

Commission d'enquête sur

**la protection de la
confidentialité des
sources journalistiques**

REPORT OVERVIEW

Texte original en français

This publication was prepared in light of the work carried out by the Commission d'enquête sur la protection de la confidentialité des sources journalistiques.

Coordination with Les Publications du Québec

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This edition was published by
Les Publications du Québec
1000, route de l'Église, bureau 500
Québec (Québec) G1V 3V9
www.publicationsduquebec.gouv.qc.ca

Translation
Documens

Graphic design and layout
Marquis Interscript

Legal deposit – 2017
Bibliothèque et Archives nationales du Québec
Library and Archives Canada
ISBN 978-2-550-80093-4 (PDF)
© Gouvernement du Québec, 2017

This publication is also available on the Commission's website: www.cepcsj.gouv.qc.ca

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The Commission d'enquête sur la protection de la confidentialité des sources journalistiques was set up by the Québec government on November 11, 2016.

Its mandate consists of:

1. Investigating, reporting and formulating recommendations on police practices with regard to investigations likely to affect the privilege protecting the identity of journalistic sources, including political intervention allegations toward police forces that may compromise this privilege and that may have led to police investigations;
2. Investigating, reporting and formulating recommendations on practices pertaining to obtaining and executing judicial authorizations likely to affect the privilege protecting the identity of journalistic sources;
3. Making recommendations to the government with regard to the best practices and concrete actions to implement in order to ensure the privilege protecting the identity of journalistic sources is respected. These recommendations could also pertain to the practices of the Directeur des poursuites criminelles et pénales, the guidelines surrounding judicial authorizations and the opportunity to amend relevant legislative and administrative frameworks.

[Translation]

The period covered by the investigation begins on May 7, 2010, date on which the Supreme Court of Canada rendered its decision in the case of *R. v. National Post* (2010 CSC 16).

Over the course of the 34 days of hearing held last spring, 74 witnesses were heard and more than 300 documents were submitted as evidence.

At the end of the hearings, the parties to the inquiry and the public were invited to file briefs summarizing what they had retained from the evidence and proposing concrete measures with regard to each of the three aspects of the Commission's mandate.

The Commission received 14 briefs and held public hearings in this respect on September 11, 12 and 13, 2017.

The evidence—both oral and written—collected throughout the course of the hearings, briefs from the parties and the public, expert reports and the work of the Commission's Research Service were used to draft the report.

The Commission's report comprises five chapters: the history of the Commission, the environment in which the events brought to light since the fall of 2016 took place; the account of the facts; the analysis of evidence and the conclusions; and finally, the recommendations.

CONCLUSIONS

The privilege relating to the confidentiality of journalists' sources is a creation of the courts, and its application in the context of an investigation or trial depends on the circumstances surrounding each case. However, beyond this privilege, the courts recognize the very particular situation of journalists and the media in a democracy from the outset, and they take this into consideration when issuing a search warrant targeting journalistic material, for example.

Therefore, the confidentiality of sources is just one aspect of the confidentiality of information gathered by the journalist.

The Commission therefore estimates that, in order for its work to be useful and recommendations relevant, the analytical focus should be broadened to cover the issue of confidentiality of information gathered by journalists in their search for information in its entirety rather than just the more narrow issue of protecting the identity of their sources and of the related privilege on a case-by-case basis.

With regard to police investigative practices

All events presented, with the exception of those involving journalists Éric-Yvan Lemay and Michaël Nguyen, have a common denominator: a leak of confidential information, proven or unproven, by a police officer to the benefit of a journalist¹.

Based on the evidence, the circumstances specific to the case determine the use of criminal versus disciplinary measures.

Five cases led to judicial authorizations targeting journalists. One of these cases included a wiretapping warrant. It aimed to tap into the telephones of two police officers—not those of the journalists identified in the warrant as being people “of interest in the investigation” and potential contacts of the police officers under investigation.

The investigations were conducted in compliance with the legislative framework in effect. Based on the evidence, the choice of investigative methods was defensible and, in all cases, the documents produced in support of the judicial authorizations explained the connection between the alleged offence against the police officers targeted by the investigation and the journalists targeted by the method.

The investigations nevertheless raise a few questions regarding the use of certain investigative methods by police officers. This is the case with:

- Systematically (and repeatedly) obtaining cell tower location information and the names and addresses of subscribers appearing in the incoming and outgoing call log;
- Checking journalists' call logs before checking those of the police officers targeted by the investigation.

The supervision of investigators' work also poses a problem.

