

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

RICHARD CONVERTINO,

Plaintiff,

Case No. 07-CV-13842-DT

v.

Hon. Robert H. Cleland

UNITED STATES DEPARTMENT OF JUSTICE,

Defendant.

Stephen M. Kohn
Kohn, Kohn
3233 P Street NW
Washington, DC 20007
202-342-6980

Lenore M. Ferber (P24223)
Convertino Associates
801 West Ann Arbor Trail, Suite 233
Plymouth, MI 48170
(734) 927-9900
lmf@convertino.net

Robert S. Mullen
Progressive Legal Services
800 Starkweather Street
Plymouth, MI 48170
734-455-2700
robsmullen@gmail.com

Attorneys for Plaintiff Convertino

Herschel P. Fink (P13427)
Brian D. Wassom (P60381)
HONIGMAN MILLER SCHWARTZ AND COHN LLP
2290 First National Building
Detroit, MI 48226
(313) 465-7400
hpf@honigman.com
bdw@honigman.com

Attorneys for Non-Party Media Respondents

**RESPONSE TO (D/E 1) PLAINTIFF'S MOTION TO COMPEL PRODUCTION,
BY NON-PARTY MEDIA RESPONDENTS DETROIT FREE PRESS, INC. AND DAVID ASHENFELTER**

ISSUES PRESENTED

Where a plaintiff in a federal Privacy Act claim seeks to compel a news reporter to disclose a confidential source, and yet has not taken any steps to exhaust other potential sources of the information, should the motion be denied on the basis of the qualified First Amendment and common law reporter's privilege that is recognized by nine federal circuit courts, four Michigan federal district judges, 49 states (including Michigan), Congress, and the Executive Branch?

CONTROLLING / MOST APPROPRIATE AUTHORITY

- *Southwell v. Southern Poverty Law Center*, 949 F. Supp. 1303 (W.D. Mich. 1996) (McKeague, J.)
- *United States v. Webber*, No. 02-80813 (E.D. Mich. July 14, 2003) (Edmunds, J.)
- *Clark v. Esser*, No. 92-72341, 1993 U.S. Dist. LEXIS 21481, 1993 WL 13551485 (E.D. Mich. July 12, 1993) (Rosen, J.)
- *McArdle v. Hunter*, No. 81-10038, 7 Media L. Rep. 2294 (E.D. Mich. Nov. 5, 1981) (Harvey, J.)
- *New York Times Co. v. Gonzales*, 459 F.3d 160 (2d Cir. 2006)
- Fed. R. Evid. 501

TABLE OF CONTENTS

ISSUES PRESENTED..... i

CONTROLLING / MOST APPROPRIATE AUTHORITYii

TABLE OF CONTENTS..... iii

INDEX OF AUTHORITIES..... v

I. Introduction 1

II. Argument..... 4

 A. The Court Should Hold Convertino’s Motion in Abeyance 4

 B. The Reporter’s Privilege Is a Common Law Privilege Encouraged by Fed. R. Evid. 501 and Flowing From Core First Amendment Values..... 4

 1. The Supreme Court’s *Branzburg* Decision Confirmed That the Privilege Is a Matter of Constitutional Dimension 4

 2. Following *Branzburg*, the Reporter’s Privilege has Become one of the Most Well-Established Privileges in Federal Common Law 6

 3. State Law and the Remaining Branches of Federal Government Reinforce This National Consensus 7

 4. The Privilege Is Available in the Sixth Circuit by Virtue of the First Amendment, Common Law, Rules of Discovery, and/or Michigan Law and Public Policy 9

 a. The Only Controlling Authority is Limited to the Grand Jury Context, but Nevertheless Reinforces the Applicability of the First Amendment..... 9

 b. *Southwell v. Southern Poverty Law Center* 11

 c. The *Webber*, *Clark*, and *McArdle* Decisions..... 12

d.	Magistrate Judge Whalen’s Rule 26(c) Balancing Test.....	13
e.	Hade v Fremont Is Off-Point and Unpersuasive.....	15
f.	Michigan Law.....	15
C.	The Privilege Requires That Convertino’s Motion to Compel Be Denied	16
1.	The Identity of Ashenfelter’s Confidential Source(s) Does not go to the Heart of Convertino’s Privacy Act Claim.....	16
2.	Convertino has not Exhausted all Other Means of Obtaining the Information	18
3.	Convertino’s Desire to Know the Source(s)’ Identity Does not Outweigh the Fundamental Societal Need to Protect Their Confidentiality.....	21
a.	Convertino Must First Prove the Merits of His Privacy Act Case, and his Need for the Information Must Outweigh the Countervailing First Amendment Interests	22
b.	Convertino Has Failed to State a Claim Under the Privacy Act.....	24
c.	Convertino’s Claim Fails for Lack of Damages.....	26
d.	Convertino’s Claim Fails for Lack of Causation	27
e.	Convertino’s “Need” Does Not Outweigh the Press Freedoms at Stake	28
D.	Convertino’s Rule 30(b)(6) Subpoena to the Free Press Fails for the Same Reasons	30
III	Conclusion.....	30

TABLE OF AUTHORITIES

FEDERAL CASES

Albright v. United States,
732 F.2d 181 (D.C. Cir. 1984) 27

Baker v. F & F Inv.
470 F.2d 778 (2d Cir. 1972) 7, 15

Best Western Int'l v. Doe,
2006 U.S. Dist. LEXIS 56014 (D. Ariz. 2006) 23

Blum v. Schegel,
150 F.R.D. 42 (W.D.N.Y. 1993)..... 21

Branzburg v. Hayes,
408 U.S. 665 *Passim*

Clark v. Esser,
No. 92-72341, 1993 U.S. Dist. LEXIS 21481, 1993 WL 13551485
(E.D. Mich. July 12, 1993) ii, 12-13

Cochran v. United States,
770 F.2d 949 (11th Cir. 1985) 25

Damiano v Sony Music Entert., Inc.,
168 F.R.D. 485 (D.N.J. 1996)..... 7

Dodge v. Trs. of the Nat'l Gallery of Art,
326 F. Supp. 2d 1 (D.D.C. 2004)..... 26

Doe v. Chao,
540 U.S. 614 (2004)..... 26-27

Hade v Fremont,
233 F. Supp.2d 884 (ND Ohio 2002)..... 15

Hiken v. DOD,
521 F. Supp. 2d 1047 (N.D. Cal. 2007)..... 23

Hudson v. Reno,
130 F.3d 1193 (6th Cir. 1997) 24, 27

In re DaimlerChrysler AG Secs. Litig.,
216 F.R.D. 395 (E.D. Mich. 2003) 13-14, 16

In re Grand Jury Proceedings (Storer Communs. Inc. v. Giovan),
810 F.2d 580 (6th Cir. 1987) 9

In re Grand Jury Subpoena (Miller),
397 F.3d 964 (D.C. Cir. 2005) *Passim*

In re Roche,
448 U.S. 1312 (1980)..... 6, 19

In re Stratosphere Corp. Securities Lit.,
183 F.R.D. 684 (D. Nev. 1999)..... 15, 20

Johnson v. Department of Treasury,
700 F.2d 971 (5th Cir. 1983) 27

Jones v. United States,
529 U.S. 848 (2000)..... 25

Lee v. DOJ,
413 F.3d 53 (D.C. Cir. 2005)..... 16-17, 24, 30

Lenhart v. Thomas,
944 F. Supp 525 (S.D. Tex. 1996) 21

McArdle v. Hunter,
No. 81-10038, 7 Media L. Rep. 2294 (E.D. Mich. Nov. 5, 1981) ii, 12-13

New York Times Co. v. Gonzales,
459 F.3d 160 (2d Cir. 2006) ii, 6, 13, 16

NLRB v. Midland Daily News,
151 F.3d 472 (6th Cir. 1998) 10, 15, 23

Omokehinde v. Detroit Bd. of Educ.,
2007 U.S. Dist. LEXIS 91554 & 91688 (E.D. Mich. 2007)..... 13-14

Pollard v. E. I. du Pont de Nemours & Co.,
532 U.S. 843 (2001)..... 27

Price v. Time Inc.,
416 F.3d 1327 (11th Cir. 2005)..... 20

Rice v. United States,
245 F.R.D. 3 (D.D.C. 2007)..... 27

Riley v. City of Chester,
612 F.2d 708, 715 (3d Cir. 1979) 15

Southwell v. Southern Poverty Law Center,
949 F. Supp. 1303 (W.D. Mich. 1996)..... *Passim*

Spector Motor Service, Inc. v. McLaughlin,
323 U.S. 101 (1944)..... 18-19

Tomasello v. Rubin,
167 F.3d 612 (D.C. Cir. 1999)..... 25

Trammel v. United States,
445 U.S. 40 (1980)..... 6

United States v. Burke,
700 F.2d 70 (2d Cir. 1983)..... 7, 12, 20

United States v. Criden,
633 F.2d 346 (3rd Cir. 1980)..... 6

United States v. Holy Land Found.,
2007 U.S. Dist. LEXIS 50239 (N.D. Tex. 2007)..... 23

