (see below), whereas intrusion upon seclusion is more applicable to video capture (see below).

Generally, people have no reasonable expectation of privacy in public. Thus most video recordings of people made in public will be unproblematic unless your behavior is unreasonable. Audio recordings are a different story (see below). Intrusions upon seclusion will sometimes involve physical trespass, but not always (see Wolfson v. Lewis).

## What privacy issues do I have to worry about when I capture video?

### Intrusion Upon Seclusion

In rare cases, subjects of a recording can prove that you intentionally intruded upon their solitude, seclusion, or private affairs in a way that would be highly offensive to a reasonable person. In New Jersey, you cannot intrude upon the seclusion of a corporation – though corporate officers may have claims in some cases.

No Intrusion	Intrusion
In general, private surveillance from public places is not intrusion. The New Jersey Superior Court affirmed summary judgment for an insurance company after a woman recovering from a car accident discovered she was being surveilled, entirely on public streets, by insurance company investigators. The court noted that she should have expected some investigation after filing an insurance claim. <b>Figured v. Paralegal Tech. Servs., 231 N.J. Super. 251 (N.J. Super. Ct. App. Div. 1989).</b>	Investigators who used shotgun microphones and video cameras from a van with tinted windows parked in parking lots, streets, and a driveway to surreptitiously record a family's conversations in and around their home from dozens of feet away could constitute intrusion upon seclusion, even if the recordings were from public places and were newsworthy.  <b>Wolfson v. Lewis, 924 F.Supp. 1413 (E.D. Pa. 1996).</b> New Jersey courts have not yet held that surveillance from a public place can constitute intrusion, though many other courts have followed Wolfson.
The intrusion must be highly offensive to a reasonable person. Merely recording people in a hospital or an emergency room and then broadcasting the footage is not necessarily an intrusion upon seclusion if it is not highly offensive to a reasonable person. <b>Castro v. NYT Television, 384 N.J. Super. 601 (N.J. Super. Ct. App. Div. 2006).</b>	
You cannot intrude upon a corporation's seclusion in New Jersey. A woman who surveilled a company lot from an adjoining property did not intrude upon the seclusion of the observed CEO. <b>N.O.C., Inc. v. Schaefer, 197 N.J. Super. 249 (N.J. Super. Ct. Law Div. 1984).</b>	

Recording from a public place does not normally give rise to intrusion upon seclusion, because things seen from public are not generally private.<sup>21</sup> But in New Jersey it may be unsettled whether persistent, surreptitious recording of people from public places, when those subjects may have a reasonable expectation of privacy, such as hundreds of feet from a street in their homes, can be an intrusion upon seclusion.

### Special New Jersey penalties for nudity

In New Jersey, you cannot film or even observe circumstances where you know or should know that others might “expose intimate parts or may engage in sexual penetration or sexual contact” – unless you have the consent of everyone being filmed or observed.<sup>22</sup> New Jersey also provides for civil damages against defendants who film or disclose people in such intimate situations.<sup>23</sup>

No Invasion	Invasion
The State must prove that a defendant has actually made the illegal recording if multiple people use the computer/recording device. <b>See, Rivera v. Hopatcong Borough Police Dept., 2010 U.S. Dist. LEXIS 9008 (N.J. Super. Ct. App. Div. 2010).</b>	Disclosing a video of a person having sex, knowing you do not have their consent to do so, violates New Jersey law. <b>Robinson v. City of Atl. City, 2013 N.J. Super. Unpub. LEXIS 769 (N.J. Super. Ct. App. Div. 2013),</b> So does recording video of someone who is naked – again, knowing you do not have their consent. <b>State v. Brown, 2014 N.J. Super. Unpub. LEXIS 2218 (N.J. Super. Ct. App. Div. 2014).</b>
	Man who distributed a nude photo sent to him on condition that it not be distributed had violated New Jersey law because he ‘disclosed’ the photo knowing it was “for his eyes only.” <b>State v. Parsons, 2011 N.J. Super. Unpub. LEXIS 2972 (N.J. Super. Ct. App. Div. 2011).</b>
	Dharun Ravi was convicted of livestreaming an intimate encounter of his dorm mate, Tyler Clementi, from a hidden camera in their shared dorm room – even though Ravi recorded no actual nudity or sex. <b>State v. Ravi, 2012 N.J. Super. Unpub. LEXIS 1757 (N.J. Super. Ct. App. Div. 2012).</b>

## What privacy issues do I have to worry about when I post video online?

### False Light

There can be liability for spreading false and offensive information to the public that significantly misrepresent a person or organization's character, history, activities, or beliefs. Opinions are generally exempt and will not result in liability, but merely putting an "I think" before a statement will not turn it into an opinion. False light claims are often similar to defamation claims, but cover utterances that are less definitive and more impressionistic.

