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# PRE-PUBLICATION LEGAL DUE-DILIGENCE GUIDE FOR JOURNALISTS

A guide to minimise legal liability before publication in Kenya, South Africa,  
and Zambia.

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SHUTTERSTOCK

## 1. INTRODUCTION

Journalists play an important role in society and the functioning of democracy. Because of this, they bear a responsibility to ensure the integrity, accuracy, and fairness of their reporting. As noted by the Constitutional Court in South Africa:<sup>1</sup>

*"[Journalists] bear an obligation to provide citizens both with information and with a platform for the exchange of ideas which is crucial to the development of a democratic culture...[T]hey have a constitutional duty to act with vigour, courage, integrity, and responsibility. The manner in which the media carry out their constitutional mandate will have a significant impact on the development of our democratic society."*

The nature of journalism often entails a conflict with the rights of others – for example, a story about a corrupt politician may affect their right to privacy or undermine their reputation. Such individuals are entitled to seek to vindicate their rights and may do so in a variety of ways – for example, by suing a journalist for defamation or a privacy violation. But their rights often conflict with other important rights – such as the public's right of access to information and the journalist's right to freedom of expression.

As reported by the [Thomson Reuters Foundation](#) and the [Tow Center for Digital Journalism](#) at Columbia University, the law is being weaponised around the world to compromise journalists' safety and silence public interest reporting.<sup>2</sup> While some cases brought against journalists are legitimate, others may not be. For

<sup>1</sup> [Kumalo & Others v Holomisa](#) 2002 (8) BCLR 771 (CC) at paras 22-24.

<sup>2</sup> [Weaponising the Law: Attacks on Media Freedom](#).

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example, some cases known as SLAPP suits,<sup>3</sup> are deliberately brought to silence or intimidate journalists. The fear of retaliation or costly lawsuits may discourage publication, cause a journalist to remove a story, or leave the profession altogether. This has the effect of chilling speech and may undermine public discourse, often on matters of great public interest.

This guide has been published in response to this context. It aims to assist journalists with minimising their legal liability by providing a checklist of factors to consider before publication. It outlines four key considerations (indicators): journalistic ethics and best practices, defamation, privacy, and copyright. Finally, it includes additional questions relating to overall risk to consider before publication.



Each indicator is explained in general terms (under each section) to enable its application across varied legal systems in Kenya, South Africa, and Zambia. Each section concludes with a checklist of questions that journalists can ask themselves before publication as part of a due-diligence check.


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3 A SLAPP suit stands for “Strategic Lawsuit Against Public Participation”. It refers to a legal action filed by someone, often with power and resources, with the intention of silencing or intimidating journalists, activists or members of the public who are exercising their right to freedom of expression or engaging in matters of public interest.

## CHECKLIST

This checklist contains a list of questions under five thematic legal headings to aid journalists in conducting pre-publication review. It will help journalists flag and address potential areas of legal risks. More detailed guidance is provided in the Pre-publication Legal Due Diligence Guide for Journalists.

	YES 	NO 
<b>JOURNALISTIC ETHICS AND BEST PRACTICES</b>		
<ul style="list-style-type: none"> <li>Was the story verified through sources with direct knowledge and without bias or ulterior motives, particularly in circumstances where claims could be considered defamatory, or doubts exist about the source’s credibility?</li> </ul>		
<ul style="list-style-type: none"> <li>Was a response sought from the subject of the publication for all material allegations? If a response was received, was its essence incorporated into the story? If no response was received, was this noted in the story?</li> </ul>		
<ul style="list-style-type: none"> <li>Does the presentation of the story make it clear that you have acted in good faith throughout the process of gathering information, writing, and editing the story?</li> </ul>		
<ul style="list-style-type: none"> <li>Have clear, dated records of any research and information-gathering been created and kept? These records (including records of attempts to communicate, responses received, and research relied upon) are vital in proving good faith in news gathering.</li> </ul>		
<ul style="list-style-type: none"> <li>Do you or the organisation you work for belong to any self-regulatory body, and if so, are there any additional stipulations to consider in line with expected ethical conduct?</li> </ul>		
<b>DEFAMATION</b>		
<ul style="list-style-type: none"> <li>Are all statements of fact supported by evidence that verifies their accuracy?</li> </ul>		
<ul style="list-style-type: none"> <li>Are all opinions distinguishable from factual statements, and are they honestly and reasonably held (that is, do they have a legitimate basis?)?</li> </ul>		
<ul style="list-style-type: none"> <li>Have reasonable steps been taken to meet the standards of journalistic ethics and practice?</li> </ul>		

