

**UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF TENNESSEE  
AT NASHVILLE**

<b>WILLIAM L. JOHNSON, et. al.</b>	)	
	)	
<b>Plaintiffs,</b>	)	
	)	
<b>v.</b>	)	<b>No: 3-07-0979</b>
	)	<b>JUDGE TRAUGER</b>
<b>METROPOLITAN GOVERNMENT</b>	)	<b>MAGISTRATE BRYANT</b>
<b>OF NASHVILLE AND DAVIDSON</b>	)	
<b>COUNTY, et. al.,</b>	)	
	)	
<b>Defendants.</b>	)	

**MEMORANDUM IN SUPPORT OF MOTION TO QUASH AND FOR PROTECTIVE ORDER**

Christian Bottorff and *The Tennessean* submit the following memorandum of law in support of their motion for a protective order and an order quashing the subpoena served on Christian Bottorff.

**Statement of the facts**

The Plaintiffs have served a subpoena on Christian Bottorff to appear for deposition on August 28, 2008, directing him to bring “all records with regard to the article written by you dated April 2, 2007 with regard to the Metropolitan Police Department promotional system.” (Exhibit A) Mr. Bottorff wrote the news article while employed as a reporter for *The Tennessean*.

In the story, *The Tennessean* reported that Chief Serpas was instrumental in developing a “new policy that allowed department officials discretion to promote from a group of top-scoring candidates.” (Exhibit B) While chief Serpas is not quoted in the story, spokesman Don Aaron is. Relevant portions of the story state: “And given the under-representation of women and

minorities in the department's supervisory ranks, the need for diversity is a factor, Aaron said. 'If you have two candidates who are essentially equal and believe that both would make very good supervisors, and if your choice is to make the department more diverse, you would probably elect to include diversity in your choice,' the spokesman said." (Exhibit B)

**The court should quash the subpoena and issue a protective order  
that discovery from the Movants not be had**

At least nine of the twelve federal circuit courts of appeals have expressly recognized a qualified journalist's privilege for reporters in civil proceedings. *Southwell v. Southern Poverty Law Center*, 949 F. Supp. 1303, 1311 (W. D. Mich. 1996)<sup>1</sup> While the Sixth Circuit has not expressly recognized this privilege in civil cases, it is clear that in the Sixth Circuit courts should "make certain that the proper balance is struck between freedom of the press and the obligation of all citizens to give relevant testimony" before requiring that they testify about news stories they have written. *In Re Grand Jury Proceedings*, 810 F. 2d 580, 586 (6<sup>th</sup> Cir. 1987); *In Re DaimlerChrysler AG Litigation*, 216 F.R.D. 395, 406 (E. D. Mich. 2003) ("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.")

In *Southwell v. Southern Poverty Law Center*, *supra*, the trial court held that the following factors should be considered when a journalist is asked to testify: 1) whether the requested information goes to the heart of the case; 2) whether the litigant has exhausted all other means of obtaining the information, and; 3) the potential harm to newsgathering activities. *Id.* at 1312.

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<sup>1</sup> Tennessee also has a news reporter's privilege which prevents the discovery of any information gathered for publication unless the party seeking the information demonstrates, by clear and convincing evidence, that the information sought is clearly relevant to a specific probable violation of law, it cannot reasonably be obtained from another source, and the party seeking the information demonstrates a compelling and overriding public interest in it. T.C.A. § 24-1-208.

Whatever information the Movants possess cannot be said to go to the heart of the case. It appears from their pleadings that the plaintiffs are challenging a new promotion policy implemented by the Police Department. There is apparently no dispute that the Police Department adopted a new policy, and the question is whether the policy is a legitimate affirmative action plan, or a subterfuge to allow reverse discrimination.

The purpose of the new policy is not something the reporter can testify about. He can testify that he accurately quoted the people interviewed for the story, but he obviously cannot testify about what they meant, or what the intent of the new policy was.

The plaintiff has numerous other and better sources for the information sought. The plaintiffs served the defendants with supplemental discovery on July 30, 2008, which has been filed with the court as document number 88-2. This supplemental discovery appears to be responsive to a request for the identities of witnesses with relevant information. Mr. Bottorff is identified by the Plaintiffs as having “knowledge of statements made by the MNPD as to why the promotional system was changed and the motive of MNPD for making the change.” Mr. Bottorff knows what he was told by the people he interviewed, and that is reflected in the news story. He does not know the motive behind the change in the policy.