No False Light Liability	False Light Liability
Making a true statement (e.g., a police search was nonconsensual and illegal) is not false light invasion of privacy. <b>Hornberger v. ABC</b> , 799 A.2d 566 (N.J. Super. Ct. App. Div. 2002). Neither is the revelation of a conviction. <b>Daruwala v. Merchant</b> , 2015 WL 4577896 (N.J. Super. Ct. App. Div. 2015). Non-defamatory opinions generally cannot give rise to a false light claim. <b>Weiss v. Pinnacle Entertainment, Inc.</b> , 2011 WL 8318482 (N.J. Super. Ct. Law Div. 2011), <i>aff'd</i> , 2012 WL 1448050 (N.J. Super. Ct. App. Div. 2012); <b>Edelman v. Croonquist</b> , 2010 WL 1816180 (D. N.J. 2010).	Repeating untrue accusations of criminality in the absence of a conviction can give rise to a false light complaint. <b>Jobes v. Evangelista</b> , 369 N.J. Super. 384 (N.J. Super. Ct. App. Div. 2004).
Information in internal company emails or memos generally cannot give rise to a false light claim if a defendant has not publicly disseminated them. <b>Clemmons v. Guest Supply-Sysco</b> , 2010 WL 4226216 (N.J. Super. Ct. App. Div. 2010).	Public accusations of seemingly innocuous, though false, assertions (e.g., that someone pulled a fire alarm) can give rise to false light claims. <b>Ciemniecki v. Parker McCay P.A.</b> , 2010 WL 2326209 (D. N.J. 2010).
Firefighter depicted in a photograph holding a flag during a 9/11 ceremony (with a caption to that effect), under a headline regarding a fire department sex scandal had no claim because no reasonable person would think firefighter was implicated in the scandal. <b>Cheney v. Daily News, L.P.</b> , 2015 WL 2084128, 43 Media L. Rep. 1811 (E.D. Pa. 2015).	Musician's false light claim was allowed to proceed when MTV used poor-quality images and sounds of his drumming that allegedly disparaged his career as a children's music teacher. <b>Savely v. MTV Music Television</b> , 2011 WL 2923691 (D. N.J. 2011).

### Private Facts

You can be liable for revealing private facts about individuals 1) if they have a reasonable expectation of privacy as to those facts, 2) if the revelation would be highly offensive to a reasonable person, 3) if they have not given you consent to reveal them, 4) and if the public has no legitimate interest in knowing those facts. Revelations considered newsworthy are generally free from private facts liability.

No Private Facts Liability	Liability for Revelation of Private Facts
A radio host who revealed that a caller and activist seeking his show's cancellation had been in a psychiatric hospital was not liable for revealing private facts. Though the host made a private and highly offensive revelation, the caller had "injected himself into a public controversy" and made himself newsworthy, granting the public a legitimate interest in knowing. <b>Wilson v. Grant</b> , 297 N.J. Super. 128 (N.J. Super. Ct. App. Div. 1996).	Disclosure of a 'bundle' of public information compiled from 'scattered bits' of information could leave you open to a private facts claim. Sex offenders are required to register their home addresses as well as a list of other personal details, <sup>24</sup> some of which are then required to be made public on the internet. In these cases, courts have found a strong, countervailing public interest. <b>A.A. v. State</b> , 384 N.J. Super. 481 (N.J. Super. Ct. App. Div. 2006) (quoting <b>Doe v. Poritz</b> ).
So long as there is a legitimate public interest in doing so, there is generally no liability for disclosing publicly available information, such as a public address, <b>Bisbee</b> , 186 N.J. Super. 335 (N.J. 1982), or someone's previous conviction record, <b>Romaine v. Kallinger</b> , 109 N.J. 282 (N.J. 1988), even if expunged. <b>G.D. v. Kenny</b> , 205 N.J. 275 (N.J. 2011), or that a university investigation has led to staff resignations. <b>Gallo v. Princeton University</b> , 281 N.J. Super. 134 (N.J. Super. Ct. App. Div. 1995).	
In upholding Megan's Law, the NJ Supreme Court held disclosure of sex offenders' 'publicly available' private addresses did implicate a privacy interest if accompanied by disclosures of other information – even if largely publicly available. However, in that case the public interest in disclosure outweighed the privacy interest. <b>Doe v. Poritz</b> , 142 N.J. 1 (N.J. 1995).	