	YES 	NO 
<b>PRIVACY: GENERAL</b>		
<ul style="list-style-type: none"> <li>Does the subject of the story have a legitimate expectation of privacy?</li> </ul>		
<ul style="list-style-type: none"> <li>Does the article include only disclosures of private information that are justified in terms of limitations on the right to privacy (e.g. is disclosure in the public interest?)?</li> </ul>		
<ul style="list-style-type: none"> <li>Where there were no justifications for limiting the right to privacy, did you obtain consent for disclosure of private information?</li> </ul>		
<ul style="list-style-type: none"> <li>Does the article respect and protect the identity of minors? If there is disclosure of a minor’s identity, is there written, specific, and informed consent provided by a parent or legal guardian?</li> </ul>		
<ul style="list-style-type: none"> <li>Does the article respect and protect the identity of any vulnerable persons it may involve?</li> </ul>		
<ul style="list-style-type: none"> <li>Were all the methods used to obtain information lawful?</li> </ul>		
<b>PRIVACY: DATA PROTECTION</b>		
<ul style="list-style-type: none"> <li>Does your country have a comprehensive data protection law or any other legal requirements that may be applicable? If yes, have you complied with these requirements?</li> </ul>		
<ul style="list-style-type: none"> <li>Do the journalistic activities in the story fall within any exemptions provided for by the relevant data protection law?</li> </ul>		
<ul style="list-style-type: none"> <li>Where there is no comprehensive data protection framework or where the law does not include a journalism exemption, does the publication comply with data protection principles (i.e. lawful, fair and transparent use; limited for its purpose; adequate and necessary; accurate; not kept longer than needed; collected for a specific purpose, data subject access; and integrity and confidentiality)?</li> </ul>		
<ul style="list-style-type: none"> <li>Did you comply with the data protection principles in the applicable code of conduct?</li> </ul>		

	YES 	NO 
<b>PRIVACY: CONFIDENTIALITY CLAUSES</b>		
<ul style="list-style-type: none"> <li>Did you take reasonable steps to confirm that the news source does not have an existing non-disclosure agreement (NDA)?</li> </ul>		
<ul style="list-style-type: none"> <li>Where an NDA exists, is the disclosure by the source an allowable exception according to the national law? Allowable exceptions typically include public interest, whistleblowing, court-ordered disclosures, and protecting the rights of others. The specific range of permissible exceptions varies by country and is often included in the text of the NDA.</li> </ul>		
<ul style="list-style-type: none"> <li>Have you put appropriate mechanisms in place to secure information in respect of confidential sources and whistleblowers?</li> </ul>		
<ul style="list-style-type: none"> <li>Have you discussed the possible risks that may arise with these sources, where this is feasible?</li> </ul>		
<b>COPYRIGHT</b>		
<ul style="list-style-type: none"> <li>Have you secured consent to use any copyrighted material, including recordings, pictures, videos, or likeness of individuals in the published report, subject to any exceptions provided for in law (e.g. "fair use")?</li> </ul>		
<ul style="list-style-type: none"> <li>Have any images/recordings/etc. been obtained in compliance with laws related to permissions to film, record, etc.?</li> </ul>		
<ul style="list-style-type: none"> <li>Does the article properly acknowledge sources and authors as appropriate?</li> </ul>		
<b>ADDITIONAL RISKS TO CONSIDER</b>		
<ul style="list-style-type: none"> <li>Could any subjects of the piece be considered risky, such as businesses or individuals with a track record of suing journalists?</li> </ul>		
<ul style="list-style-type: none"> <li>Does the article disclose any information which is classified or otherwise prohibited from being disclosed on the basis of a national security law?</li> </ul>		
<ul style="list-style-type: none"> <li>Where the law makes disclosure subject to authorisation by a government department/ministry/agency etc., have reasonable measures been taken to obtain such authorisation prior to publication?</li> </ul>		
<ul style="list-style-type: none"> <li>Where potential risk has been identified, have you engaged with your editor, lawyers, or any other available parties on the extent of the risk and possible mitigation measures?</li> </ul>		

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## 2. JOURNALISTIC ETHICS AND BEST PRACTICES

The best way for journalists to minimise liability is by acting ethically and adhering to best practices and editorial standards in the profession. Doing so can limit legal liability – as the conduct of a journalist is often considered in defamation cases – but it can also minimise the risk of internal sanction within the industry.

Most countries have a set of standards that govern the conduct of journalists and are aimed at ensuring the credibility and integrity of the media. These standards are not typically codified into law but are included in self-regulatory instruments, such as codes of conduct. Generally, an independent regulatory body will be established to ensure compliance with the code of conduct, such as the [Broadcasting Complaints Commission of South Africa](#) (“BCCSA”). Non-compliance with these codes can attract liability for journalists. Members of the public can submit complaints if a journalist has breached the code, and the regulatory body is empowered to adjudicate it and issue sanctions – such as requiring a public apology or issuing a fine.

Despite the differing codes of conduct, the standards are generally the same across jurisdictions and will likely be familiar to most journalists. The most relevant standards are included in the checklist below.



## CHECKLIST | JOURNALISTIC ETHICS AND BEST PRACTICE

Before publishing a story, journalists should consider:<sup>4</sup>

- 1. Sources:** Was the story verified through sources with direct knowledge and without bias or ulterior motives, particularly in circumstances where claims could be considered defamatory, or doubts exist about the source's credibility?
- 2. Right of reply:** Was a response sought from the subject of the publication for all material allegations? If a response was received, was its essence incorporated into the story? If no response was received, was this noted in the story?
- 3. Fairness and balance:** Does the presentation of the story make it clear that you have acted in good faith throughout the process of gathering information, writing, and editing the story?
- 4. Records:** Have clear, dated records of any research and information-gathering been created and kept? These records (including records of attempts to communicate, responses received, and research relied upon) are vital in proving good faith in news gathering. The best practice is to keep all notes for at least three years, as in various jurisdictions there is a three-year time period in which any civil legal action can be lodged before the claim expires (although this varies by jurisdiction and by type of claim).
- 5. Self-regulation:** Do you or the organisation you work for belong to any self-regulatory body, and if so, are there any additional stipulations to consider in line with expected ethical conduct?<sup>5</sup>

<sup>4</sup> These considerations are adapted from Reuters, '[Standards and Values](#)'.