United States v. Sarkissian,
841 F.2d 959, 965 (9th Cir. 1988)..... 23

United States v. Webber,
No. 02-80813 (E.D. Mich. July 14, 2003)..... ii, 12-13

United States v. Yunis,
924 F.2d 1086 (D.C. Cir. 1991)..... 23

Zerilli v. Smith,
656 F.2d 705 (D.C. Cir. 1981)..... 7, 13, 19, 29

STATE CASES

Doe v Cahill,
884 A.2d 451 (Del. 2005)..... 23

Gordon v. Boyles,
9 P.3d 1106 (Colo. 2000)..... 22

In re Does 1-10,
2007 Tex. App. Lexis 9652 (2007)..... 23

In re Subpoenas to News Media Petitioners,
240 Mich. App. 369, 377, *aff'd*, 463 Mich. 378 (2000)..... 15-16

Krinsky v Doe 6,
159 Cal. App. 4th 1154 (2008)..... 22-23, 27

Mobilisa, Inc v Doe 1,
170 P3d 712 (Ariz. App. 2007) 23

FEDERAL STATUTES

5 U.S.C. § 552a(i)(1)..... 25
5 U.S.C. § 552a(a)(4) 24
5 U.S.C. § 552a(b)..... 24
42 U.S.C. §2000-aa 8
Privacy Act of 1974, 5 U.S.C. § 552a 24

STATE STATUTES

MCL § 767.5a(1)..... 15

RULES

Fed. R. Civ. P. 26 3, 13, 14
Fed. R. Evid. 501ii, 4, 6
FRE 201(b)&(d) 29
FRE 902(6)..... 29
Fed. R. Civ. P. 30(b)(6)..... 30

CONSTITUTIONAL PROVISIONS

First Amendment *Passim*
Sixth Amendment 10

I. INTRODUCTION

Respondent David Ashenfelter is a long-time, Pulitzer Prize-winning reporter for Respondent Detroit Free Press, Inc. In early 2004, he learned from a confidential source or sources within the Department of Justice (“DOJ”) about a DOJ investigation of Plaintiff, then-Assistant U.S. Attorney Richard Convertino. Potentially corrupt activity by those sworn to uphold the law is a matter of acute public interest, and reporting on such misconduct is a core mission of a free press. Ashenfelter properly reported this important information in an article published in the *Free Press* on January 17, 2004 (the “Article”). **Ex A.**

Convertino had been the lead AUSA prosecuting *United States v. Koubriti*, No. 01-80778, before Judge Gerald Rosen of this Court. **Ex B ¶¶ 3-4.** Two of the four defendants were convicted on terrorism-related charges. *Id.* Convertino, however, was removed from the case, and in November 2003, the DOJ’s Office of Professional Responsibility (“OPR”) launched an investigation into possible ethics violations by Convertino, in *Koubriti* and a separate criminal case involving defendant Marwan Farhat. Ashenfelter’s Article, entitled “Terror case prosecutor is probed on conduct,” reported some of the details of this investigation, and noted that it could force a new trial in the *Koubriti* case. **Ex A.** Among other things, the Article detailed Convertino’s alleged involvement in the Farhat prosecution and sentencing. Ashenfelter cited “[Justice Department] officials, who spoke on the condition of anonymity, fearing repercussions.” *Id.*

On February 13, 2004, Plaintiff responded by suing the DOJ, the Attorney General of the United States, the U.S. Attorney for the Eastern District of Michigan, two assistants, and another DOJ official in the U.S. District Court for the District of Columbia, for making public the so-called “private” information about the DOJ investigation.

Exactly as the Article predicted, a post-trial review by DOJ investigators found that Convertino’s prosecution team had withheld documents and evidence and allowed government witnesses to mislead the jury about the facts of the case. Therefore, then-Acting U.S. Attorney Craig Morford asked Judge Rosen to

dismiss the charges. Judge Rosen did so on September 2, 2004, and in the process severely criticized Convertino's prosecution team for "prevalent and pervasive" failures. **Ex C.**

In March 2006, the DOJ investigation culminated in Convertino's indictment by a federal grand jury. **Ex B.** No longer employed by the DOJ, former AUSA Convertino faced trial in this district for "present[ing] false or misleading evidence" at sentencing to one judge of this Court, and for "presenting false and misleading evidence" and "knowingly false material declarations" to "corruptly influence, obstruct, and impede" justice in a criminal trial before another judge of this Court. *Id.* Although a jury eventually declined to convict Convertino, the trial was front-page news throughout the metro Detroit area and nationally.

Now, having *still* undertaken virtually no meaningful discovery in his civil action, Convertino has set his sights on Ashenfelter. He wants to know who Ashenfelter's confidential source(s) are. But the identities of those sources are protected by a constitutional and common law privilege that belongs to Ashenfelter. The privilege is at the heart of Ashenfelter's ability to function as a professional journalist, and Ashenfelter must have the ability to articulate and defend it. At a bare minimum, established privilege law requires Convertino to depose the pool of persons the DOJ itself has identified as possible sources, before a court even begins to balance Convertino's desire for information against the gravity of safeguarding a robust and uninhibited press. Convertino could have begun this process years ago. Instead, he has stonewalled the Government in its efforts to get discovery from him, *see, e.g., Ex D* (Government's Renewed Motion to Compel), and played procedural games to get Ashenfelter's testimony (such as noticing a 30(b)(6) deposition in the District of Columbia of the company that owns the Free Press in his D.C. case), rather than confronting him directly. *See, e.g., Ashenfelter v Convertino*, No. 06-14016 (Duggan, J.) (declaratory judgment action opposing D.C.-issued subpoena, which was voluntarily dismissed after Convertino withdrew the subpoena in the face of resistance and a motion to quash by Ashenfelter).

Before this Court, Convertino attempts to gloss over his complete lack of effort to take discovery by relying on the report compiled by the DOJ's Office of the Inspector General ("OIG"). **Ex E** (heavily redacted

report). From the other side of his mouth, however, Convertino has spent years publicly condemning the DOJ and the OIG report on his <convertino.org> fundraising website, for “conspiring” against him in “retaliation” for testimony he gave to Congress. See, e.g., **Ex F at 1** (calling investigation “tainted” and a “cover-up”); **id. at 6** (claiming the DOJ did not try to identify the source because “it would help Convertino in his lawsuit”). For him to now rely on the same government investigation he long disparaged to avoid investing the required time and effort into his own lawsuit is, at best, questionable.

Convertino’s rationale for overcoming Ashenfelter’s legal privilege to protect the confidentiality of his source is just as dubious. Repeatedly mischaracterizing the state of the law, he claims that the Sixth Circuit has “refused to recognize” a First Amendment-derived, common law qualified privilege for reporters, that only one Michigan federal judge has applied the privilege, and that only an “undemanding” balancing test under Rule 26(c) is available. Nothing could be further from the truth. In reality, nine of the federal circuit courts—and four Michigan federal district judges, among others—recognize that reporters possess a qualified First Amendment right to shield the identity of their confidential sources, which can be overcome only if the information sought is highly relevant, crucial to a litigant’s claim, if all alternate sources have been exhausted, and the public interest in disclosure outweighs the solemn commitment to protect source confidentiality. Moreover, even the relevant decisions by one magistrate judge that have couched their analysis within Rule 26(c) instead of the First Amendment have applied an equally strict scrutiny, and held in favor of the reporters.

Freedom of the press must be zealously guarded if reporters are to continue serving as vigilant watchdogs against government encroachment on liberty. The Reporters’ Privilege places an intentionally high hurdle in front of *any* effort to destroy *any* source’s confidence in journalists, lest *all* potential sources be deterred from speaking to the press. The national consensus demands that it be so. The important public interest in this case demands it. Accordingly, this Court should deny Convertino’s motion to compel.

II. ARGUMENT

A. The Court Should Hold Convertino's Motion in Abeyance

Although the court has initially directed the parties to brief Convertino's motion to compel for a May 2008 hearing, recent developments in Convertino's Privacy Act action warrant the suspension of that schedule. Under the scheduling order entered by the D.C. court, Convertino's discovery cannot even *begin* until the Court resolves the DOJ's pending motion to compel discovery from Convertino. **Ex G** at ¶ c (Order); **Ex D** (Motion). Convertino did not respond to that motion until March 21, 2008. **Ex H**.

Prudential reasons likewise counsel that this matter remain in abeyance. What little discovery Convertino has provided shows that his case is wholly without merit, and will almost certainly be dismissed on summary judgment, with or without Ashenfelter's testimony. As an essential element of Convertino's prima facie case, he must show that he suffered some "actual damages." As discussed in more detail below, Convertino's long-delayed discovery responses suggest only that he can make no such showing.

Accordingly, in the interests of judicial economy, the Court should hold Convertino's motion in abeyance, pending the resolution of the DOJ's pending motion to compel.

B. The Reporter's Privilege Is a Common Law Privilege Encouraged by Fed. R. Evid. 501 and Flowing From Core First Amendment Values

1. The Supreme Court's *Branzburg* Decision Confirmed That the Privilege Is a Matter of Constitutional Dimension

Convertino grudgingly admits that the 1972 decision in *Branzburg v. Hayes*, 408 U.S. 665, "did recognize that 'news gathering is not without its First Amendment protections,' [*id.* at 707, and that it] left to the lower courts the task of deciding when the interests of justice trumped the public interest in protecting news source confidentiality." Motion to Compel at 5. His attempt to downplay that fact by noting that the Court "expressly refused to recognize any general First Amendment privilege that would allow a reporter to avoid giving testimony," *id.* at 4-5, is misleading at best.