## Appropriation

There may be liability for appropriating someone’s likeness, without consent, for financial benefit. The classic case would be using someone’s photo in a product advertisement.

No Liability for Appropriation	Liability for Appropriation
A television dramatization of a murdered police officer was not an illegal appropriation because it was information produced for its own sake and not to market some other product. <b>Lamonaco v. CBS, 21 Media L. Rep. 2193 (D. N.J. 1993), aff’d, 27 F.3d 557 (3rd Cir. 1994).</b>	Use of a Vietnam veteran’s photo for a book’s promotional campaign, where the photo was not used in the book itself, was appropriation. <b>Tellado v. Time-Life Books, 643 F.Supp. 904 (D. N.J. 1986).</b>
The mere broadcast of video containing someone’s likeness is not actionable unless a defendant seeks to benefit from a commercial association with that likeness. <b>Castro v. NYT Television, 370 N.J. Super 282 (N.J. Super. Ct. App. Div. 2004).</b>	Though a family consented to be photographed, a defendant’s reprinting and circulation of that photo for commercial use beyond the original consent could constitute appropriation. <b>Canessa v. J. I. Kislak, Inc., 97 N.J. Super. 327 (N.J. Super. Ct. Law Div. 1967).</b>
Voluntary participation in the creation of a YouTube video may invalidate a claim of appropriation, particularly if the use did not seek to take commercial advantage of the complainant’s likeness. <b>Collins v. Beauty Plus Trading Co., 2012 WL 967596 (N.J. Super. Ct. App. Div. 2012).</b>	

### What if I just record audio of people?

New Jersey has a “one-party consent” wiretap law<sup>25</sup> that makes it a crime to purposely record a private conversation without the consent of one of the parties to the conversation. If you are recording audio or filming video that includes audio, you cannot knowingly film private conversations without consent. The same law also criminalizes using or disclosing recordings of private conversations, which is particularly tricky when livestreaming, since disclosure of the video occurs at the time it is recorded.

The wiretap statute kicks in only when the subjects of recording have a legitimate expectation of privacy.<sup>26</sup> Moreover, only the intentional audio capture actually violates the wiretap law.<sup>27</sup> If you film with audio, you cannot intentionally film someone speaking on the phone in their room without their

consent or the consent of the person on the other end of the line. It would be problematic to film people speaking in the corner of a party, or even on a public park bench if they are whispering deliberately so that others cannot hear them.

### Are there limitations to recording in public places?

New Jersey’s “one-party consent” recording law (see above) prohibits purposely recording or distributing private conversations without the consent of one of the parties to the conversation. This includes private conversations that occur in public, if the people conversing have a reasonable expectation of privacy.

You have a right to record public meetings and police operations so long as you do not interfere, but you do not have carte blanche to record all public events. You can report on events, but you cannot record the entirety of public sports or entertainment events that are subject to exclusive licensing agreements.<sup>28</sup> Likewise, you cannot film in certain places designated by the President under national security regulations.

### What about limitations on recording on private property?

As a general matter, you cannot film in private places if the owner or occupant of a property asks you not to, or to stop. The same is true if a business has a posted no-filming policy. However, if you have filmed in such places, and you post the video, there is unlikely to be any recourse against you.

In some cases, the privacy interest in controlling video capture on private property is outweighed by a public interest, such as newsworthiness. For example, even a private citizen who inserts themselves into a public debate may make themselves newsworthy (see [Wilson v. Grant](#)).