In addition to Mr. Bottorff, the plaintiffs identify the following individuals and what they know or should know:

1. Jack Byrd, Esq.: “Mr. Byrd has knowledge as to why the police department changed the promotional system and had discussions with Chief Serpas and top officials from the Metropolitan Government about the need for diversity within the ranks of the police department.

2. Michael Allen, Civil Service Commission: “He should have knowledge about why the promotional system changed at the MNPd and what the recommended changes were and what was actually changed.”
3. Ed Mason & Calvin Hullett, Fraternal Order of Police: “Knowledge of the dealings and reasoning behind adopting the new promotional system.”
4. Chief Emmett Turner and Debra Faulkner: “Knowledge of the dealings and reasoning behind adopting the new promotional system.”
5. Reggie Miller (quoted in *The Tennessean’s* news story) and Walter Holloway, Black Police Association, Sunny Dixon, NAACP: “They have knowledge that there were problems with the department not promoting enough black officers and that when the term diversity was used it was used in the context of race minorities.”

From this list, it is obvious that the Plaintiffs are aware of numerous individuals, other than Mr. Bottorff, some of whom appear to have first-hand knowledge about the development of the policy. The Movants understand that the plaintiffs have not deposed all of the people identified in their supplemental discovery, nor have they scheduled all of them for deposition. Because the information sought from Mr. Bottorff is obtainable from these sources, the Plaintiffs’ failure to exhaust those sources alone, merits entry of the Movants’ requested protective order. *In Re DaimlerChrysler AG Litigation*, 216 F.R.D. 395 (E. D. Mich. 2003) (the court quashed a subpoena served on journalists in large part because the party seeking the information had not exploited the numerous alternative sources of information, even though doing so might require compliance with the Hague Convention and extraterritorial depositions.)

Not only are there other sources for obtaining the information, there are better sources. The motivation and reasons of the Police Department to adopt a new promotion policy is best

learned from the defendants who implemented it, not from a journalist who interviewed them for a news story. Given the numerous other sources from which the plaintiffs can obtain the information sought, the additional testimony of Mr. Bottorff, assuming his testimony would be relevant and admissible, would be unreasonably cumulative or duplicative.

In *In Re DaimlerChrysler AG Litigation*, 216 F.R.D. 395 (E. D. Mich. 2003), the trial court entered a protective order preventing discovery from journalists about a book they had written. The court applied the balance of interest test, relying on the rules of civil procedure and taking into account the important fact that it was journalists from whom the information was sought. The court noted that Rule 26 (b) (2), F.R.Civ.P, authorizes the court to limit or prohibit discovery: 1) when the information sought is obtainable from other sources that are “more convenient, less burdensome or less expensive;” 2) when the party seeking the information “has had ample opportunity by discovery in the action to obtain the information sought,” and; 3) when the “burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case and the importance of the proposed discovery,” among other things. *Id.* at 403.

The court emphasized the fact that the plaintiffs could obtain the testimony sought from the original sources without deposing the journalists, as well as the “important role that newsgathering plays in a free society” and the corresponding role of the courts to be “vigilant against attempts by civil litigants to use turn non-party journalists or newspapers into their private discovery agents.” *Id.* at 406.

In its holding the court quoted at length from *Gonzales v. Nat’l Broadcasting Co., Inc.*, 194 F. 2d 29, 35 (2<sup>nd</sup> Cir. 1999) about the harm that results in permitting wholesale discovery from journalists.

If the parties to any lawsuit were free to subpoena the press at will, it would likely become standard operating procedure for those litigating against an entity that had been the subject of press attention to sift through the press files in search of information supporting their claims. 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, or insisted on remaining anonymous, because of the likelihood that they would be sucked into litigation ... 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 AG Litigation*, 216 F.R.D. at 406

### **Conclusion**

The Movants should not be put to the burden of a deposition when the information sought is clearly obtainable from numerous and better sources, and when the reporter's testimony would constitute speculation about the meaning and intent of the individuals quoted in the story he wrote. The burden on the Movants, and the risk of turning them into discovery agents for the plaintiffs outweighs any benefit the plaintiffs may gain from Mr. Bottorff's testimony which likely has little value to the case. For these reasons, the Movants request that the subpoena issued to Christian Bottorff be quashed and a protective order be entered that discovery from *The Tennessean* and its reporters not be had.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on August 15, 2008 the forgoing document was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to:

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