Branzburg's relevance here is cabined by its facts. The reporter in that case had been subpoenaed to testify in a grand jury proceeding, the “constitutional prerogatives [of which] are rooted in long centuries of Anglo-American history” [408 U.S. at 687]—not a civil case such as this one. Therefore, *Branzburg's* actual holding was that any privilege that journalists may enjoy to protect the confidentiality of their sources must yield to the government’s “compelling” interest in unfettered grand jury proceedings. *Id.* at 700. *Branzburg* did not (and could not have) foreclosed the existence of such a privilege in *all* circumstances, and it specifically did not address it in the context of civil litigation.

In fact, the *Branzburg* majority took pains to emphasize that courts should be wary of compelling discovery of confidential news sources, and specifically limited its holding to the grand jury context:

The use of confidential sources by the press is not forbidden or restricted; reporters remain free to seek news from any source by means within the law. No attempt is made to require the press to publish its sources of information or indiscriminately to disclose them on request. The sole issue before us is the obligation of reporters to respond to grand jury subpoenas as other citizens do

Id. at 681-82. It also recognized the freedom of legislatures to protect the reporter’s privilege, and noted the DOJ’s internal rules requiring its prosecutors to obey the privilege—which the court described as “a major step in the direction the reporters herein desire to move.” *Id.* at 707. Finally, the majority acknowledged that the First Amendment placed limits even on what grand juries could discover from reporters. *Id.* at 707-08.

Justice Powell, who joined the five-justice majority, added a separate concurrence. He stressed “the limited nature of the Court’s holding,” *id.* at 709, and that the privilege would need to be shaped “on a case-by-case basis.” *Id.* at 710. The remaining four justices argued adamantly for the necessity of a qualified First Amendment privilege, lest “the journalistic profession [be annexed] as an investigative arm of government.” *Id.* at 725 (Stewart, J.). They also saw a silver lining in “Justice Powell’s enigmatic concurring opinion[, which] gives some hope of a more flexible view in the future.” *Id.* Therefore, all nine

justices acknowledged that forcing reporters to testify inevitably conflicts with First Amendment principles, and a majority expressly endorsed the common law development of a qualified First Amendment privilege.

For these reasons, “most circuits [hold] that *Branzburg* could be interpreted as *creating* a qualified [reporter’s] privilege.” *Southwell v. SPLC*, 949 F. Supp. 1303, 1311 (W.D. Mich. 1996) (McKeague, J.) (emphasis added); *cf. In re Roche*, 448 U.S. 1312, 1315 (1980) (Brennan, J. in chambers) (“I do not believe that the Court has foreclosed news reporters from resisting a subpoena on First Amendment grounds”).

2. Following *Branzburg*, the Reporter’s Privilege has Become one of the Most Well-Established Privileges in Federal Common Law

Fed. R. Evid. 501, which came into effect three years after *Branzburg*, expressly instructs that “[privileges] shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.” *See also Trammel v. United States*, 445 U.S. 40, 47 (1980) (“Rule 501 . . . manifested an affirmative intention not to freeze the law of privilege.”) Since then, courts have overwhelmingly endorsed the qualified First Amendment privilege for reporters’ confidential sources. *See New York Times*, 459 F.3d at 181 (Sack, J., dissenting) (“there has been developed in those thirty-four years [since *Branzburg*] federal common-law protection for journalists’ sources under [Rule] 501”); *In re Grand Jury Subpoena (Miller)*, 397 F.3d 964, 983 (D.C. Cir. 2005) (Henderson, J., conc.) (“we are not bound by *Branzburg*’s commentary on the state of the common law in 1972”). Only the Sixth and Eighth Circuits have yet to definitively address the availability of the privilege outside the grand jury context. But “nine of the twelve federal circuit courts of appeals have recognized a qualified privilege for reporters and their sources in civil proceedings.” *Southwell*, 949 F. Supp. at 1311.

This should come as no surprise. “The First Amendment was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people, and bottomed on a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.” *United States v. Criden*, 633 F.2d 346, 355 (3rd Cir. 1980) (citations

omitted). “[A] certain trust exists between interviewer and interviewee. This trust extends to all future interviews Any infringement upon this bond, has the potential to offset the vitality of the free exchange of information between journalist and interviewee which form the basis of the reporter’s privilege.” *Damiano v Sony Music Entert., Inc.*, 168 F.R.D. 485, 496 (D.N.J. 1996). Failing to provide a reporter’s privilege “will jeopardize the journalist’s ability to obtain information on a confidential basis.” *Baker v. F & F Inv.* 470 F.2d 778, 782 (2d Cir. 1972). “This demanding burden has been imposed by the courts to reflect a paramount public interest in the maintenance of a vigorous, aggressive and independent press capable of participating in robust, unfettered debate over controversial matters, an interest which has always been a principal concern of the First Amendment.” *United States v. Burke*, 700 F.2d 70, 77 (2d Cir. 1983) (quotation omitted). These vital First Amendment interests require protecting reporters’ confidential sources in all but the most extreme cases:

Compelling a reporter to disclose the identity of a confidential source raises obvious First Amendment problems. . . .

* * *

“[I]n the ordinary case the civil litigant’s interest in disclosure should yield to the journalist’s privilege. Indeed, if the privilege does not prevail in all but the most exceptional cases, its value will be substantially diminished. Unless potential sources are confident that compelled disclosure is unlikely, they will be reluctant to disclose any confidential information to reporters.”

Zerilli v. Smith, 656 F.2d 705, 710-11, 712 (D.C. Cir. 1981). Clearly, the overwhelming abundance of federal common law decided since *Branzburg* recognizes a qualified reporter’s privilege derived from the First Amendment and rooted in deep concern for the vitality of our nation’s democracy.

3. State Law and the Remaining Branches of Federal Government Reinforce This National Consensus

Society’s commitment to protecting journalists’ ability to gather news from confidential sources has also been firmly demonstrated by legal authorities beyond the federal judiciary. For example, 49 states (including Michigan and D.C.) protect the Reporter’s Privilege. *New York Times*, 382 F. Supp. 2d at 502.

Congress has endorsed the policy behind the privilege. The Federal Privacy Protection Act, codified at 42 U.S.C. §2000-aa, with certain exceptions, forbids the government to, without a subpoena:

search for or seize documentary materials . . . possessed by a person in connection with a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication, in or affecting interstate or foreign commerce.

The July 1980 Senate Report accompanying this Act explicitly recognized the “unique needs of the journalism profession, and the unique role that the press is accorded in our constitutional framework.” **Ex I at 16**. It announced Congress’ commitment “to the principle that the government ought to employ the least intrusive, practicable means to secure information that is necessary for criminal proceedings,” *id.* **at 16-17**, and made clear that Congress’ intention was to ensure that members of the press have an opportunity to appear in court before the government may obtain materials reflecting their newsgathering process.

As *Branzburg* observed, these principles also form the foundation of the Attorney General’s guidelines governing subpoenas to the media, still codified at 28 CFR § 50.10. The initial version of the guidelines were issued by Attorney General John Mitchell. In a 1970 speech to the American Bar Association, Mitchell recognized an ongoing “bitter dispute” between the DOJ and the media that had “produced seeds of suspicion and bad faith.” Observing that “a free press is the condition of a free society,” Mitchell promised future “good faith and common sense” in subpoenas issued to the media. **Ex J**.

The guidelines begin with an observation that:

Because freedom of the press can be no broader than the freedom of reporters to investigate and report the news, the prosecutorial power of the government should not be used in such a way that it impairs a reporter’s responsibility to cover as broadly as possible controversial public issues. This policy statement is thus intended to provide protection for the news media from forms of compulsory process, whether civil or criminal, which might impair the news gathering function.

28 CFR § 50.10. The guidelines further provide that attempts by DOJ to seek materials from news media should, “in every case,” carefully consider the effects such action will have on the “public’s interest in the free dissemination of ideas and information.” *Id.* The guidelines also instruct United States Attorneys to

seek materials from news media only as a last resort, to engage in negotiations with the media before formally seeking any materials, to set forth the need for the materials with particularity, and to receive the express permission from the Attorney General before formally seeking such materials. The guidelines add that “except under exigent circumstances,” subpoenas to the press should “be limited to the verification of published information and to such surrounding circumstances as relate to the accuracy of the published information” and that “wherever possible,” subpoenas should be direct at a “limited subject matter” and “should cover a reasonably limited period of time.” *Id.*

These policies echo the qualified reporter’s privilege recognized by nearly all federal circuit courts.