### Does it matter if the camera is obvious or concealed?

In public, if subjects have no reasonable expectation of privacy, the camera can be hidden or in plain sight. If subjects do have expectations of privacy, such as in a public restroom or a changing room, you cannot film without consent whether the camera is visible or not.

Courts may infer consent from a camera obviously visible to a subject, particularly if the subject participates on camera – such as answering interview questions.<sup>29</sup> You still cannot purposely film audio of private conversations without consent, whether or not the camera is hidden (see above). Though again, courts may consider a visible camera a sign of a subject’s tacit consent.

Surreptitious recording can be more unambiguously illicit. New Jersey offers civil remedies for recording without consent in a setting where parties are engaged in sexual activity, have exposed intimate parts, or where you reasonably believe either condition may exist (see above). Entities have run into problems using cameras to capture vandalism in restrooms.<sup>30</sup>

## Can I film police?

You have a right to film police operations in public for journalistic purposes so long as you do not interfere with the police (see “Filming Police”). Under those conditions, you have a right to continue filming even if asked to stop.

Recording can be subject to reasonable restrictions on time, place, and manner. Courts have found that filming sometimes interferes with official police work.<sup>31</sup> If asked to stop filming, you should be prepared to be arrested if you refuse to comply.

## When do I need someone’s consent to film them?

You need someone’s permission to film them if they have a reasonable expectation of privacy – either because they are in a private place or if they are secluded in a public place (in a restroom or changing room, for example).

You need one party’s consent to capture audio (see What if I just record audio of people?).

You should also obtain someone’s consent if you are filming for commercial purposes to avoid potential appropriation lawsuits (see above). You may need consent to use a video of someone in an advertisement for a piece, even if the piece is for purely journalistic purposes, if you do not use that same likeness in the piece itself (see Tellado).

The Children’s Online Privacy Protection Act requires you to obtain parental consent if you operate a website directed at children under 13 or know you are collecting information from a child under 13 (see “COPPA”). This can include running an online journalism campaign as a subdomain or section of a website, or operating a feed through a website to receive video from a source or interviewee who is under 13. More information can be found on the FTC’s COPPA FAQ.

Federal law restricts the disclosure of video of substance abuse patients, except – among other conditions – in cases of the patient’s consent.<sup>32</sup>

## Are there special limitations on the posting or streaming video of minors?

Minors do not enjoy special privacy protections with respect to other people filming them. In private, the same expectations of privacy are implicated for children as for adults. What differs for children is that they may not always possess the ability to consent to be filmed, meaning you may need to obtain parental consent.

There has been some movement in New Jersey to criminalize the filming of minors without parental consent; these laws have not been enacted so far. However, filming for commercial purposes, particularly filming extensively, might implicate parental consent through child labor laws.<sup>33</sup>

The Appellate Division has upheld the right of a parent or guardian to vicariously consent to their child’s being recorded when the parent or guardian is not a party to the conversation, so long as they have a “good faith, objectively reasonable basis” for believing it is necessary and in the best interests of the child.<sup>34</sup>

Schools and the like can restrict filming on their campuses. The release of information about some educational records is also restricted, which may impact what you can film.

Younger children’s online privacy is to some degree protected by federal law, which requires website operators to obtain parental consent. Older children, between the age of 13 and 17, may still have a right to disaffirm contracts. So consent given – particularly for commercial purposes – is not absolute.

If you are a minor under the age of 13 posting video, you may also have to worry about the Children’s Online Privacy Protection Act (see “COPPA”) when posting videos or livestreaming.

## Do I have to blur people’s faces?

If you’re recording in public, you don’t have to blur faces, because there is no reasonable expectation of privacy. While you could face a lawsuit for appropriation if you market someone’s likeness for commercial gain, New Jersey recognizes political, newsgathering and entertainment exceptions.

If you are filming in private and without consent, blurring faces can be an expedient way of limiting potential liability.

Federal law protects the identity of substance abuse patients’ identities except in certain cases, including with the consent of the patient (see [above](#)). However, disguising the voice, blurring all identifiable likeness, and otherwise obscuring the patient’s identity may evade these restrictions.

Additionally, under the Children’s Online Privacy Protection Act, website operators do not require parental consent (with strict regard to likenesses in photographs or video) if the face of a minor from whom a photograph or video is collected is blurred (although consent is still required for the child’s voice).