<sup>5</sup> In Kenya, the main self-regulatory body is the [Media Council of Kenya](#), while the [Kenya Editors' Guild](#) plays an important normative role. In South Africa, the main self-regulatory body is the [Press Council of South Africa](#), while the [South African National Editors Forum](#) plays an important normative role. Broadcasters are also governed by the [Broadcasting Complaints Commission of South Africa](#). In Zambia, various attempts to establish self-regulatory bodies have ultimately failed, although journalists in the country have recently launched the "[Media Pure Self-Regulation Mechanism](#)", whose efficacy remains to be seen.

## USEFUL RESOURCES

- International Federation of Journalists, '[Global Charter of Ethics for Journalists](#)' (2019).
- United Nations Communications Group, '[Ethical Guidelines for Journalists](#)' (2016).

### Kenya

- [Code of Conduct](#) for the Practice of Journalism in Kenya.
- [Programming Code](#) for Broadcast Services in Kenya (4th Edition, June 2023).
- **Regulatory bodies:** [Communications Authority of Kenya](#) (CAK); [Media Council of Kenya](#); [Kenya Film Classification Board](#).

### South Africa

- [Code of Conduct](#) for Online Services.
- [Code of Conduct](#) for Subscription Broadcasting.
- [Free to Air Code of Conduct](#) for Broadcasting Service Licensees.
- The [Press Code](#) of Ethics and Conduct for South African Print and Online Media.
- **Regulatory bodies:** [The Broadcasting Complaints Commission of South Africa](#) (BBCSA); [Independent Communications Authority of South Africa](#) (ICASA); [The Press Council of South Africa](#); [The Films and Publications Board](#) (FPB).

### Zambia

- Additional '[Ethical Guidelines](#)' published by the Independent Broadcasting Authority.
- [Code of Conduct of the Media Council of Zambia](#).
- [Standard Operating Procedures for Broadcasting in Zambia](#).
- **Regulatory Bodies:** [The Independent Broadcasting Authority](#) (IBA); [The Zambia Information and Communications Technology Authority](#) (ZICTA); [The Media Council of Zambia](#) (MECOZ).



### 3. DEFAMATION

Defamation is the act of making a false statement about someone that harms their reputation, and that is published “with fault” – that is, as a result of negligence or malice.<sup>6</sup> For example, if a journalist publishes a story that states a politician made nepotistic appointments, but the journalist made it up, the politician may be able to sue them for defamation.

Defamation can be both a criminal offence and a civil wrong, depending on the jurisdiction.<sup>7</sup> Criminal offences are prosecuted by the state, and must be proved beyond reasonable doubt, while civil claims can be instituted by anyone and only need to be proved on a balance of probabilities. Criminal offences are typically punishable by fines or imprisonment terms or both while successful civil suits for defamation attract damages. Bodies such as the United Nations and the African Commission on Human and Peoples’ Rights have condemned criminal defamation, on the basis that it disproportionately punishes expression.<sup>8</sup> While the crime is largely seen as outmoded, it has not disappeared from law entirely.<sup>9</sup>

6 Thomson Reuters Foundation, [Understanding Defamation Law in South Africa](#) (2023); Thomson Reuters Foundation, [‘Understanding Defamation Laws in Kenya’](#) (2023); and Thomson Reuters Foundation, [‘Understanding Defamation Laws in Zambia’](#) (2023).

7 Id. at p1. and p3.

8 Media Defence, [“Defamation: Summary Module on Litigating Digital Rights and Freedom of Expression Online”](#) (2022) at p3.

9 In Kenya, section 194 of the [Penal Code](#) on criminal defamation was declared unconstitutional in 2017. However, journalists could be charged with false information which is likely to discredit the reputation of another person under section 23 of the [Computer Misuse and Cybercrimes Act](#). In South Africa, the President signed the [Judicial Matters Amendment, Act 2023](#) in April 2024 which includes a provision that repeals the common law crime of defamation. Notably, even when the crime existed, nobody had been convicted on this basis for decades (see [here](#)). In Zambia, while ‘criminal defamation of President’ under section 69 of the Penal Code was [repealed](#) in December 2022, other kinds of criminal defamation are still prosecutable.

In practice, the distinction between criminal and civil defamation is not too important for a journalist, because the steps to take to minimise liability are the same for both types of defamation. We can think of these in two phases:

1. Are the elements necessary to establish a defamation claim present?
2. Are there defences available to refute a defamation claim?

The individual who brings the defamation claim has to prove that all the necessary elements of the claim exist. The person defending the claim, in this case a journalist, must then justify the publication by raising a lawfully recognised defence. If they are unable to prove a defence, the claim will succeed.