4. The Privilege Is Available in the Sixth Circuit by Virtue of the First Amendment, Common Law, Rules of Discovery, and/or Michigan Law and Public Policy

a. The Only Controlling Authority is Limited to the Grand Jury Context, but Nevertheless Reinforces the Applicability of the First Amendment

The Sixth Circuit has never addressed the availability of the reporter’s privilege outside the grand jury context. Its only grand jury decision is *In re Grand Jury Proceedings (Storer Communs. Inc. v. Giovan)*, 810 F.2d 580 (6th Cir. 1987), which derived from *Branzburg* a four-factor balancing test for protecting reporters’ confidential sources even before a grand jury [*Id.* at 586]:

courts should . . . follow the admonition of the majority in *Branzburg* to make certain that the proper balance is struck between freedom of the press and the obligation of all citizens to give relevant testimony, by determining [1] whether the reporter is being harassed in order to disrupt his relationship with confidential news sources, [2] whether the grand jury’s investigation is being conducted in good faith, [3] whether the information sought bears more than a remote and tenuous relationship to the subject of the investigation, and [4] whether a legitimate law enforcement need will be served by forced disclosure of the confidential source relationship.

“Some of these factors are obviously not relevant in a civil case like th[is] one,” *Southwell*, 949 F.Supp. at 1312 n.23, and “[t]he Sixth Circuit’s views in *In re Grand Jury*, are perhaps best understood as a reaction to the argument put forth by the defendant reporter, who though finding himself in the identical fact situation in which *Branzburg* ruled no privilege existed, attempted to argue the opposite.” *Id.*

“Unlike the *Branzburg* and *In re Grand Jury* cases which involved grand jury proceedings or other cases where a criminal defendant’s Sixth Amendment right to a fair trial was at stake, [however,] confidential source questions in civil cases raise different concerns. . . .” *Id.* at 1312. “Despite its refusal to recognize even a qualified First Amendment privilege in *In re Grand Jury*, the court went on to say that courts should . . . continue to make certain that the proper balance is struck between freedom of the press and the obligation of all citizens to give relevant testimony” *Id.* at 1312 n.23. Therefore, one current Sixth Circuit Judge, and three judges of this Court, have read the Sixth Circuit’s common law as creating a Reporter’s Privilege in non-grand jury proceedings.

What is more, any construction of *In re Grand Jury* that forecloses the First Amendment Reporter’s Privilege’s application to civil cases was undercut by the Sixth Circuit itself 11 years later in *NLRB v. Midland Daily News*, 151 F.3d 472 (6th Cir. 1998). There, the NLRB subpoenaed a newspaper to learn the identity of an anonymous advertiser, based solely on a labor union’s “spurious complaint” that the advertisement was part of an unfair labor practice. *Id.* at 473. Judge Taylor of this Court quashed the subpoena, finding it “an unnecessary intrusion upon the First Amendment rights to commercial speech of both the Respondent newspaper and its advertiser[, and] further conclud[ing] that the [NLRB] failed to demonstrate that it cannot pursue its investigation in a less intrusive manner.” *Id.* A Sixth Circuit panel unanimously agreed, noting that “if this court permitted the Board to obtain the identity of Midland’s advertiser, without demonstrating a reasonable basis . . . , the chilling effect on the ability of every newspaper and periodical to publish lawful advertisements would clearly violate the Constitution.” *Id.* at 475. The Court rejected the NLRB’s plea that it—like *Convertino*—“purportedly lacks the personnel and resources necessary to conduct investigations which intrude less on the commercial speech rights of anonymous advertisers, [because] the organizational structure and congressionally authorized funding level of the Board does not alter the text or the decisional law interpreting the Constitution.” *Id.* This opinion puts to rest any doubt that anonymous speech is protected by the First Amendment in the Sixth Circuit.

b. Southwell v. Southern Poverty Law Center

The leading case within this Circuit on the availability of the reporter's privilege in civil cases is the *Southwell* decision by District (now Circuit) Judge McKeague. In that libel case, Judge McKeague found in the Sixth Circuit's federal common law a qualified First Amendment privilege with three factors. He derived the first two factors from both Michigan and federal civil cases:

[A] civil litigant seeking confidential information should not be able to abrogate a news writer's privilege absent a showing that: (1) the requested information goes to the heart of the litigant's case; and (2) the litigant has exhausted all other means of obtaining the information.

Id. at 1312 (citations omitted). After meticulously reviewing Justice Powell's *Branzburg* concurrence, Judge McKeague concluded that it is also necessary for courts to step back from the circumstances of the case at hand, and assess whether the plaintiff's need for the confidential information outweighs the injury that any forced disclosure would do to society's collective interest in protecting journalist's confidential sources:¹

Finally, this Court believes that a third factor implicit in this balance, especially in cases like the one at bar, is the potential harm that may be caused by ordering disclosure of a confidential source's identity. As Justice Powell, whose concurrence in *Branzburg* is cited as articulating the reporter's privilege, stated: "In short, the courts will be available to newsmen under circumstances where legitimate First Amendment interests require protection." *Branzburg*, 408 U.S. at 710. As such, a case-by-case balancing of constitutional and societal interests is necessary to determine whether First Amendment interests would be jeopardized by ordering disclosure.

Id. (other citations omitted). Judge McKeague ultimately refused to force the defendant to divulge his confidential source, wholeheartedly endorsing its "compelling argument that forced disclosure might . . . have a dire impact on its future ability to gather news," *id.* at 1314, as well as

¹ Convertino misrepresents this third element of *Southwell's* privilege analysis. He claims that Judge McKeague merely considered the fact that the plaintiff was a former leader of the Michigan Militia who could have retaliated against the confidential source, and that "[t]here is no such danger in the present case." Motion to Compel at 7 n.2. While *Southwell* did acknowledge this consideration, it also went on to explain that, "In addition to any potential physical harm that might befall its source, defendant has made a compelling argument that forced disclosure might also have a dire impact on its future ability to gather news [This Court] cannot help but note the generic danger that forced disclosure presents for any journalistic enterprise." 949 F. Supp. at 1314.

the generic danger that forced disclosure presents for any journalistic enterprise. The First Amendment implications of such disclosure were noted by Justice Stewart, who wrote in *Branzburg*:

“No less important to the news dissemination process is the gathering of information. News must not be unnecessarily cut off at its source, for without freedom to acquire information the right to publish would be impermissibly compromised. Accordingly, a right to gather news, of some dimensions must exist.”

Branzburg, 408 U.S. at 728, (Stewart, J., dissenting). The right to gather news implies a right to a confidential relationship between a reporter and his source. *Id.* As Judge Markow in *Philip Morris* so aptly pointed out: “What kind of confidential relationship can hope to be fostered if a source knows, that despite a reporter’s promise not to disclose him, that he may be revealed during the course of discovery in a subsequent libel suit?” [*Id.*]

c. The Webber, Clark, and McArdle Decisions

Judges Edmunds, Rosen, and Harvey of this bench have likewise held that the Reporters’ Privilege is available in this circuit.² *United States v. Webber*, No. 02-80813 (E.D. Mich. July 14, 2003) (**Ex K**) was a criminal case in which the defendants subpoenaed another Free Press journalist, Mitch Albom, to provide unpublished, but non-confidential, information allegedly helpful to the defense. Judge Edmunds analyzed *Branzburg*, *In re Grand Jury*, and “[t]he vast majority of federal appellate courts . . . interpret[ing] *Branzburg* as recognizing a qualified First Amendment privilege for journalists to be free from compelled disclosure,” *id.* at 4, to determine that “there is such a privilege here.” *Id.* at 5. The Court faithfully applied the Second Circuit’s three-part *Burke* test, although ultimately determining that it was met in that case (because, *inter alia*, “Defendants [did] not seek confidential information,” *id.* at 6, unlike this case). Judge Edmunds also

² Convertino again misrepresents the law by arguing that *Southwell* is the “lone contrary holding” applying the reporter’s privilege in the Sixth Circuit. Motion to Compel at 7. Although *Webber*, *Clark*, and *McArdle* are unpublished, Ashenfelter and the Free Press brought them to Convertino’s attention 9 months before he filed his motion to compel. See Response Brief (D/E 8) at 16-17, in *Ashenfelter v Convertino*, No. 06-14016, filed Oct. 24, 2006.

made note of the more compelling need for a reporter's information in criminal cases where it is sought for the defense.³

Similarly, in *Clark v. Esser*, No. 92-72341, 1993 U.S. Dist. LEXIS 21481, 1993 WL 13551485 (E.D. Mich. July 12, 1993) (**Ex L**), civil litigants subpoenaed Free Press reporter John Lippert to reveal a confidential source. Judge Rosen quashed the subpoena, holding that “[a] qualified testimonial privilege applies to this case under the First Amendment with regard to the testimony of Lippert,” and that the testimony went to the heart of the civil litigation, but that “[n]evertheless, plaintiffs have failed to exhaust alternate sources for the information sought from Lippert.” *Id.* And in *McArdle v. Hunter*, No. 81-10038, 7 Media L. Rep. 2294 (E.D. Mich. Nov. 5, 1981) (**Ex M**), Judge Harvey followed D.C. and Second Circuit precedent to find a qualified First Amendment privilege and quash a subpoena seeking the confidential source of a Flint Journal reporter in a civil case. Quoting *Zerilli*, Judge Harvey held that “[i]f the reporter's privilege is not upheld in all but rare cases, it will be of little value.” *Id.* at 2295.