## Is livestreaming any different from just posting videos online?

When livestreaming, you cannot always get the consent of subjects where consent is required (see above). Even where the subject consents to a recording, using a video in a way that exceeds the scope of that consent, particularly for commercial gain, might still leave you open to an invasion of privacy claim.

UPDATED OCTOBER 2015



# Am I responsible as the “author” when I edit website comments?

The answer depends on how much you touch the comments. The Communications Decency Act (CDA) protects “interactive computer services” from civil liability (for example, for defamation or invasion of privacy) for postings made by third parties. So, if you are passively transmitting reader comments on your website, you won’t be responsible for their content.

The definition of an interactive computer service (ICS) is broad and courts have interpreted it to cover internet service providers, listservs, websites that allow reader comments, websites that host bloggers, and websites that repost information. These services have immunity if they are sued for content that appears on their website, so long as the content was authored by a third party.

The authors themselves remain liable for the content of their posts, even if the host website is protected. Moreover, a website or blog owner is still responsible for her own comments. Therefore, if you add to a comment written by a third party, you can be liable for your own statements, but not the original content posted by the user.

Website or blog owners may perform traditional editorial functions, such as editing for accuracy, without giving up protection under the statute. However, the owner must not substantially alter the meaning of the original statement.<sup>35</sup>

Therefore, you have a good chance of being immune if (1) you are operating a website that hosts content created by others, (2) the content you want to edit has been created by a third party, (3) your changes serve a traditional editorial function, and (4) your alterations do not materially contribute to the problematic nature of the content.

## What are traditional editorial functions?

The decision to publish, withdraw, postpone, or alter content provided by others is central to the editorial function. There are only a few New Jersey and Third Circuit cases on this topic; most courts have adopted the following principles.

### Traditional editorial functions typically include:<sup>36</sup>

- Screening content prior to publication.
- Correcting, editing, or removing content.
- Selecting content for publication.
- Soliciting or encouraging users to submit content.
- Paying a third party to create or submit content.
- Providing forms or drop-downs to facilitate user submission of content.
- Leaving content up after you have been notified that the material is defamatory.



DAVID MICHAEL HOWARTH PHOTOGRAPHY

Professor Ellen P. Goodman, Rutgers Law School, @ellgood.

#### Editors will typically lose immunity if they:<sup>37</sup>

- Edit content to materially alter its meaning.
- Engage with users, through drop-down forms, to create discriminatory content.
- Fail to comply with promises to remove material.

#### What is considered a material contribution?

Editors risk losing immunity if they co-author or develop content by adding to the substance of the posting. In addition, editors may be liable if they are responsible for what makes a third party's posting problematic. In other words, an editor will not be liable if she merely provides instructions that are neutral, for example, "Tell us what's happening. Remember to tell us who, what, when, where, why." However, an editor will be liable if she pays users to post defamatory information or otherwise breach a duty to the subject of the post.

#### Immune from liability:

The defendant ran a website hosting third party comments criticizing local elected officials. The defendant regularly deleted offensive messages, provided guidelines for posting, edited postings to remove obscenities, and commented favorably or unfavorably on postings originally authored by a third party. The court held that his activities were editorial functions because he did not develop or change the substance of the messages. Donato v. Moldow, 374 N.J. Super. 475 (App. Div. 2005).


Jones sued Dirty World, LLC and its owner, Richie, when a third party posted comments about Jones on the [www.TheDirty.com](http://www.TheDirty.com) website. The comments referred to Jones' sexual conduct and Richie replied "Why are all high school teachers freaks in the sack?" Richie was not liable because his comment did not materially contribute to the defamatory content of the original statement. Jones v. Dirty World Entertainment Recordings, LLC, 755 F.3d 398 (6th Cir. 2014).

#### Not immune from liability:

Roommates.com required that its users create a profile by filling out a drop down menu. The defendant was not immune from liability because it was responsible for creating discriminatory drop down menus (e.g., users made selections indicating a preference for male or female roommates). Fair Housing Council of San Fernando Valley v. Rommates.com, LLC, 521 F.3d 1157 (9th Cir. 2008).