## ELEMENTS OF DEFAMATION

The following elements are usually necessary for a defamation claim to arise:

1. **False statement of fact:** A statement was made that presents itself as a fact, and which is proven to be untrue. Statements of opinion do not attract defamation risk.
2. **Publication:** The statement must be made available to somebody other than the person whom it is about. Any content a journalist releases to the public – whether online, in print, or through broadcasting – can be considered published. Increasingly, the law is developing to also include publication on social media platforms.<sup>10</sup>
3. **Identification:** The statement identifies or refers to a specific person, either explicitly or by reasonable inference.
4. **Defamatory meaning:** The statement is reasonably likely to impair the reputation of the person it is about. This is typically measured by whether the statement would be understood by the average person to lower the reputation of the individual in the eyes of their community.
5. **Fault:** The statement was made negligently (the person who made it failed to take adequate steps to ensure it was true) or with malice (the person who made it actively wished to harm the subject's reputation).<sup>11</sup>

## DEFENCES AGAINST DEFAMATION CLAIMS

If a case for defamation is brought, there are various defences one can rely on to refute such a claim. These include:

1. **Truth and public interest:** The statement, even if defamatory, is substantially true and its publication was in the public interest. This defence is available when reporting on matters of genuine concern to the public, such as corruption or wrongdoing by public figures.

<sup>10</sup> In South Africa, for example, the case of *Manuel v Economic Freedom Fighters and Others* (13349/2019) concerned defamation on Twitter.

<sup>11</sup> In Kenya, the requirement for fault is malice, rather than negligence – for journalists to avoid liability, they should strive to avoid both negligence and malice – see further Thomson Reuters Foundation, '[Understanding Defamation Laws in Kenya](#)' (2023).

2. **Protected comment/fair comment:** The statement is an expression of opinion (not fact) on a matter of public interest, is based on true facts, and is made without malice. This defence is available for reviews, editorials, or critical commentary on issues like politics, art, or public events.
3. **Reasonableness:** In publishing the defamatory statements, the journalist acted without negligence, and considering all the circumstances, publication was reasonable.<sup>12</sup> This defence is relatively limited and is typically available in situations where journalists relied on what they reasonably believed to be reliable sources, took steps to verify the information, but it later turns out to be false. When this defence is raised, courts will typically consider several factors including: the nature of the defamatory allegations, the source of the information and whether they were reliable, the tone of the article and whether there was a right of reply.<sup>13</sup> As such, adherence to best practice included in codes of conduct becomes important for this defence.
4. **Qualified privilege:** The statement was made during the process of accurately reporting the proceedings of a court or public body and is protected by qualified privilege.<sup>14</sup>
5. **Consent:** The subject of the statement has consented to the publication of the statement.

To avoid liability from defamation, consider the following checklist:

## CHECKLIST | DEFAMATION

1. **Are all statements of fact supported** by evidence that verifies their accuracy?
2. **Are all opinions distinguishable from factual statements,** and are they honestly and reasonably held (that is, do they have a legitimate basis)?
3. **Have reasonable steps been taken** to meet the standards of journalistic ethics and practice?<sup>15</sup>

## Useful Resources

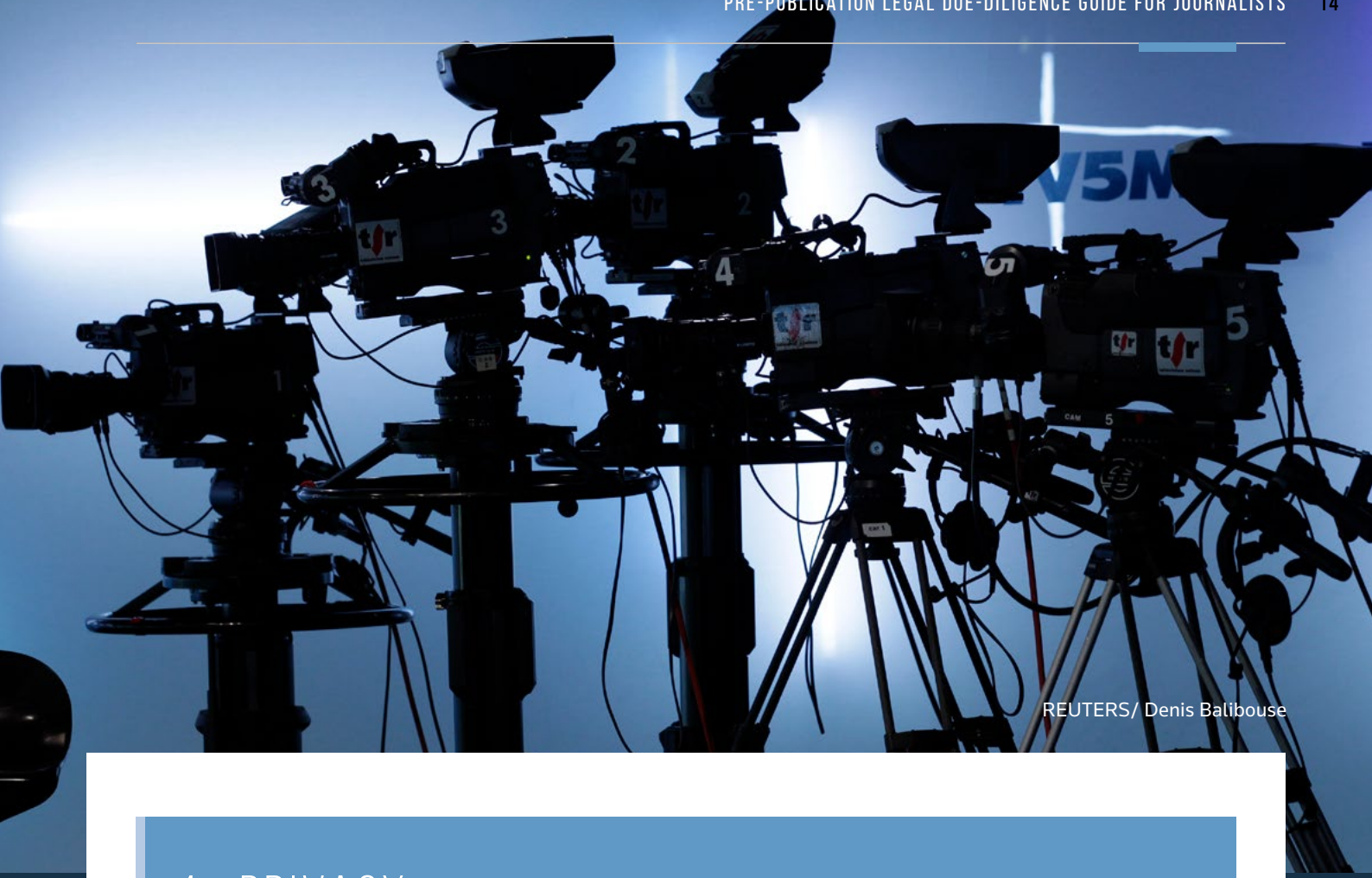
- Media Defence, '[Summary Modules on Litigating Digital Rights and Freedom of Expression Online Module 5: Defamation](#)' (2022).
- Thomson Reuters Foundation, '[Understanding Defamation Laws in Kenya](#)' (2023).
- Thomson Reuters Foundation, '[Understanding Defamation Laws in South Africa](#)' (2023).
- Thomson Reuters Foundation, '[Understanding Defamation Laws in Zambia](#)' (2023).