d. Magistrate Judge Whalen's Rule 26(c) Balancing Test

Concededly, one of this Court's magistrate judges has denied the existence of a Reporter's Privilege deriving from the First Amendment. *In re DaimlerChrysler AG Secs. Litig.*, 216 F.R.D. 395 (E.D. Mich. 2003) (Mag. Whalen); *Omokehinde v. Detroit Bd. of Educ.*, No. 06-15241, (D/E 71 & 72), 2007 U.S. Dist. LEXIS 91554 & 91688 (E.D. Mich. 2007) (Mag. Whalen) (**Ex N**) (reiterating *In re DaimlerChrysler*). But this holding is simply less persuasive than *Southwell*, *Webber*, *Clark*, and *McArdle*. Magistrate Judge Whalen made clear that he found “the reasoning of cases such as *Southwell* and *Zerilli* . . . cogent and persuasive,” but felt “constrained by” his reading of *In re Grand Jury* to reject a First Amendment privilege. *In re DaimlerChrysler*, 216 F.R.D. at 401. Judge McKeague, to the contrary, rightly observed that *In re Grand Jury*, “like *Branzburg*, considered [only] the narrow issue of whether a reporter could refuse to

³ An illuminating exposition on the development of reporter's privilege since *Branzburg* and its application to civil and criminal cases is found in Judge Sack's dissent in *New York Times*, 459 F.3d at 178.

comply with a grand jury subpoena.” *Southwell*, 949 F. Supp. at 1312 n.20. Any language that could be construed as applicable to civil cases is therefore “dictum.” *Id.* at 1312. Magistrate Judge Whalen’s interpretations of *In re Grand Jury* are unreasonably strained, and undervalue the weight of federal common law from this Court and nationwide.

The distinction may, however, be one without a difference. The alternative applied by Magistrate Judge Whalen to the qualified privilege is not a complete lack of protection for the reporter’s pledge of confidentiality, but rather a demanding balancing test derived from *In re Grand Jury* and Fed. R. Civ. P. 26. Magistrate Judge Whalen demonstrated that this “balancing test” has teeth, by using it in *DaimlerChrysler* to quash subpoenas targeting two Detroit reporters, and in *Omokehinde* to quash another subpoena to a Detroit reporter and prohibit a third party from disclosing the reporter’s emails. He based these rulings on the same First Amendment concerns that inform the privilege:

Given the important role that newsgathering plays in a free society, courts must be vigilant against attempts by civil litigants to turn non-party journalists or newspapers into their private discovery agents. . . . [T]he following cautionary language of *Gonzales v. Nat’l Broadcasting Co., Inc.*, 194 F.3d 29, 35 (2nd Cir. 1999) is apropos in scrutinizing the good faith of a discovery request even under a Rule 26(b)(2) or 26(c) paradigm:

"If the parties to any lawsuit were free to subpoena the press at will, it would likely become standard operating procedure The resulting wholesale exposure of press files to litigant scrutiny would burden the press with heavy costs of subpoena compliance, and could otherwise impair its ability to perform its duties--particularly if potential sources were deterred from speaking to the press. . . . And permitting litigants unrestricted, court-enforced access to journalistic resources would risk the symbolic harm of making journalists appear to be an investigative arm of the judicial system, the government, or private parties."

In re DaimlerChrysler, 216 F.R.D. at 406 (emphasis added). Therefore, even if this Court declined to join the national consensus and Judge McKeague’s reasoning recognizing a qualified privilege, the Court still has the inherent power and duty to rigorously scrutinize Convertino’s attempt to force discovery of Ashenfelter’s confidential source(s).

e. Hade v Fremont Is Off-Point and Unpersuasive

Convertino makes much of the holding in *Hade v Fremont*, 233 F. Supp.2d 884 (ND Ohio 2002) (Carr, J.), which disagreed with *Southwell* and interpreted *In re Grand Jury* as foreclosing a qualified First Amendment privilege. First and foremost, *Hade* simply misreads *In re Grand Jury*, for the reasons explained above, and ignores *Midland*. What is more, this aspect of the *Hade* opinion is itself *dicta*. Although Judge Carr opined that he would not read Sixth Circuit law to contain a privilege for protecting confidential sources, he went on to observe that “[e]ven if the Sixth Circuit agreed with the majority [of federal courts] with regard to a reporter’s privilege, the result would be the same. This is particularly so in light of the fact that what plaintiff seeks is not the identity of sources but unpublished information.” *Id.* at 888. He further concluded that, even if the privilege did apply, the plaintiff had met its two tests of exhaustion and centrality. *Id.* at 889-90.

For all of these reasons, *Hade* is unpersuasive authority, and does little to stem the overwhelming tide of federal common law—inside and outside the Sixth Circuit—in favor of a First Amendment privilege.

f. Michigan Law

This Court should also consider Michigan’s Reporters’ Shield Law, MCL § 767.5a(1). Federal courts regularly look to state Reporter’s Privilege laws for guidance. *Southwell*, 949 F. Supp. at 1312; *Riley v. City of Chester*, 612 F.2d 708, 715 (3d Cir. 1979); *Baker*, 470 F.2d at 781-82. As the Nevada federal court held: “Although this Court is not bound to follow Nevada law in determining whether a reporter should be compelled to disclose his or her sources, . . . it should not ignore Nevada’s public policy, as expressed in its statute, of providing reporters protection from divulging their sources.” *In re Stratosphere Corp. Securities Lit.*, 183 F.R.D. 684 (D. Nev. 1999). Ashenfelter, too, had a reasonable expectation that he would be protected by Michigan’s shield law. Michigan law provides an “absolute privilege [against] compelled disclosure of informant-related information,” *In re Subpoenas to News Media Petitioners*, 240 Mich. App. 369, 377, *aff’d*, 463 Mich. 378 (2000), and its courts do not permit “fishing expedition[s] utilizing

the media as [litigants'] indentured servants." *Id.* at 380 (endorsing First Amendment privilege analysis in 2d Circuit's *Gonzales*). And in quashing the *DaimlerChrysler* subpoena, Magistrate Judge Whalen cited Michigan law as an independent ground for quashing the subpoena. 216 F.R.D. at 406-07.

Therefore, whether derived from the First Amendment, common law, civil procedure, or state law, Ashenfelter has established a claim of privilege to defeat Convertino's motion to compel.

C. The Privilege Requires That Convertino's Motion to Compel Be Denied

The source(s) that Convertino seeks to identify spoke to Ashenfelter on the condition of confidentiality. **Ex O ¶ 4**; **Ex H** at 9. Therefore, the qualified privilege shields Ashenfelter from forced disclosure of the source(s) unless and at least until Convertino makes a convincing showing that:

(1) the requested information goes to the heart of [Convertino]'s case; . . . (2) [Convertino] has exhausted all other means of obtaining the information . . . [and (3) that the interest in disclosure outweighs] the potential harm that may be caused by ordering disclosure of a confidential source's identity[, including the] First Amendment interests [that] would be jeopardized by ordering disclosure.

Southwell, 949 F. Supp. at 1312. Convertino has not, and cannot, satisfy these prerequisites.⁴

1. The Identity of Ashenfelter's Confidential Source(s) Does not go to the Heart of Convertino's Privacy Act Claim

Convertino argues that the identity of Ashenfelter's source(s) is central to his Privacy Act claim against the DOJ, because he "needs to prove that DOJ employees leaked the details of the allegations against him and the subsequent investigation by OPR." Motion to Compel at 8. He repeatedly asserts, *id.*,

⁴ Convertino remarks in passing that, because he believes that Ashenfelter's source(s) may have violated criminal laws in providing information to Ashenfelter, this very fact disqualifies them from the privilege's protection. *Branzburg* did hold that "the First Amendment [does not] confer[] a license on either the reporter or his news sources to violate valid criminal laws. . . . Neither is immune, on First Amendment grounds, from testifying against the other, before the grand jury or at a criminal trial." 408 U.S. at 691. But this is not a grand jury or a criminal trial. Rather, Convertino's subpoena stems from his own civil suit, which seeks only civil damages under the Privacy Act. See *Lee v. DOJ*, 413 F.3d 53, 59-60 (D.C. Cir. 2005) (discussing this passage from *Branzburg* and still applying the privilege in Privacy Act case).

that his “circumstances are identical to those of” the plaintiff in *Wen Ho Lee v. DOJ*, 413 F.3d 53 (D.C. Cir. 2005), the only authority on which Convertino relies.

But Convertino is wrong. “The journalists [in *Lee*] refused to reveal even *the employer of their unidentified sources*, information that arguably *would have been sufficient* to support at least a portion of Lee’s claim.” *Id.* at 60 (emphasis added). By contrast, Ashenfelter is willing to stipulate that his Article—which identified his source(s) as being employed by the DOJ—is accurate. Convertino need not prove the specific person(s) within the DOJ who leaked the information in order to prevail in his Privacy Act claim—only that the source was a DOJ employee and disclosed the information willfully.

Convertino himself admitted as much in the response he filed to the DOJ’s pending motion to compel. First, he states the relevant elements of his claim as being that “the *agency* improperly disclosed the information; [and] the disclosure was willful or intentional.” **Ex H** at 2 (emphasis added). Then, in the course of resisting DOJ discovery into his own knowledge of the underlying disclosures, Convertino argued vigorously (and accurately) that the source(s)’ intentionality and willfulness may be presumed:

Notably, had the leak not been a willful or intentional disclosure there would have been no need for the leaker to demand confidentiality from the Detroit Free Press reporter as a condition of disclosing the Privacy Act protected information. In other words, basic underlying facts related to the Defendant’s willful or intentional conduct are not disputed, such as the content of the information leaked and published by the reporter, and the undisputed fact that the leaker requested anonymity.