Accusearch paid third party researchers to acquire confidential telephone records and it operated a website that sold the information to individuals. The company was liable because it was responsible for the unlawful conduct of the researchers when it paid them to retrieve records that were protected by law. F.T.C. v. Accusearch Inc., 570 F.3d 1187 (10th Cir. 2009).

UPDATED OCTOBER 2015



# What permissions do I need to collect information on children?

Under the Children’s Online Privacy Protection Act of 1998 (COPPA), you need parental permission to receive or gather individually identifying information from anyone online under the age of 13 if you operate a site that is directed to kids or knowingly collects information from kids. Individually identifying information includes pictures.

To be clear, as a legal matter (as opposed to best practices), you are not required to get permission before taking pictures of children in a public place.

## **Am I an operator?**

Under COPPA, an operator is someone who runs a website or online service and collects personal information about users and visitors to the site, e.g. address or geolocation. An operator is also someone on whose behalf personal information is collected from a website or online service that has commercial purposes or involves commerce, for instance an ad plug-in. COPPA applies to any operator with content or services directed to children, or who has actual knowledge that the website collects information from children.

While most cases have involved operator companies that sell candy or toys, the operator status also extends to entities that publish information children are likely to search for. Artist Arena, for example, ran teen celebrity fan sites and incurred a \$1,000,000 fine.

## **How do I comply with COPPA?**

Any operator with content or services directed to children, or who has actual knowledge that the website collects information from children, must post a privacy policy on the website explaining: what information is collected, how it is used, and the disclosure practices used for that information.

Operators covered by COPPA must have reasonable procedures to protect the confidentiality, security, and integrity of information collected from children.

Operators also need verifiable parental consent in order to collect, use, or disclose any information received from children. Verifiable consent includes: getting the parent’s email address, sending a direct notification to the parent, describing the information that has been and will be collected, as well as providing a way for the parent to give verifiable consent. This also involves enabling parents to refuse permission, obtain the information that has been collected, and require an operator to delete information.

Operators cannot disclose information to third parties unless disclosure is necessary to run the website and parents have notice that it is necessary. This will generally not include the disclosure of kids’ photographs.

For more information about how to comply with COPPA, visit the compliance page of [COPPA.org](http://COPPA.org) and the Federal Trade Commission’s COPPA compliance FAQ page. For guidance on creating your privacy policy, visit Digital Media Law Project.

## How is COPPA enforced?

New Jersey has actively pursued protection of children's online privacy. Although the bills died in committee, both the Senate and General Assembly introduced the "Adolescents' Online Privacy Protection Act" in recent years. The state has also brought two suits against app developers for COPPA violations in the past five years. Both cases reached a settlement agreement involving compliance requirements.

The United States has brought several COPPA violation complaints against companies including Lisa Frank, Inc., American Pop Corn Company, Mrs. Fields, and Hershey Foods Corporation. A consent decree tends to resolve this type of complaint, enjoining the prohibited conduct, ordering COPPA compliance, and requiring on-demand proof of compliance for a set number of years, as well as a civil penalty.

## Do I need additional permission to post pictures?

If you want to post pictures that you obtained from children under 13, you need verifiable parental permission before you can post them.

Under the Children's Online Privacy Protection Act of 1998 (COPPA), the operator of a website or online service directed to children, or having actual knowledge that the website collects children's information, must obtain permission for all collection and uses of personal information from children. This means you need verifiable permission to collect, and also to post, a child's picture.

Verifiable permission entails getting the parent's email address, sending a direct notification to the parent, describing the information that has been collected and how it will be used, as well as providing a way for the parent to give verifiable consent. You must also enable parents to refuse permission, obtain the information that has been collected, and require an operator to delete information.

Alternatively, you can blur the facial features of a child in a photo and post it without parental consent. You must ensure that you remove geolocation metadata and other persistent identifiers from the file.