<sup>12</sup> Dario Milo and Pamela Stein, [A Practical Guide to Media Law](#), LexisNexis 2013, p. 33.

<sup>13</sup> Dario Milo and Pamela Stein, [A Practical Guide to Media Law](#), LexisNexis 2013, p. 33.

<sup>14</sup> Dario Milo and Pamela Stein, [A Practical Guide to Media Law](#), LexisNexis 2013, p. 29.

<sup>15</sup> This is discussed further in the previous indicator.



## 4. PRIVACY

The right to privacy is recognised as a fundamental human right. *“Privacy encompasses a number of elements, all of which are closely associated with the concept of individual identity and recognise the human desire to be free of unwanted intrusions and interferences by the State and others in one’s personal life.”*<sup>16</sup> These different elements result in different forms of liability which could be civil, criminal or relate specifically to data protection. For example, if a journalist publishes the medical records of an individual, this could constitute a violation of that person’s right to privacy and a data protection breach.

We unpack these elements in three parts: 1) general privacy issues; 2) data protection issues; and 3) confidentiality issues, which are separate but related.

### GENERAL PRIVACY ISSUES

In general, liability for a privacy invasion arises where someone proves the wrongful and intentional infringement of their right to privacy.<sup>17</sup> This typically arises in two ways:

<sup>16</sup> Dario Milo and Pamela Stein, [A Practical Guide to Media Law](#), LexisNexis 2013, p. 51.

<sup>17</sup> [NM v Smith](#) (Freedom of Expression Institute as Amicus Curiae) 2007 5 SA 250 (CC), 2007 7 BCLR 751 (CC) para. 55.

1. Through an unauthorised intrusion into the private sphere of another, for example if a journalist physically enters private property or monitors another person.
2. Through the unlawful publication or disclosure of private facts, for example, someone's medical or financial information.<sup>18</sup> Private facts include photographs<sup>19</sup> and information which someone intends to keep private – the disclosure of which will cause mental distress.<sup>20</sup>

The right to privacy is not absolute and it needs to be weighed against other competing rights such as access to information and freedom of expression. This is particularly relevant where, for example, a journalist has published private facts about a politician, but by doing so exposes corruption and it is in the public interest. Accordingly, the law recognises instances where it may be justified for a journalist to publish private facts – these are referred to as defences or grounds of justification.<sup>21</sup> The law typically recognises two defences: public interest and consent. These are discussed in detail below.

Privacy laws vary across jurisdictions, but knowledge of the following broad concepts is generally sufficient for journalists to protect themselves from liability related to general privacy issues.

1. **Legitimate expectation of privacy:** The right to privacy entitles anyone to assume, within reason, that their private life will not be subject to public exposure. This applies particularly to activities in private spaces and to personal communications. However, there are various situations where this legitimate expectation may not apply, such as where the individual is a public figure, is part of a public event or in a public space, and where disclosing information would serve a greater public interest (such as informing the public on matters of safety, health, or significant social issues). "Legitimate expectation" is a subjective standard that is ultimately assessed on a case-by-case basis.<sup>22</sup> Whether or not someone has a legitimate expectation of privacy will depend on the legal standards in the relevant country, but some general examples include: private spaces such as someone's home, personal communications including telephone calls and emails, financial information such as transactions and records, and medical records.
2. **Limits on the right to privacy:** An individual's right to privacy can be limited in various circumstances, especially when it conflicts with the public interest. This includes cases where transparency is crucial – such as revealing unethical behaviour, addressing public health concerns, or protecting national security. The right to freedom of expression can also justify limitations on an individual's privacy. As with "legitimate expectation", whether it is justifiable to limit the right to privacy is determined on a case-by-case basis, but as discussed, typical justifications include that the disclosure was in the public interest, or the individual concerned consented.
3. **Private facts obtained by unlawful means:** Whether or not private information was obtained through unlawful means, for example by impersonating someone, leaking documents or hacking a device, will be considered by courts in determining whether or not the disclosure is justified.<sup>23</sup>
4. **Minors:** Individuals younger than 18 ('minors') are entitled to enhanced privacy protections. Their identity is typically safeguarded unless there is a particularly significant reason to disclose it, and consent from their parents or legal guardians has been obtained.