Ex H at 9. By Convertino’s own admission, then, he need not know the specific identity of Ashenfelter’s source(s) to establish the elements of his claim—only that they worked for the DOJ. Ashenfelter’s proposed stipulation, and the Article itself, provide sufficient evidence on that point. Convertino’s motion does not identify any other basis for discovering the personal identity of Ashenfelter’s source(s).⁵

⁵ Even if Convertino were required to forego some potential remedy, such as punitive damages, that compromise would be a far better result, on balance, than forcing Ashenfelter to disclose a confidential source just so that Convertino could make every possible argument for damages.

2. Convertino has not Exhausted all Other Means of Obtaining the Information

Convertino's entire basis for asserting that he has exhausted all other means of determining the source(s)' identity is his claim that the government has already done it for him, through its OIG report. Specifically, he alleges that the OIG report narrowed the field of possible sources to 30, that the DOJ obtained sworn statements from each person denying that they were the source, and that the three most likely sources were deposed. Motion to Compel at 10-11.

This assertion is wholly insufficient to meet Convertino's exhaustion burden, for several reasons. First, Convertino has woefully failed to obey his discovery obligation in his Privacy Act case, of which this motion to compel is but a subset. The Court is aware that the D.C. proceeding, and hence this case, was stayed for a lengthy period during the criminal trial. After that stay expired, the D.C. court gave Convertino six weeks to respond to the government's outstanding discovery requests. Four more weeks after that—more than a year and a half since the requests were served—Convertino "provided only improper interrogatory responses, no amended document responses, and no privilege log, and has refused to produce a wide range of relevant documents." **Ex D** at 1.

The D.C. court has yet to decide the DOJ's motion to compel, and it has stayed further fact discovery until it does so. Until that time, it would be manifestly unfair for this Court to permit Convertino to obtain highly sensitive discovery from Ashenfelter. If the D.C. case is dismissed for failure to provide discovery, or narrows the issues in response to Convertino's recalcitrance, the subpoena and Ashenfelter's asserted privilege will be moot. Ashenfelter's claim derives in part from the First Amendment to the U.S. Constitution, and the Supreme Court's well-established instruction is that courts should not "pass on questions of constitutionality . . . unless such adjudication is unavoidable." *Spector Motor Service, Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944).

Second, throughout the entire span of his dispute with the DOJ (which predates Ashenfelter's Article), Convertino himself has publicly denounced the DOJ's motives and actions with respect to him. His

fundraising website at <convertino.org> has consistently painted all government officials with any connection to the investigation as corrupt goons, hell-bent on smearing Convertino's name and conspiring to hide their own misdeeds, **Ex F**, and that the government's leak investigation was "tainted," and a "cover-up." *Id.* Yet, when it means that he might not have to spend money and exert himself in discovery, Convertino is happy to ride these same individuals' coattails, validate their "tainted" investigation, and complain that he is merely "a private individual, with limited resources, [who could not] uncover new information that the OIG, supported by the extraordinary resources of the Federal Government, was unable to discover." Motion to Compel at 13. At the very least, Convertino's out-of-court statements should estop him from relying on the government to avoid his own, substantial discovery burden.

Third, even if the court takes the OIG report at face value, it is far from enough to satisfy the demanding exhaustion requirement spelled out by reporter's privilege caselaw. Convertino admits that his circumstances "seem reminiscent of *Zerilli v. Smith* [656 F.2d 705 (D.C. Cir. 1981)]," Motion at 11, which rejected the Privacy Act plaintiff's reliance on a DOJ internal investigation. He claims to have "done exactly what the *Zerilli* plaintiffs did not," (Motion at 12), however—but only because he says this DOJ report contains sworn statements and three depositions. Of course, it bears noting that the redacted version of the OIG report says *nothing* about having deposed any of the potential sources. Even if Convertino is right, however, a mere three depositions falls far short of *Zerilli's* requirement:

[T]he litigant need not have deposed every one of the [defendant's] employees. Nonetheless, the obligation is clearly very substantial. In *Carey* we suggested that an alternative requiring the taking of as many as 60 depositions might be a reasonable prerequisite to compelled disclosure. . . . Appellants cannot escape their obligation to exhaust alternative sources simply because they feared that deposing Justice Department employees would be time-consuming, costly, and unproductive."

656 F2d at 714-15 (emphasis added); see also *In Re Roche*, 448 US at 1316 ("[t]he hardship that [deposing 65 witnesses] would impose—although not negligible—does not outweigh the unpalatable choice that civil contempt would impose upon the [reporter]").

Convertino's reliance on sworn statements is even less persuasive. The Court has no idea what these affidavits actually say. All it has are the conclusory characterizations of the statements provided by Convertino and the unredacted portions of the OIG summary. And that description merely says that "all denied providing the information to the Detroit Free Press." **Ex E at 5**. That says nothing about whether they talked with *Ashenfelter*, for example, nor does it foreclose the innumerable permutations of the same question that any competent litigator might devise on direct or cross-examination in order to elicit a different response. Numerous courts have held that, for these reasons, written statements alone are insufficient:

For their argument that the information cannot be obtained any other place, Plaintiffs rely on declarations of only two of the named defendants. Furthermore, these declarations only contain general denials of disclosure to the media of financial projections and they were prepared in connection with a motion for summary judgment. Thus, they are not directly or specifically responsive to the issue of Mr. Di Rocco's article. In addition, although Plaintiffs have deposed Mr. Berman, they asked no questions regarding his alleged conversations with Mr. Di Rocco or the potential source of Di Rocco's statements. There is no information whether other named defendants have been deposed or whether such inquiry has been directed to them. Accordingly, there is no clear or specific showing that the information sought is not obtainable from other sources, or that Plaintiffs have exhausted other potential sources.

In re Stratosphere Corp. Securities Litigation, 183 F.R.D. 684, 686-87 (D. Nev. 1999) (brackets omitted, emphasis added); *see also Price v. Time Inc.*, 416 F.3d 1327, 1346-47 (11th Cir. 2005) (where "none of the [four potential sources were] under oath [or] subject to cross-examination," plaintiff must depose them "[b]efore we can say that [he] has exhausted all reasonable alternative means to discover the identity of the confidential source"); *Ko v. Zilog, Inc.*, 25 Med. L. Rptr. 1892, 1894 (D. Idaho Mar. 26, 1997) (holding affidavits insufficient and requiring each potential source to be deposed).

Even if Convertino were correct that it would be "futile" to examine persons who have already given a sworn statement, the Second Circuit has found this a "lame excuse . . . [that] does not insulate defense counsel from his duty to exhaust all reasonable alternatives. [Circuit precedent] demands that effort." *U.S. v. Burke*, 700 F.2d 70, 77 n.8 (2d Cir. 1983). Other courts agree. *See, e.g., Ashcraft v Conoco, Inc*, 26 Media L. Rep. 1620, 1998 US Dist Lexis 4092, *29-30, 1998 WL 404491 (EDNC 1998), *rev'd on other*

grounds 218 F.3d 282 (CA4 2000) (“Conoco has not exhausted reasonable means of uncovering Reiss’ sources by, for instance, deposing each plaintiff and their counsel or even questioning them in a proceeding before the court. Although this task would be cumbersome and possibly fruitless, until such efforts have been pursued, it cannot be said that all reasonable non-media outlets have been exhausted.” (emphasis added)); *Reitz v. Gordon*, 26 Med. L. Rptr. 1447 (N.D. Ill. Dec. 9, 1997) (quashing subpoena for reporter’s photographs, where “the parties have not established that the government photos are so irretrievably lost that the court can and should find that all non-privilege[d] sources of the information have been exhausted”); *Lenhart v. Thomas*, 944 F. Supp 525 (S.D. Tex. 1996) (“The law is clear that compulsory disclosure of a reporter’s confidential sources should be the last resort for obtaining information; all other means must first be exhausted. Respondent must fulfill his obligation to exhaust alternative sources even though he fears that the investigation may be time consuming, costly, and unproductive”) (citing *Zerilli*); *Blum v. Schegel*, 150 F.R.D. 42, 46 (W.D.N.Y. 1993) (“The caselaw in this area is clear. Where the source is known and can be deposed, the availability of a deposition is an alternative source that must be pursued. It is not enough to say that questioning would be futile. The cases clearly establish that ‘all reasonable attempts should be made to obtain information from non-press sources before there is any consideration of subpoenaing the press.’ (quoting *Branzburg*, 408 U.S. at 707 n. 41” (emphasis added)).

Convertino notes that Wen Ho Lee took only 20 depositions out of potentially hundreds of sources, but there are not hundreds of potential deponents here. Requiring Convertino to depose the roughly 30 persons identified as possible sources is entirely within the mainstream of privilege case law, including the very cases that he relies on.

3. Convertino’s Desire to Know the Source(s)’ Identity Does not Outweigh the Fundamental Societal Need to Protect Their Confidentiality

The third *Southwell* factor requires “a case-by-case balancing of constitutional and societal interests . . . to determine whether First Amendment interests would be jeopardized by ordering disclosure.”