1 See the summary table of events, Appendix A.

Finally, the evidence revealed a certain lack of sensitivity, knowledge and precaution from the investigators with regard to personal life issues raised by the use of certain investigation methods in the modern digital era. This lack of sensitivity is especially relevant with regard to journalists' work in collecting information and protecting their sources.

With regard to obtaining and executing judicial authorizations

In the absence of a real tracking system, statistics concerning applications for judicial authorizations are unreliable.

Applications for judicial authorizations are generally well structured and well written, but they are not immune to a few unintended errors or inaccuracies.

Certain issues were, however, noted with regard to police officers' obligation to state the facts supporting their application fully and frankly. The practice of building the statement under oath that will accompany a new application for judicial authorization from a previous statement—the most recent one—adding a few paragraphs to express the most recent investigative steps, becomes an issue when investigators omit or fail to revise their text to ensure the facts and hypotheses stated in the borrowed paragraphs still reflect what they know or think, and fail to notify the reader of this.

The ongoing training offered to investigators responsible for producing documents to support applications for judicial authorizations is lacking.

The evidence does not support the affirmation stating that presiding justices of the peace simply appose their signature to the applications they receive without making the appropriate verifications first. Certain applications targeting journalists have been denied, others released of certain elements, and others were imposed conditions different from the ones proposed by the investigator.

The rules concerning the conservation and destruction of data collected in the course of the investigation vary considerably from one police force to another. They need to be reviewed in great detail, even if the evidence does not allow the conclusion that the data were misused. The same is true for policies relating to the management of data once the investigation is completed.

With regard to allegations of political intervention in the launching of police investigations

The evidence does not allow the conclusion that an elected official intervened to ask that a criminal investigation be instituted, suspended or abandoned, or to give any directive whatsoever with regard to such an investigation.

The evidence leads to believe that elected officials understand their role when it comes to the conduct of police investigations and, more generally speaking, police operations. They do not interfere with the conduct of operations.

That said, a call from a mayor or minister to a chief of police undoubtedly gets special attention. The desire expressed or question asked can easily be perceived as an order.

The absence of clear rules concerning the rapport between the police and elected officials can only pave the way to unfortunate misunderstandings.

RECOMMENDATIONS

Recommendations are presented in the form of two key recommendations—one on the protection of journalistic material and sources, and the other on the rapport between elected officials and police forces—followed by a series of complementary recommendations that can be grouped under three different themes: police investigation practices, judicial authorizations and contacts between police and the media².

Two key recommendations

First: the enactment of a *Journalistic Material and Sources Protection Act* (no. 1)

An umbrella law that would help gather all elements of a regime of immunity in one place, ensuring the protection of journalistic material and sources in all matters falling under Quebec's constitutional jurisdiction.

A law that would echo, in civil and penal matters, the recent *Journalistic Sources Protection Act* (October 18, 2017).

With regard to testifying, the proposed rule is simple: journalists have the right to remain silent. They are not required to answer questions and respond to requests for documents relating to the information collected as part of their journalistic activities. The rule therefore covers not only the confidentiality of their sources, it also covers all documents and information they may have gathered as part of their research.

The protection also applies to journalists' collaborators.

Journalists can choose not to claim immunity, but when the identity of a confidential source runs the risk of being revealed, the judge must act *ex officio*.

2 See the list of recommendations, Appendix B.

However, immunity stops when certain conditions are met:

1. the evidence is of crucial importance (necessity criterion);
2. there is no other reasonable way to obtain the evidence (subsidiarity criterion);
and lastly,
3. the weighing of the conflicting public interests at cause justifies lifting the immunity.

The goal here is to avoid situations where maintaining the immunity would result in a real injustice.

The burden of convincing the court rests on the shoulders of the person demanding that the immunity be lifted.

As for seizure (civil) or search (penal), the proposed rules are similar to those of the *Journalistic Sources Protection Act*:

1. there is no other means by which the evidence sought can reasonably be obtained;
and
2. the weighing of the conflicting public interests at cause justifies the seizure or search.

The umbrella law would also provide for the sealing of documents, the sending of a notification by the police to the journalist and media, and a reasonable delay to allow them to contest the measure and assert their point of view.

Second: the implementation of different legislative measures aiming to better support the rapport between elected officials and police forces, based on three axes:

- 1. the independence of the police with regard to elected officials;**
- 2. the responsibility of elected officials in defining public safety orientations;
and**
- 3. the exchange and circulation of information between the police forces
and political authorities.**

This would mean legislatively recognizing the principle of police independence in the conduct of criminal investigations and operations linked to the performance of their mission (nos. 4 and 5).