18 Dario Milo and Pamela Stein, [A Practical Guide to Media Law](#), LexisNexis 2013, p. 53.

19 *O'Keefe v Argus Printing and Publishing Co. Ltd and Another* [1954] (3).

20 *National Media Ltd v Jooste* [1996] 2 All SA 510 (A) 515 – 516.

21 Dario Milo and Pamela Stein, [A Practical Guide to Media Law](#), LexisNexis 2013, p. 57.

22 BBC, '[Editorial Guidelines: Privacy – Introduction](#)' (2023). For a discussion of the concept in the context of South African law, see [Bernstein and Others v Bester NO and Others](#) (CCT23/95) [1996] ZACC 2 at para 75, where it is explained that there must be a subjective expectation of privacy that is objectively reasonable.

23 Dario Milo and Pamela Stein, [A Practical Guide to Media Law](#), LexisNexis 2013, p. 55.

5. **Vulnerable persons:** The category of “vulnerable persons” includes victims of abuse, persons with disabilities, and people in precarious situations such as those living in extreme poverty, or members of a marginalised group. Because these individuals may be put at particular risk if their identities are disclosed, journalists have a heightened duty to protect their identities and information.

To ensure that a story is generally privacy-compliant, journalists should consider the checklist below.

## CHECKLIST | GENERAL PRIVACY CONCERNS

1. **Does the subject of the story have a legitimate expectation** of privacy?
2. **Does the article include only disclosures of private information** that are justified in terms of limitations on the right to privacy e.g. is disclosure in the public interest?
3. **Where there were no justifications** for limiting the right to privacy, did you obtain consent for disclosure of private information?
4. **Does the article respect and protect the identity of minors?** If there is disclosure of a minor’s identity, is there written, specific, and informed consent provided by a parent or legal guardian?
5. **Does the article respect and protect** the identity of any vulnerable persons it may involve?
6. **Were all the methods used** to obtain information lawful?

### Useful Resources

- Article 19, [‘The Global Principles on Protection of Freedom of Expression and Privacy’](#).
- Media Helping Media, [‘Respecting Privacy as a Journalist’](#).

## DATA PROTECTION

As public life has increasingly moved online, it has become more important than ever for journalists to be sensitive in handling personal information. In this context, “personal information” (or “personal data”) refers to any information that can be used to identify an individual. This includes names, email addresses, identification numbers, location data, online identifiers, and any other information that, directly or indirectly, would enable a third-party to identify a person. It is this information that data protection laws seek to protect by requiring compliance with certain principles – for example, that the least amount of information required is collected, that it be kept safe and secure and that it is not retained for longer than necessary. Importantly, penalties can result from non-compliance with data protection laws, but there are important exclusions which apply to journalism that limit this liability. For example, someone may be fined if they share personal information with a third party who is not authorised to see it.



In South Africa, data protection is governed by the [Protection of Personal Information Act, 2013](#). However, this Act excludes personal information that is processed for “journalistic, artistic, or literary purposes”, where this is necessary in terms of freedom of expression. If journalists are bound by a self-regulatory ethics code (for example, the [Press Code](#)), then this applies instead of the Act.<sup>24</sup>

In Kenya, data protection is governed by the [Data Protection Act, 2019](#), and a host of associated regulations. As in South Africa, the Act contains an explicit exception for journalism conducted in the public interest, particularly where the journalist is bound by a self-regulatory code.<sup>25</sup>

In Zambia, data protection is governed by the [Data Protection Act, 2021](#), which as above, contains explicit exceptions for journalistic work where journalists are bound by a regulatory code issued by the [Independent Broadcasting Authority](#).<sup>26</sup>

Accordingly, it is common for data protection laws to include an exclusion for journalism. This means that when a journalist is investigating, which includes collecting personal information, they may not be legally required to comply with all the requirements in data protection law. However, it is important to confirm whether the exclusion applies, and adhere to best practice wherever feasible.

To limit liability concerning data protection laws, consider the following checklist below:

## CHECKLIST | DATA PROTECTION

1. **Does your country have a comprehensive data protection law** or any other legal requirements that may be applicable? If yes, have you complied with these requirements?
2. **Do the journalistic activities in the story fall** within any exemptions provided for by the relevant data protection law?
3. **Where there is no comprehensive data protection framework** or where the law does not include a journalism exemption, does the publication comply with data protection principles (i.e. lawful, fair and transparent use; limited for its purpose; adequate and necessary; accurate; not kept longer than needed; collected for a specific purpose; data subject access; and integrity and confidentiality)?
4. **Did you comply** with the data protection principles in the applicable code of conduct?

24 This Code states the following, in section 4: “Data protection” Members of the media shall:

4.1 take reasonable steps to ensure that data containing personal information under their control is protected from misuse, loss, and unauthorized access;

4.2 amend inaccuracies in published personal information where a person requests a correction;

4.3 inform the affected person(s) and take reasonable steps to mitigate any prejudicial effects where it is reasonably suspected that an unauthorized person may have obtained access to personal information held by the media;

4.4. use and disclose personal data only for journalistic purposes.