949 F. Supp. at 1313. This analysis must account for “the generic danger that forced disclosure presents for any journalistic enterprise[, including its] First Amendment implications” *Id.* at 1314.

a. Convertino Must First Prove the Merits of His Privacy Act Case, and his Need for the Information Must Outweigh the Countervailing First Amendment Interests

To assess the strength of a plaintiff’s argument for disclosure, Judge McKeague began from the common-sense starting point of evaluating the strength of plaintiff’s case. “A court may deny disclosure of a confidential source where the record supports a defendant’s motion for summary judgment.” *Southwell*, 949 F. Supp. at 1310. “[T]he Court must determine whether [Convertino] has made a ‘concrete demonstration’ that disclosure of defendant’s confidential source will provide ‘persuasive evidence on the [elements of his claim.] The point of principal importance is that there must be a showing of cognizable prejudice before the failure to permit examination of anonymous news sources can rise to the level of error.” *Id.* at 1311 (citations omitted, emphasis added).⁶

It is common throughout media and First Amendment law to require such a showing before ordering the disclosure of confidential information. This is seen most clearly in cases on the emerging issue of anonymous internet speech. Before a plaintiff alleging defamation or similar theory may discover the identity of an anonymous online speaker, he must first prove the viability of his claims. Although state and federal courts across the country have varied somewhat on the specific scrutiny to apply, “[c]ommon to most courts considering the issue is the necessity that the plaintiff make a prima facie showing that a case . . . exists. Requiring at least that much ensures that the plaintiff is not merely seeking to harass or embarrass the speaker or stifle legitimate [speech].” *Krinsky v Doe 6*, 159 Cal. App. 4th 1154, 1171 (2008). Many “trial courts in various jurisdictions” further specify that it is a summary judgment standard that

⁶ *cf. Gordon v. Boyles*, 9 P.3d 1106, 1120 (Colo. 2000) (following *Southwell*) (“If a newsperson defendant in a defamation case can provide evidence that a confidential source’s information was at least probably truthful, then the court should favor non-disclosure”).

plaintiffs must meet—*i.e.*, plaintiffs must prove that their complaint would survive summary judgment. *Id* at 1169 (collecting cases following *Doe v Cahill*, 884 A.2d 451 (Del. 2005)); see *In re Does 1-10*, 2007 Tex. App. Lexis 9652 (2007) (**Ex P**) (also following *Cahill*); *Best Western Int'l v. Doe*, 2006 U.S. Dist. LEXIS 56014 (D. Ariz. 2006) (**Ex Q**) (following *Cahill* and 6th Circuit's *NLRB v Midland* to protect anonymity of online speakers).

Inherent in this requirement is “a balancing of the strength of the requesting party's case against the need for disclosure.” *Mobilisa, Inc v Doe 1*, 170 P3d 712, 720 (Ariz. App. 2007). Analyzing the rationale of the *Cahill* line of cases, *Mobilisa* clarified that this balance must take into account “a broader range of competing interests . . . [including] that a balance of hardships favors [disclosure].” *Id* at 720-21.

Motions for disclosure should be vetted as strictly as are motions for preliminary injunctions:

An order compelling disclosure of an anonymous party's identity is essentially a mandatory injunction; both such orders change the status quo. Unlike most parties subject to a preliminary mandatory injunction, however, an unmasked anonymous speaker cannot later obtain relief from the order should the party seeking the speaker's identity not prevail on the merits of the lawsuit. Given this consequence, it is even more appropriate to require the court to balance the parties' competing interests before permitting discovery on the identity issue.

Id at 721. This scrutiny is entirely consistent with *Southwell*, and should be applied here.⁷ If Convertino's Privacy Act claim is subject to summary judgment, or his need for the information simply does not outweigh the specific and societal detriment that disclosure would inflict, his motion must be denied.

⁷ Courts likewise balance a defendant's need for information against national security concerns when determining whether information is discoverable or otherwise disclosable. *United States v. Sarkissian*, 841 F.2d 959, 965 (9th Cir. 1988); *United States v. Yunis*, 924 F.2d 1086, 1096 (D.C. Cir. 1991); *Hiken v. DOD*, 521 F. Supp. 2d 1047, 1065 (N.D. Cal. 2007) (“national security . . . [and] privacy interests outweigh the interests in disclosure”); *United States v. Holy Land Found.*, 2007 U.S. Dist. LEXIS 50239 (N.D. Tex. 2007) (**Ex S**) (“the government's interest in preventing disclosure of the national security information involved outweighs the defendants' need to have the information”).

b. Convertino Has Failed to State a Claim Under the Privacy Act

Concededly, in the *Wen Ho Lee* and *Hatfill* cases, D.C. judges have interpreted the federal Privacy Act of 1974, 5 U.S.C. § 552a, to create a cause of action against the government for the unauthorized disclosure of information about the status of active criminal investigations. But it is hard to imagine that the drafters of the Privacy Act foresaw these developments. The Act was drafted, and has mostly been used, to protect citizens against the accumulation of inaccurate historical information in government files and the disclosure of information that the public had no business knowing. See, e.g., Wasil, *What Is 'Record' Within Meaning of Privacy Act of 1974*, 121 A.L.R. Fed. 465 §§ 7[a], [b] (West 1994 & 2006 Supp.).

The statutory prohibition Convertino relies on is the Privacy Act's ban on the unauthorized disclosure by the government of "any record which is contained in a system of records." 5 U.S.C. § 552a(b). Whenever "records pertaining to an individual have been improperly disclosed," that person is entitled to bring a civil action. But what constitutes a "record" for these purposes is not always clear, as the statutory definition is less than precise:

[T]he term 'record' means any item, collection, or grouping of information *about an individual* that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history *and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph. . . .*

5 U.S.C. § 552a(a)(4) (emphases added). Federal courts of appeals have split three ways on the proper interpretation of the term "record" as used in the statute. Yet there are well-recognized principles supporting a narrow interpretation that would not include the kind of current, newsworthy information about an active criminal investigation that was at issue in cases like *Hatfill* and *Lee*.

First and foremost, the Privacy Act is a statute that effects a limited waiver of the government's sovereign immunity. As a result, "bedrock principle[s] require] that courts must strictly construe waivers of immunity in favor of the sovereign and not enlarge the waiver beyond what the language requires." *Hudson v. Reno*, 130 F.3d 1193, 1207 n.12 (6th Cir. 1997) (interpreting meaning of Privacy Act "damages");

Tomasello v. Rubin, 167 F.3d 612, 618-19 (D.C. Cir. 1999) (same). This means that courts cannot embrace an interpretation of the Privacy Act that would impose liability on the government so long as there is at least one “plausible” alternative reading that would allow the government to prevail.

Second, and related, is the fact that a violation of the Privacy Act is not merely a tort for which damages may be recovered against the government, but also a misdemeanor for which individual government employees can be prosecuted. 5 U.S.C. § 552a(i)(1). This is important because of the “rule of lenity,” an interpretive doctrine that requires (much like the sovereign immunity canon) that statutory ambiguities be resolved against a finding of wrongdoing. See, e.g., *Jones v. United States*, 529 U.S. 848, 858 (2000). Therefore, an expansive reading of the Privacy Act is fundamentally at odds with the nature of the statute, which requires that it be read narrowly and with doubts about its meaning resolved against a finding of coverage. And there is substantial room to doubt that the statute has anything to say about the dissemination of current, newsworthy information about a criminal investigation.

The legislative history suggests a similar conclusion. As more than one Court has found, the “legislative history indicates [that] the Privacy Act was primarily concerned with the protection of individuals against the release of *stale personal information* contained in government computer files to other government agencies or private persons.” *Cochran v. United States*, 770 F.2d 949, 959 n.15 (11th Cir. 1985) (emphasis added); see also S. Rep. No. 93-1183, at 1 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6916, 6916 (The purpose of the Privacy Act is to “promote accountability, responsibility, legislative oversight, and open government with respect to the use of computer technology in the personal information systems and data banks of the Federal Government and with respect to all of its other manual or mechanized files.”). The emphasis in the legislative history is on “the need to protect against governmental abuse of ‘*personal information*.’” *Bechhoefer*, 209 F.3d at 62 (emphasis added). “The legislative history of the Act does not evidence any intent to prevent the disclosure by the government to the press of current, newsworthy information of importance and interest to a large number of people.” *Cochran*, 770 F.2d at 959 n.15.

