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Legal Considerations in Releasing Information to the Public and Engaging with the Press



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What is Possible <-----> What is Prudent

- Role of government
- Short term versus long term
- Varied but coextensive goals
 - Informed public
 - Transparency
 - Proactive
 - Complete investigation
 - Criminal proceeding
 - Civil proceeding

Sunshine Laws

- Public policy favors public safety and effective law enforcement
- But this is often outweighed by public policy of “open and transparent government”
- Political decision
- Balance
- Particularized justification
- Process for response

Sunshine Laws

- Closed investigations
 - Generally – less protection than open investigations
 - Balance between privacy interests and investigation techniques on side of nondisclosure versus public oversight of law enforcement activities

Sunshine Laws

- Open investigations
 - Generally, policy stronger in favor of nondisclosure
 - Still requires particularized assessment
 - And particularized response

Sunshine Laws

- Witness safety
- Confidential informants
- Pledge of necessary confidentiality otherwise

Defamation

- False statement purporting to be fact
- Published or communicated
 - libel
 - slander
- Some level of fault – negligence to actual malice
- Damages or harm caused to reputation

Defamation

- Defenses
 - Truth
 - Privilege
 - Qualified privilege
 - Innocent construction
 - opinion

Defamation

- Truth
 - Substantial truth

Defamation

- Privilege
 - Absolute privilege
 - Statements made during any stage before or during a judicial or quasi-judicial proceeding
 - To advance the overriding public and community interest in allowing complainants to seek justice and safety without worry of repercussions
 - Qualified privilege
 - Depends on circumstances, including motive
 - Can be lost if abused
 - Varied standards of intent
 - Common or public interest

Defamation

- Innocent Construction
 - A reasonably innocent construction of alleged defamatory statement
 - The words are given their plain, natural, and obvious meaning to determine whether implication is innocent or defamatory
 - Without reference to extrinsic evidence

Defamation

- Opinion
 - No longer artificial dichotomy between fact and opinion
 - False factual assertion veiled as opinion can be defamatory
 - False factual assertions implied through opinions can be defamatory
 - Assessment based upon specific context
 - Obvious embellishment, hyperbole, or rhetoric are generally not defamatory

Defamation

- Richard Jewell
 - Former sheriff's deputy and campus police officer
 - Working as security at 1996 Atlanta Olympics
 - Found suspicious backpack near Centennial Olympic Park where concert taking place
 - With police began clearing area
 - Within minutes the bag exploded, killing one and injuring more than 100 others

Defamation

- Richard Jewell
 - FBI labeled Jewell as lead suspect
 - Reporters within days published a lead from a former college employer a suspicion that Jewell could have planted bomb
 - Reported as lead suspect by media outlets

Defamation

- Richard Jewell
 - FBI cleared Jewell three months later
 - NBC, CNN, and New York Post settle
 - Claims against Journal-Constitution were dismissed based upon substantial truth at the time
 - Janet Reno formally apologized
 - “person of interest” versus “suspect”

Defamation

- *City of Scottsdale v. Mason*, 512 P.3d 92 (Ct. App. AZ 2022)
 - Police report statements – officers stated plaintiff pointed gun at officers, despite body cam showing otherwise
 - Charged with aggravated assault
 - Officers listed as victims of charge

Defamation

- *City of Scottsdale v. Mason*, 512 P.3d 92 (Ct. App. AZ 2022)
 - City argued the officers' statements in the reports were protected by absolute privilege
 - State law did not extend absolute privilege to all officer statements
 - Privilege did extend to citizen crime victim statements to police
 - Extended to officers' statements as crime victims

Defamation

- Berrio v. City of New York, 212 A.D. 3d 569 (S.C.N.Y App. Div. 2023)
 - Police media release that plaintiff was arrested for hate crime
 - Substantially true at time
 - Witness had not yet recanted her identification of plaintiff
 - Plaintiff was still in custody

Defamation

- *Zoellner v. City of Arcata*, 588 F.Supp.3d 979 (N.D.Cal. 2022)
 - In probable cause statement, officer stated numerous witnesses had detained plaintiff and suggested he stabbed victim
 - Absolute privilege applied to probable cause statement as part of a judicial proceeding

Defamation

- *Zoellner v. City of Arcata*, 588 F.Supp.3d 979 (N.D.Cal. 2022)
 - Chief media release
 - “We have a white male who stabbed and killed a black male – it’s prudent and logical to look at race as an issue, and I think it absolutely is and should be part of our investigation.”
 - Context of opinion

Defamation

- *Zoellner v. City of Arcata*, 588 F.Supp.3d 979 (N.D.Cal. 2022)
 - Statements by Chief not made in vacuum – was part of broader discussion with media in trying to obtain additional evidence, including eye witnesses
 - So while Chief was not definitively stating plaintiff stabbed the victim and was racially motivated in doing so, statements are arguably falsifiable
 - Negligence standard for fault

Defamation

- *Charron v. County of York*, 2020 WL 1868767 (D. Maine)
 - Sheriff's press release and Facebook posting that plaintiff was arrested for using his snow plow truck to ram into another vehicle with occupants to push that vehicle down a road and over an embankment into snow