Beyond its symbolic value, this recognition would be a solid basis to enable the chief of a police force to refuse to respond to a request from an elected official if he considers it would amount to an interference in the conduct of investigations or operations.

It would also consist of legislatively recognizing the responsibility of elected officials in the definition of police orientations, and providing a public and transparent framework for the exercise (no. 6).

Finally, it would provide a legislative framework for both direct communications between political authorities and the police force authorities and requests for information they may formulate to the police force for which they are responsible (no. 7).

The law should provide that it is inappropriate for an elected official in a position of authority to contact the chief of a police force to discuss a personal situation that may lead to a criminal investigation.

The law should also set out that requests for information from elected officials must absolutely go through the highest-ranking government, departmental or municipal official.

Other recommendations

Police investigation practices

- Require that police forces draft an investigation plan approved by their chief for any investigation involving a journalist or any other person exercising a particular function (no. 8).
- Require that police forces improve first-level supervision for all investigators (no. 9).
- Require that the people responsible for supervising investigations take a course preparing them for this role (no. 10).
- Require that the investigators working in internal affairs divisions and professional standards complete a training in this matter (no. 11).
- Require that all investigators regularly fine tune their training on investigation practices likely to compromise the protection of privacy, personal information and confidentiality of journalistic material and sources, and on drafting authorization applications targeting a journalist or other individual exercising a particular function (no. 11).
- Remind the police forces of the importance of updating internal reference documents pertaining to the drafting of documents supporting applications for judicial authorization and to adapt their content, form and level of language to the various types of readers affected (no. 12).
- Require the police forces to:
 - Limit applications for judicial authorizations for obtaining identifying information on subscribers and cell tower location data to only cases where such information or data are crucial to the investigation.
 - Provide the judge handling an application for judicial authorization with clear explanations of the intrusive nature of the investigation method considered and its scope with regard to the journalist or any other person exercising a particular function, when considered alone or in association with other investigative methods (no. 13).

Judicial authorizations

- Amend directive no. 2016-26 of the Ministère de la Sécurité publique to make a consultation with a prosecutor of the Directeur des poursuites criminelles et pénales (DPCP) mandatory in all cases where an application for judicial authorization targets someone exercising a particular function (no. 16), and confirm its permanent nature (no. 17), while taking the necessary measures for the DPCP to account for these consultations in its annual report (no. 18).
- Ensure directive MED-1 of the Directeur des poursuites criminelles et pénales is amended to apply, as is current practice, to all types of judicial authorizations targeting a journalist (and not only to the seizure of journalistic material) (no. 19).
- Take different measures, both in terms of the Ministère de la Justice (services de justice) and the police forces, in order to closely monitor all applications for judicial authorization:
 - Creation of a justice system registry (no. 20) and publication of an annual report by the Ministère de la Justice (no. 21).
 - Creation of a police force registry (no. 22), amendment of section 265 of the *Police Act* (no. 23) and publication of an annual report by the Ministère de la Sécurité publique (no. 24).
 - For search warrants, require that police forces notify the journalist and the media before executing the warrant, unless it is urgent or there is a risk for the conduct of the investigation (no. 3).
 - For other authorizations or orders, require that a notice be sent to the journalist and media concerned systematically in the days following the execution (no. 2).
- Require police forces to adopt a policy for the conservation, during the investigation, of information collected following judicial authorizations targeting a journalist or any other person exercising a particular function, and to make it public (no. 14).
- Set up a work group to study the issue of conserving information collected by police officers once the investigation is completed (no. 15).

Contacts between the police and the media

- Require the police forces to specify in their disciplinary rules and internal documents that there can only be a breach if communication between the journalist and the police officer concerns information of which the latter has learned in the performance of his duties (no. 25).
- Require that police forces make their media relations policy public (no. 26).
- Plan regular meetings in order to allow police investigators and journalists to discuss issues relating to their respective practices (no. 27).

The proposals made by the Commission are compliant with its mandate and guiding values, such as freedom of the press and the public right to information, respect for democratic institutions, transparency and citizen participation in public debate and respect for the rule of law.

Finally, the Commission reiterates the important role journalists, police officers and elected officials play in a democratic society. Journalists inform us, police officers protect us, and elected officials guide us.

There is a distinction to be made between individuals and institutions. Individuals come and go, but institutions remain.

It was institutions that the Commission kept in mind when making its recommendations.

EVENTS PRESENTED AS EVIDENCE

In total, 14 events were put into evidence. These events come from four police organizations: the Service de police de la Ville de Montréal (SPVM), the Sûreté du Québec (SQ), the Service de police de la Ville de Gatineau (SPVG) and the Service de police de Laval (SPL).