25 The Act also notes (section 52(2)) that another condition for the journalistic exception to apply is compliance with a Code issued by Kenya’s Data Commissioner “containing practical guidance in relation to the processing of personal data for purposes of Journalism, Literature and Art”. However, at the time of publication, no such code has been issued. For more on data protection law in Kenya, see Nzilani Mweu, [‘Kenya – Data Protection Overview’](#) (2024).

26 For more on data protection law in Zambia, see Sydney Chisenga, [‘Zambia – Data Protection Overview’](#) (2023).

### Useful Resources

- ALT Advisory, '[Data Protection Africa](#)' (2024).
- Information Commissioner's Office, '[Data Protection and Journalism: A Guide for the Media](#)' (2014) (United Kingdom).
- Media Defence Resource Hub, '[Privacy, Security, and Data Protection](#)' .
- Yellowbrick, '[Balancing Data Privacy in Journalism: A Comprehensive Approach](#)' (2023).

## CONFIDENTIALITY CLAUSES

The issue of confidentiality can arise when a source for a story is bound by a non-disclosure agreement (NDA) relevant to the matter at hand. This often occurs when a source is acting as a whistleblower. A non-disclosure agreement is a contract in which parties agree not to share confidential information. If a party, such as your source, breaches an NDA, they may be held liable. The most typical form of liability is breach of contract where one party is held liable for violating the terms of the contract. If a party suffers harm or financial loss as a result of the breach, they may seek financial compensation in the form of damages.

Confidentiality also arises in instances where a journalist is required to protect the identities of their sources, especially when the information provided could expose the source to risks such as retaliation, loss of employment, or personal harm. The promise of confidentiality encourages sources to come forward with important information that is often in the public interest. If this confidence is breached it may result in a loss of trust between journalists and their sources and have a chilling effect on freedom of expression and on the willingness of individuals to speak out on important issues. Such a breach may also result in legal consequences. Some of the steps you can take to protect the confidentiality of sources could include:

- **Secure communications:** Encrypted communication tools can help journalists communicate with sources securely. Some platforms, such as Signal, offer end-to-end encryption which provide a secure way to exchange sensitive information.
- **Limit access:** Restrict access to sensitive information within newsrooms and only share it with individuals who have a legitimate need to know. Implement protocols for handling confidential information securely including password protection, encryption, and secure storage.
- **Protect digital footprints:** Take steps to minimise digital footprints and avoid leaving traces of communication that could compromise anonymity. This includes using anonymous email accounts, avoiding shared devices or networks, and being cautious about metadata in files or documents.
- **Educate sources:** Provide sources with clear guidance on how to protect their own identity and minimise risks when communicating with journalists. This may include advice on how to use certain secure platforms to share information and general tips such as avoiding work-related networks and refraining from sharing personal information.

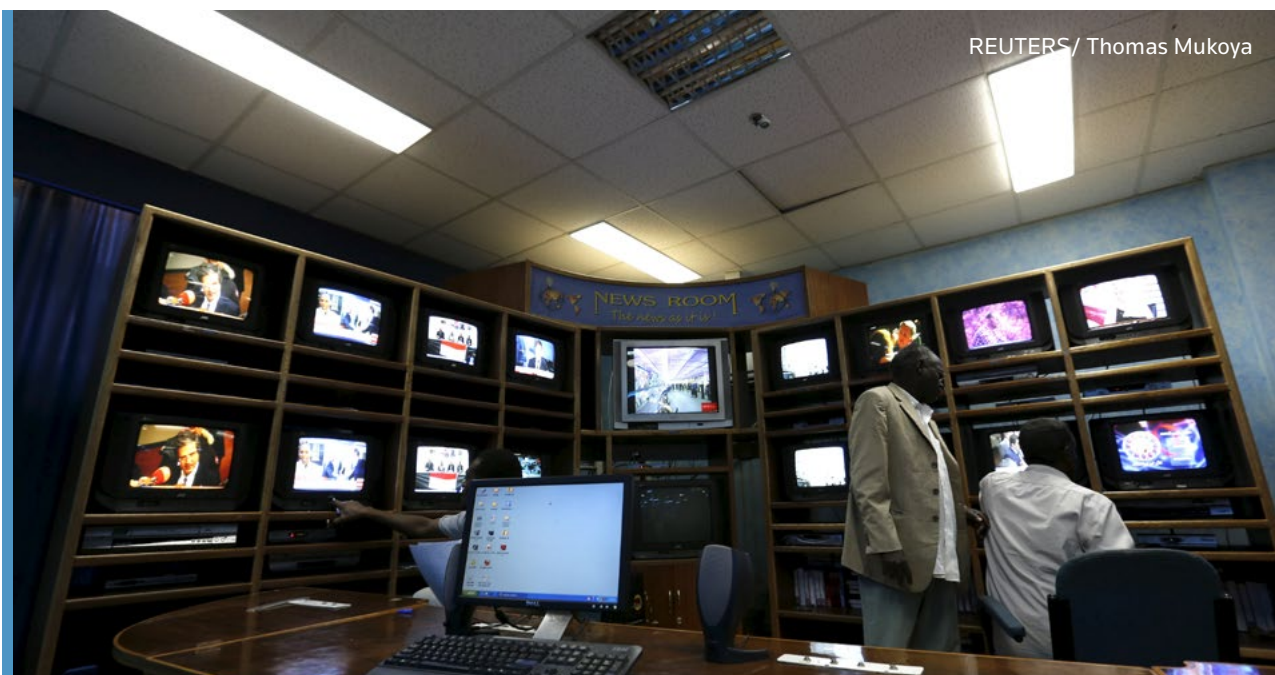
To navigate such situations, and protect sources and whistleblowers from potential liability, journalists should consider the checklist below:

## ✓ CHECKLIST | CONFIDENTIALITY CLAUSES

1. **Did you take reasonable steps** to confirm that the news source does not have an existing NDA?
2. **Where an NDA exists**, is the disclosure by the source an allowable exception according to the national law? Allowable exceptions typically include public interest, whistleblowing, court-ordered disclosures, and protecting the rights of others. The specific range of permissible exceptions varies by country and is often included in the text of the NDA.
3. **Have you put appropriate mechanisms** in place to secure information in respect of confidential sources and whistleblowers?
4. **Have you discussed the possible risks** that may arise with these sources, where this is feasible?

## 🔍 Useful Resources

- Blueprint for Free Speech, [‘The Perugia Principles for Journalists Working with Whistleblowers in the Digital Age’](#) (2018).
- Digital Media Law Project, [‘Practical Tips for Protecting Your Sources and Source Material’](#) (2023).
- Media Defence, [‘Source Protection and the Protection of Journalistic Materials’](#) (2022).



REUTERS/ Thomas Mukoya

## 5. COPYRIGHT

Copyright law protects original works created in any medium, including images, literature, music, and audio recordings.<sup>27</sup> It is globally recognised through various international treaties and enforced at the national level.<sup>28</sup>

Journalists must take care to ensure their reporting complies with copyright law, either by securing consent for any copyrighted work they use in their reporting, or by ensuring the use of the work is legally permissible. For example, many jurisdictions rely on the concept of “fair use” or “fair dealing” to regulate when copyrighted work can be used. While what constitutes “fair use” varies somewhat by jurisdiction, in general the concept covers use for commentary, criticism, news reporting, teaching, scholarship, or research. Journalists can therefore typically use copyrighted material in their reporting, so long as their use does not undermine the market value of the work (for example, by reproducing it in full).

To minimise liability for a copyright infringement, journalists should consider the checklist below:

### CHECKLIST | COPYRIGHT

1. **Have you secured consent** to use any copyrighted material, including recordings, pictures, videos, or likeness of individuals in the published report, subject to any exceptions provided for in law (e.g. “fair use”)?
2. **Have any images/recordings/etc. been obtained in compliance** with laws related to permissions to film, record, etc.?
3. **Does the article properly acknowledge sources** and authors as appropriate?

### Useful Resources

- Center for Media and Social Impact, '[FAQ Set of Principles in Fair Use for Journalism](#)' (2013).
- Center for Social Media, '[Set of Principles in Fair Use For Journalism](#)' (2013).
- First Draft, '[A Journalist's Guide to Copyright Law and Eyewitness Media](#)' (2016).
- Society of Professional Journalists, '[A Beginner's Guide to Copyright for Freelance Journalists](#)' (2018).
- US Copyright Office, '[What Does Copyright Protect?](#)'.

27 For a detailed treatment of this topic, see Varsha Mahendrasignh, '[Understanding Media Law: Copyright, Fair Use, and Intellectual Property for Journalists](#)' (2023).

28 Relevant international treaties include the [Berne Convention](#) (1886) and the [Universal Copyright Convention](#) (1952).

## 6. ADDITIONAL RISKS TO CONSIDER

As a final check, it is important to consider the overall risk that publication of a piece may pose –this relates to issues that do not fall within the sections above but may expose a journalist to risk, including criminal charges. The checklist below includes a few questions to consider when assessing overall risk.

### CHECKLIST | ADDITIONAL RISKS TO CONSIDER

1. **Could any subjects of the piece be considered risky**, such as businesses or individuals with a track record of suing journalists?
2. **Where potential risk has been identified**, have you engaged with your editor, lawyers, or any other available parties on the extent of the risk and possible mitigation measures?

## 7. FURTHER RESOURCES

- Media Defence, '[Factsheet: Spyware and Digital Surveillance](#)'.
- Media Institute for Southern Africa, '[A Survival Toolkit for Journalists: How to Protect Yourself Against Digital Surveillance](#)' (2022).
- Privacy International, '[Government Hacking and Surveillance: 10 Necessary Safeguards](#)' (2018).
- Reporters Without Borders, '[Safety Guide for Journalists](#)' (2015).
- Reuters, '[Standards and Values](#)'.
- William Horsey, '[OSCE Safety of Journalists Handbook](#)' (2012).



SHUTTERSTOCK/ Akintunde Akinleye

## ACKNOWLEDGEMENTS & DISCLAIMER

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TrustLaw is the Thomson Reuters Foundation's global pro bono legal programme, connecting high-impact NGOs and social enterprises with the best law firms and corporate legal teams to provide them with free legal assistance. TrustLaw also facilitates operational legal support for media outlets, and legal research for non-profit media freedom focused organisations that are working to improve the legal environment for journalists and media organisations. To find out more please visit [www.trust.org/trustlaw/](http://www.trust.org/trustlaw/).