UPDATED APRIL 2016

# Notes

1. <http://www.dmlp.org/legal-guide/new-jersey/access-public-records-new-jersey>
2. <http://www.dmlp.org/legal-guide/new-jersey/access-public-records-new-jersey>
3. <http://www.dmlp.org/legal-guide/new-jersey/access-public-records-new-jersey>
4. Barber v. Shop-Rite of Englewood & Associates, Inc., 393 N.J. Super. 292 (App.Div. 2007); Smith v. Smith, 379 N.J. Super. 447 (Ch.Div. 2004).
5. <http://www.dmlp.org/legal-guide/new-jersey/access-new-jersey-court-proceedings>; In re E.F.G., 398 N.J. Super. 539 (App.Div. 2008).
6. N.J. Court Rules, R. 3:6-6.
7. N.J. Court Rules, R. 5:19-2.
8. N.J. Court Rules, CJC Canon 3a(9); <https://www.judiciary.state.nj.us/rules/appcamera.htm>.
9. <http://www.dmlp.org/legal-guide/remedies-if-you-are-denied-access-court-proceedings>.
10. [https://www.judiciary.state.nj.us/superior/copies\\_court\\_rec.htm#how](https://www.judiciary.state.nj.us/superior/copies_court_rec.htm#how).
11. <https://njcourts.judiciary.state.nj.us/web15z/ExternalPGPA/CaptchaServlet>.
12. N.J. Court Rules, R. 1:38-2
13. Spinks v. Township of Clinton, 402 N.J. Super. 454, 460 (App.Div. 2008).
14. Hammock by Hammock v. Hoffmann-Laroche, 142 N.J. 356, 381 (N.J. 1995).
15. Publicker Industries, Inc. v. Cohen, 733 F.2d 1059, 1070 (3d Cir. 1984); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580(1980).
16. Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 7 (U.S. 1986).
17. USCS Fed Rules Crim Proc R 6d(1).
18. See Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 7 (U.S. 1986); N. Jersey Media Group v. Ashcroft, 308 F.3d 198 (3d Cir. N.J. 2002); United States v. A.D., 28 F.3d 1353 (3d Cir. Pa. 1994).
19. Press-Enterprise Co., 478 U.S. 1, 13-14.
20. <http://www.dmlp.org/legal-guide/federal-court-records>.
21. Figured v. Paralegal Tech. Servs., 231 N.J. Super. 251, 258 (N.J. Super. Ct. App. Div. 1989) (quoting N.O.C., Inc. v. Schaefer, 197 N.J. Super. 249, Fn. 1 (N.J. Super. Ct. Law. Div. 1984) (citing Bisbee v. John C. Conover Agency, 186 N.J. Super. 335 (N.J. Super. Ct. App. Div. 1982)).
22. N.J. Stat. Ann. § 2C:14-9.
23. N.J. Stat. Ann. § 2A:58D-1.
24. Disclosures to police included "name, social security number, age, race, sex, date of birth, height, weight, hair and eye color, address of legal residence, address of any current temporary residence, date and place of employment, . . . any anticipated or current school enrollment,' 'date and place of each conviction, adjudication or acquittal by reason of insanity, indictment number, fingerprints, . . . a brief description of the crime or crimes for which registration is required,' and '[a]ny other information that the Attorney General deems necessary to assess [the] risk of future commission of a crime.'" N.J.S.A. 2C:7-4(b)." A.A. v. State at 486.
25. N.J. Stat. Ann. § 2A:156A-3.
26. See Stark v. South Jersey Transp. Authority, 2014 WL 2106428 (N.J. Super. Ct. App. Div. 2014) (citing Hornberger).
27. See H.E.S. v. J.C.S., 175 N.J. 309 (N.J. 2003).
28. Wis. Interscholastic Athletic Ass'n v. Gannett Co., 658 F.3d 614 (7th Cir. 2011).
29. Kinsella v. Welch, 362 N.J. Super. 143 (N.J. Super. Ct. App. Div. 2003).
30. Soliman v. Kushner Companies, 433 N.J. Super. 153 (N.J. Super. Ct. App. Div. 2013).
31. American Civil Liberties Union of Illinois v. Alvarez, 679 F.3d 583, 607 (7th Cir. 2012).
32. 42 U.S.C. § 290dd-2(b)(1).
33. See N.J. Stat. Ann. § 34:2-21.59.
34. D'Onofrio v. D'Onofrio, 344 N.J. Super. 147 (N.J. Super. Ct. App. Div. 2001).
35. <http://www.dmlp.org/legal-guide/immunity-online-publishers-under-communications-decency-act>.
36. <http://www.dmlp.org/legal-guide/online-activities-covered-section-230>.
37. <http://www.dmlp.org/legal-guide/online-activities-not-covered-section-230>.