Event put into evidence	Police force involved	Investigation launch date	Type of investigation	Alleged infraction	Journalist targeted by a judicial authorization application	Information requested
Nicolas Saillant affair	SQ	October 12, 2011	Criminal	Obstruction of justice (s. 139 Cr.C.)	Nicolas Saillant	Incoming and outgoing call log (cell)
Laflamme affair	SQ	January 12, 2012	Disciplinary	Violation of the oath of discretion	None	–
Assainir project (Journalistic leaks component)	SQ	February 8, 2012	Criminal	Obstruction of justice (s. 139 Cr.C.) Disclosure of the existence and content of communications intercepted via wiretapping (s. 193(1) Cr.C.)	None	–
Éric-Yvan Lemay affair	SQ	February 15, 2012	Criminal	Theft under \$5,000 (s. 322a Cr.C.) Trafficking of identifying information (s. 402(2) Cr.C.)	Éric-Yvan Lemay	Search
Claude D'Astous affair	SPVM	February 15, 2013	Disciplinary	Disobeying superiors' orders and instructions	None	–
Lois Street	SPVG	June 13, 2013	Disciplinary	Violation of the oath of discretion	None	–

Event put into evidence	Police force involved	Investigation launch date	Type of investigation	Alleged infraction	Journalist targeted by a judicial authorization application	Information requested
Diligence project (Journalistic leaks component)	SQ	September 5, 2013	Criminal	Disclosure of the existence and content of communications intercepted via wiretapping (s. 193(1) Cr.C.)	Isabelle Richer	Incoming and outgoing call log (cell) Cell tower location data
					Marie-Maude Denis	Incoming and outgoing call log (cell) Cell tower location data
					Denis Lessard	Incoming and outgoing call log (cell) Cell tower location data
					André Cédilot	Incoming and outgoing call log (cell) Cell tower location data
					Alain Gravel	Incoming and outgoing call log (cell)
					Éric Thibault	Incoming and outgoing call log (residential line)
Roger Larivière affair	SPVM	October 10, 2014	Criminal	Breach of trust (s. 122 Cr.C.)	None	–
Allumette project (Journalistic leaks component)	SPL	December 2, 2014	Criminal	Obstruction of justice (s. 139 Cr.C.)	Monic Néron Audrey Gagnon	Confirmation of telephone numbers
Coderre-Lagacé affair	SPVM	December 4, 2014	Criminal	Unauthorized use of a computer (s. 342.1 Cr.C.) Breach of trust (s. 122 Cr.C.)	Patrick Lagacé	Incoming and outgoing call log (cell) Cellular tower location data

Event put into evidence	Police force involved	Investigation launch date	Type of investigation	Alleged infraction	Journalist targeted by a judicial authorization application	Information requested
Denis Mainville affair	SPVM	November 21, 2014	Disciplinary	Disobeying supervisors' orders	None	–
			Criminal	Breach of trust (s. 122 Cr.C.)		
Escouade project (Journalistic leaks component)	SPVM	January 11, 2016	Criminal	Breach of trust (s. 122 Cr.C.)	Patrick Lagacé	Incoming and outgoing call log (cell)
					Vincent Larouche	Cellular tower location data Subscribers' contact information Cell phone location Wiretapping
F-8 affair (Montréal-Nord)	SPVM	April 18, 2016	Administrative/ Disciplinary	Breach of the oath of discretion	Aucun	–
Michaël Nguyen affair	SQ	June 7, 2016	Criminal	Intrusion into a protected website section (s. 342.1 Cr.C.)	Michaël Nguyen	Raid