Defamation

- *Charron v. County of York*, 2020 WL 1868767 (D. Maine)
 - Defamation alleged based upon omission of critical facts from media releases
 - Contradiction of witness statements
 - Intoxication of witnesses
 - Lack of context of dispute between parties
 - Disputed physical evidence

Defamation

- *Charron v. County of York*, 2020 WL 1868767 (D. Maine)
 - Not false if substantially true at time of publication
 - But incomplete statements can be false if statements falsely impute criminal conduct
 - Implied defamation → knowingly failing to tell whole story which results in misleading impression

Defamation

- *Charron v. County of York*, 2020 WL 1868767 (D. Maine)
 - Not shown that Sheriff was knew or should have known all alleged details and otherwise decided to tell only partial truths

HIPAA

- Protected health information
 - Any medical/healthcare history/treatment/payment Information created or received by healthcare provider

HIPAA

- Applies to covered entities, which include healthcare providers
 - Jails
 - DHS

HIPAA

- Applies to business associates of covered entities
 - receives, maintains, or transmits PHI
 - Outside counsel

HIPAA

- Covered entities and business associate obligations – 45 C.F.R. 164.306
 - Ensure confidentiality of PHI
 - Protect against reasonably anticipated threats or unpermitted uses
 - Ensure compliance of workforce

HIPAA

- Covered entities and business associate obligations
 - Organizational/personnel compliance – outside vendors
 - Documentation of policies and procedures – C.F.R. 164.316

HIPAA

- Disclosure without consent – C.F.R. 164.512
 - Necessary for treatment
 - Necessary for job performance of covered workforce

HIPAA

- Disclosure without consent – C.F.R. 164.512
 - Public health activities
 - Emergency
 - Law enforcement

HIPAA

- Disclosure without consent – C.F.R. 164.512
 - By investigative demand
 - Provided information is relevant and material to legitimate investigation
 - Request is specific and limited in scope to extent reasonably practicable in light of purpose

HIPAA

- Disclosure without consent – C.F.R. 164.512
 - Investigative demand continued –
 - Avert serious threat to health or safety
 - Information for identification and location of suspect, fugitive, material witness, or missing person, limited by enumerated criteria (name, address, date/place of birth, type of injury, distinguishing characteristics, gender, race, scars, tattoos)

HIPAA

- Disclosure without consent – C.F.R. 164.512
 - Mandatory reporting
 - Child abuse, elder abuse, gunshot wounds, wounds from crime

HIPAA

- Penalties for violations - civil
 - 42.U.S.C. § 1320d-5 – HHS shall impose a fine if criminal sanction not applicable

HIPAA

- Penalties for violations – civil -
 - Depends on severity of offense, circumstances of offense, and response of subject entity, fines range from \$100 per violation, not to exceed \$25,000 annually to \$100,000 per violation, no to exceed \$1,500,000 annually

HIPAA

- Penalties for violations – criminal -
42.U.S.C. § 1320d-5
 - Knowing violation
 - Range of penalties from \$50,000 and/or one year in prison to \$250,000 and ten years in prison

Other Privacy Interests

- State privacy laws
 - Constitution
 - Statute
- Generally – four elements
 - Public disclosure of facts or substantially certain to become public
 - Facts disclosed were private
 - Disclosure would be highly offensive to a reasonable person
 - Disclosure was made by one acting unreasonably, recklessly, or intentionally as to whether there was a legitimate public interest

Other Privacy Interests

- *Grubbs v. University of Delaware Police Dept.*, 174 F.Supp.3d 839 (D. Del. 2016)
- Chief published press release with plaintiff's arrest and charges, including multiple incidents of indecent exposure, sexual assault of dozens of women, and that additional victims should contact police
- Stated investigation was ongoing and continuing and that all suspects are innocent until proven guilty
- Included photographs of plaintiff, one of which was shirtless bald man in field pulling down his boxer shorts

Other Privacy Interests

- *Grubbs v. University of Delaware Police Dept.*, 174 F.Supp.3d 839 (D. Del. 2016)
- Plaintiff labeled as the UD Flasher, Moonlight Derriere, and Naked Man
- Other media followed
- Pleaded to one count of resisting arrest and one count of lewdness
- No invasion of privacy, however, when press release constituted dissemination of truthful, newsworthy material and reflects matter of public record and concern

Other Privacy Interests

- *Miles v. City of Hartford.*, 719 F.Supp.2d 207 (D. Conn. 2010)
- Chief issued press release stating plaintiff arrested after two month investigation and charged with counts of fabricating physical evidence and one count of tampering with a witness.
- No falsity, so no right of action.

Goals

- Present best record to jury
- Control presentation
 - Release of evidence
 - Complete picture
 - Manage expectations
 - Investigation affects criminal and civil proceedings
 - Criminal proceedings affect civil proceedings
- Communication
 - Responsiveness to inquiries
 - People understand process
 - People do not understand non-responsiveness

QUESTIONS/SUGGESTIONS

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