The Congress that passed the Privacy Act would have found Convertino's reading of the Act supremely ironic. A law that was passed to guard against the misuse of personal information of no legitimate interest to the public is being invoked to challenge the release of information of current public interest. And a law that was prompted by Watergate-era abuses brought to light by confidential sources is being invoked to challenge reporters' rights to maintain their confidential source relationships. This Court should not lend its authority to such an interpretation.

c. Convertino's Claim Fails for Lack of Damages

Even if Convertino has stated a Privacy Act claim, one element of that claim for which Convertino has failed to provide "concrete evidence" is damages. His only basis for relief is the Privacy Act, which provides statutory damages in the amount of "not less than \$1,000." **Ex R** at 37-38 ¶¶ (a)-(b). But the Supreme Court recently clarified that "[t]he entitlement to recovery necessary to qualify for the \$1,000 minimum is not shown merely by an intentional or willful violation of the [Privacy] Act producing some adverse effect. The statute guarantees \$1,000 only to plaintiffs who have suffered some actual damages." *Doe v. Chao*, 540 U.S. 614, 627 (2004) (brackets and quotations omitted). "Because presumed damages are therefore clearly unavailable, we have no business treating just any adversely affected victim of an intentional or willful violation as entitled to recovery, without something more." *Id.* at 622; *Dodge v. Trs. of the Nat'l Gallery of Art*, 326 F. Supp. 2d 1, 12 (D.D.C. 2004) (Lamberth, J.) ("In the absence of evidence indicating that the plaintiff suffered actual damages, the Court cannot grant monetary relief . . . [under] the Privacy Act"). Therefore, Convertino cannot prevail without proving that the disclosure to the Free Press itself proximately caused him actual damages.

The DOJ's pending motion to compel, however, reveals that, after 18 months of evasion, Convertino has finally admitted that he has no evidence to support his claims for lost wages or emotional injuries. **Ex D** at 7-8. The only other damages alleged in his complaint are "harm to reputation . . . [and] damage to [his] career." **Ex R** at 37-38 ¶(a). But this is a slender reed from which to hang his complaint.

There is a lopsided circuit split over whether reputational injury can ever be cognizable as “actual damages” under the Privacy Act. *Doe* did not resolve the issue, 540 U.S. at 627 n.12, nor has the D.C. Circuit. *Albright v. United States*, 732 F.2d 181, 186 (D.C. Cir. 1984); *Rice v. United States*, 245 F.R.D. 3, 5 (D.D.C. 2007). But this Circuit holds, and “the weight of authority [nationwide] suggests[,] actual damages under the Privacy Act do *not* include recovery for mental injuries, *loss of reputation*, embarrassment or other nonquantifiable injuries.” *Hudson*, 130 F.3d at 1207.8 The only circuit case to the contrary⁹ improperly failed to strictly construe the Privacy Act’s limited waiver of sovereign immunity:

[T]he term “actual damages” has no plain meaning or consistent legal interpretation, thus when it is being applied against the government it must be narrowly interpreted—here that requires finding that actual damages only mean out-of-pocket losses, not emotional distress.

Id. at 1207 n.12. Moreover, even if reputational damages are cognizable, Convertino cites no evidence—let alone the “concrete evidence” demanded by *Southwell*—that he has suffered any, nor has he given any to the DOJ in discovery. Therefore, Convertino’s claim fails for lack of actual damages.

d. Convertino’s Claim Fails for Lack of Causation

Similarly, Convertino can only prove causation—another element of his prima facie case—if he can show a proximate link between his claimed damages (reputational injury) to the action that allegedly violated the Privacy Act (disclosing details of the investigation to Ashenfelter). *Albright*, 732 F.2d at 182-86 (dismissing plaintiffs’ claim “to have suffered severe emotional injuries as a result of their attendance at [a] videotaped meeting” for lack of causation where plaintiffs failed to prove “that those injuries were caused by the *videotaping*” (emphasis original)); *Hudson*, 130 F.3d at 1207 (plaintiff “did not carry her burden of showing that the alleged violations of the Privacy Act *caused* her any damages” (emphasis original)).

⁸ Quotes omitted, emphasis added; overruled on unrelated issue, *Pollard v. E. I. du Pont de Nemours & Co.*, 532 U.S. 843, 846 (2001)

⁹ *Johnson v. Department of Treasury*, 700 F.2d 971 (5th Cir. 1983).

It would defy logic to attribute any reputational injury Convertino may have incurred to the confidential conversation between Ashenfelter and his source(s), or even to the publication of Ashenfelter's Article. Before that conversation ever took place, the DOJ had already removed Convertino from the *Koubriti* trial—a very public slap in the face—and Convertino had given the Congressional testimony to which he attributes that removal. **Ex R ¶¶** 72-75. By the time the Article was printed in January 2004, the internal investigation was already well underway. Nine months later, Judge Rosen publicly excoriated Convertino and his team for their handling of *Koubriti*. Soon thereafter, the very investigation that Ashenfelter disclosed concluded in a four-count indictment against Convertino. Even after being acquitted on three of the counts, the government's investigation and prosecution of him continue to this day.¹⁰ Without question, these developments injured Convertino's reputation far more than the Article ever could have—injury that would have inevitably occurred regardless of the Article.

e. Convertino's "Need" Does Not Outweigh the Press Freedoms at Stake

The anti-disclosure side of the balance is weighty and well-established. See *supra* § II.B. Every forced disclosure of a journalist's confidential source rips a new and ominous hole into the fabric of press freedom. The social utility of confidential news sources, extolled so resoundingly in the abstract by the above-cited cases, is manifested in this case. Only because of Ashenfelter's promise of confidentiality to his source, and Ashenfelter's credibility that his promise would be kept, the public learned valuable information of vital concern about how an important terrorism prosecution was botched by an overzealous prosecutor, possibly resulting in guilty persons being set free. See **Ex O ¶¶** 6-8. The Court may likewise take judicial notice of the important role of confidential sources in the Free Press's recent publication of text

¹⁰ As Convertino recently told Judge Lamberth: "The fourth count . . . was dismissed without prejudice and can be refiled. . . . Similarly, the United States initiated an OPR investigation of Mr. Convertino. Mr. Convertino has not obtained any confirmation that this OPR investigation has been terminated. . . . *Finally, the United States has filed allegations against Mr. Convertino before the Michigan Grievance Commission.* . . . The jury verdict did not terminate the government's ongoing . . . actions against [him]." **Ex H** at 6.

messages showing that the Mayor of the City of Detroit lied under oath, and spent over \$9 million in public funds to cover it up. This developing story—broken by a series of Free Press reporters that include Ashenfelter—is one of the most important efforts of investigatory journalism in Michigan in decades, and would not have been possible without the source of the text messages, who remains anonymous.¹¹

These two examples show the simple truth recognized by the D.C. Court in *Zerilli*—that many sources will not talk, and many stories of great public importance will not be written, without a firm promise of anonymity. Indeed, one study found that confidential sources played a significant role in two-thirds of the stories nominated for Pulitzer Prizes. John E. Osborn, *The Reporter's Confidentiality Privilege: Updating the Empirical Evidence After a Decade of Subpoenas*, 17 COLUM. HUM. RTS. L. REV. 57, 74 (1985).

The only reason Convertino offers this Court for undercutting the ability of Ashenfelter and every other reporter in America to promise such confidentiality is the proposition that Convertino was somehow personally damaged by Ashenfelter's disclosure of the DOJ's investigation—a matter of undeniable public interest, resulting in unprecedented corruption charges—somewhat earlier than when the DOJ itself disclosed it. Yet Ashenfelter's stipulation would remove any obstacle that his source's confidentiality places in front of Convertino's claims. And even if there would be some marginal, independent benefit to Convertino from the forced disclosure of Ashenfelter's source(s)—such as, *arguendo*, the availability of punitive damages—it would simply not come close to outweighing the powerful, universally recognized, and nationally felt injury to the First Amendment's freedom of the press that would be the certain result of such compelled testimony. Judge Tatel of the D.C. Circuit made a similar comparison in the *Wen Ho Lee* case:

Without slighting Lee's private interest in receiving compensation for governmental malfeasance, his claim *pales in comparison to the public's interest in avoiding the chilling of disclosures* This case is thus very different from [grand jury cases].

¹¹ See, e.g., **Ex T**. The Court must take judicial notice of these facts under FRE 201(b)&(d) because they are “not subject to reasonable dispute [and is] generally known within the territorial jurisdiction of the [Court and] capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” As a collection of published articles, the exhibit is self-authenticating. FRE 902(6).

Lee's private interest in this civil suit implicates no similarly critical concerns, and it's hard to imagine how his interest could outweigh the public's interest in protecting journalists' ability to report without reservation on sensitive issues of national security.

Lee, 428 F.3d at 302 (Tatel, J., dissenting from denial of rehearing *en banc*) (emphasis added). Similarly, Convertino cannot justify the injury to freedom of the press that his request would inflict. Indeed, he is not seeking disclosure of sources to protect national security, or because someone has published leaked grand jury testimony. This is just about improving his chances of a big payday from the government.

D. Convertino's Rule 30(b)(6) Subpoena to the Free Press Fails for the Same Reasons

Rule 30(b)(6) requires a corporation to designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf. In this case, the only individual who has personal knowledge of Ashenfelter's conversations with source(s) is Ashenfelter. Therefore, Convertino's subpoena to the Free Press fails for all of the above reasons.

III. Conclusion

Ashenfelter and the Free Press respectfully request that this Court DENY Convertino's Motion.

By: /s/ Herschel P. Fink
Brian D. Wassom (P60381)
2290 First National Building
Detroit, Michigan 48226
(313) 465-7400
hpf@honigman.com
P13427

Dated: March 26, 2008

CERTIFICATE OF SERVICE

I hereby certify that on March 26, 2008, I electronically filed the foregoing paper(s) with the Clerk of the Court using the ECF system, which shall send a notice to all counsel of record.

Dated: March 26, 2008

/s/ Herschel P. Fink

DETROIT.2995287.4