LIST OF RECOMMENDATIONS³

KEY – MEDIA No. 1	Enact a <i>Journalistic Material and Sources Protection Act</i> , in civil and penal matters.
No. 2	Develop a directive for all police forces, requiring that a notice systematically be sent to the journalist and media concerned in the days following the issuance of the warrant, authorization or order.
No. 3	Develop a directive for all police forces requiring that, unless it is urgent or there is a risk for the conduct of the investigation, the journalist and media be notified <u>before</u> executing a search warrant.
KEY – POLICE No. 4	Recognize, in the <i>Police Act</i> , the principle of police independence in the conduct of criminal investigations and operations linked to the performance of its mission.
No. 5	Review the rules pertaining to the appointment of chiefs for all police forces so as to support their independence with regard to political authorities in place, from the process leading to their appointment to the end of their contract.
No. 6	Legislatively recognize the responsibility of elected officials in defining orientations that will guide the police in the accomplishment of their mission, and support the exercise in a public and transparent process.
No. 7	Legislatively provide a framework for direct communications between the political authorities and the police force chiefs for which they are responsible, as well as for requests for information they may formulate.
Criminal investigations: quality control	
No. 8	Develop a directive for all police forces, which will make it mandatory to 1) draft a plan for any investigation involving a journalist or any other person exercising a particular function, and 2) have it approved by the chief of the police force.
No. 9	Develop a directive for all police forces, aiming to improve supervision of first-level investigators, particularly with regard to judicial authorizations.
No. 10	Include in the <i>Police Act</i> the obligation for those responsible for supervising an investigation to follow a course to prepare them for this task.
Investigators training	
No. 11	Develop a directive for police forces that will require that: <ul style="list-style-type: none"> - The investigators working in internal affairs divisions and professional standards complete a training on professional standards. - The investigators regularly fine tune their training on: <ol style="list-style-type: none"> a) investigation practices likely to compromise the protection of privacy and personal information, particularly when the confidentiality of journalistic material and sources are at stake; and b) drafting applications for judicial authorization when the investigation method targets a journalist or any other person exercising a particular function.
No. 12	Remind the police forces of the importance of updating internal reference documents pertaining to the drafting of documents supporting applications for judicial authorization and to adapt their content, form and level of language to the various types of readers affected.

LIST OF RECOMMENDATIONS³

Certain investigative methods

- No. 13** Develop a directive for all police forces regarding the use of certain investigative methods, which will provide:
- a)** That the application for judicial authorization to have access to the identifying information of all subscribers whose telephone numbers appear in the call log be limited only to cases where this information is crucial to the investigation;
 - b)** That the application for judicial authorization for access to cell tower location data be limited only to cases where the information regarding the location of the interlocutors is crucial to the investigation;
 - c)** That the documents supporting an application for judicial authorization clearly explain the intrusive nature of the investigation method considered and its scope with regard to the journalist or any other person exercising a particular function, when considered alone or in association with other investigation methods.

Management of data collected by police forces

- No. 14** Develop a directive that will require all police forces to adopt a policy for the conservation, during the investigation, of information collected following judicial authorizations targeting a journalist or any other person exercising a particular function, and make it public.
- No. 15** Set up a work group who will be responsible for studying the issue of conserving information collected by police officers when the criminal investigation is complete.

MSP directive no. 2016-26

- No. 16** Amend directive no. 2016-26 of the Ministère de la Sécurité publique in order to make a consultation with a prosecutor of the DPCP mandatory in all cases where an application for judicial authorization targets someone exercising a particular function.
- No. 17** Make directive no. 2016-26 of the Ministère de la Sécurité publique permanent.
- No. 18** Take the necessary measures to ensure the DPCP includes in its annual report an account of the consultations by the police forces regarding judicial authorizations targeting people exercising a particular function.

DPCP directive / MED-1

- No. 19** Ensure directive MED-1 of the Directeur des poursuites criminelles et pénales will be amended to apply to all types of judicial authorizations targeting a journalist.

Tracking and statistics

- No. 20** Take the measures necessary for the creation of a registry where all applications for judicial authorization submitted to a judge or presiding justice of the peace will be logged.
- No. 21** Produce a detailed annual report reflecting all of the information logged in the registry of judicial authorizations.
- No. 22** Develop a directive for all police forces, requiring them to hold, based on a unique model, a registry of applications for judicial authorizations submitted by their staff.
- No. 23** Amend section 265 of the *Police Act* in order to expand its scope to all applications for judicial authorization rather than only to search warrants.
- No. 24** Produce a report annually that compiles all information entered in the registries of the police forces with regard to applications for judicial authorization submitted by their staff.

LIST OF RECOMMENDATIONS³

Police and journalist discipline

- No. 25** Develop a directive for all police forces to better define, in their disciplinary regulations and internal documents, what is considered a breach with regard to contacts between police officers and journalists, particularly by specifying that it is only a breach if the communication concerns information the police officer became aware of in the performance of his duties.

Police/media communications

- No. 26** Develop a directive for all police forces, requiring them to make their media relations policy public.
- No. 27** Plan regular meetings that will allow police investigators and journalists to discuss issues relating to their respective practice, under the joint responsibility of the Minister of Public Security and Minister of Justice.

³ The recommended measures with regard to the police forces apply to the Bureau des enquêtes indépendantes (BEI), a police force under section 289.5 of the Police Act, and to the Unité permanente anticorruption (UPAC), with the exception of recommendation *no. 5*.

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