

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

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RICHARD G. CONVERTINO)	
)	
	Plaintiff,)	
)	
v.)	Case No. 07-CV-13842
)	Assigned to: Hon. Robert H. Cleland
UNITED STATES DEPARTMENT OF JUSTICE,)	
<i>et al.</i>)	
)	
	Defendants.)	
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**PLAINTIFF RICHARD G. CONVERTINO’S OPPOSITION TO NON-PARTY
DETROIT FREE PRESS’ MOTION FOR PROTECTIVE ORDER**

On April 30, 2007 Mr. Convertino served the Detroit Free Press (“Free Press”) with a subpoena *duces tecum* under Rules 30(b)(6), 34, and 45, requesting that they designate a corporate representative to testify regarding Mr. Ashenfelter’s anonymous source(s) for the January 17, 2004 article at issue in this matter (the “Article”), as well as requesting several documents related to past stories the Free Press had written about Mr. Convertino. The Free Press refused to comply with the subpoena on First Amendment grounds and, on July 6, 2007, Mr. Convertino moved to compel. On August 28, 2008, the Court denied, without prejudice, Mr. Convertino’s motion to compel on grounds that it was duplicative of his motion to compel Mr. Ashenfelter to provide similar information. The Court did not, however, reject or even address the merits of Mr. Convertino’s arguments as to the Free Press’ obligation to produce the subpoenaed information.

On April 29, 2009, following nearly two years of as yet unsuccessful attempts to compel Mr. Ashenfelter to produce the subpoenaed information, Mr. Convertino renewed his motion to compel as to the Free Press. The Free Press responded with the instant motion for protective

order, claiming that Mr. Convertino's document requests were overbroad, and that it could not produce a corporate representative to answer Mr. Convertino's questions about Mr. Ashenfelter's source(s) because Mr. Ashenfelter was the only employee of the Free Press who had that information.

As set forth below, the Free Press' arguments are without merit. All of the documents requested by Mr. Convertino are potentially relevant to his Privacy Act lawsuit and the Mr. Ashenfelter's invocation of the Fifth Amendment has no effect on the Free Press' obligation to designate a corporate representative and adequately prepare him to answer Mr. Convertino's questions. This representative must be adequately prepared to testify as to information reasonably available to the Free Press, including, but not limited to: the identity of Mr. Ashenfelter's source(s); any information known by any current or former employee related to the identity of Mr. Ashenfelter's source(s); any and all work product produced by Mr. Ashenfelter related to the Article, or any prior/subsequent article about Mr. Convertino; any and all correspondence between Mr. Ashenfelter and any other individual(s) related to/regarding Mr. Convertino or the Article; and any other information in the possession and/or control of the Free Press related to the Article and/or the source(s) thereof.

I. THE FREE PRESS MUST PRODUCE THE DOCUMENTS REQUESTED BY MR. CONVERTINO'S SUBPOENA *DUCES TECUM*

Under Fed. R. Civ. P. 26(c)(1), a court may "for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." To show good cause, "a movant for a protective order must articulate specific facts showing 'clearly defined and serious injury' resulting from the discovery sought and cannot rely on mere conclusory statements." *Potluri v. Yalamanchili*, 2008 U.S. Dist. LEXIS 16780 (E.D. Mich.

Mar. 5, 2008) (quoting *Nix v. Sword*, 11 Fed. Appx. 498, 500 (6th Cir. Ohio 2001)); *Avirgan v. Hull*, 118 F.R.D. 252, 254 (D.D.C. 1987). The Free Press, however, has alleged no such injury.

In opposition to Mr. Convertino's document request, the Free Press relies solely on the argument that the request "seeks numerous documents not relevant to the one article at issue in the underlying Privacy Act case," and is thus overbroad and burdensome. See Dkt. # 74, Free Press Mtn., at 2. This argument completely mischaracterizes Mr. Convertino's Privacy Act suit. Mr. Convertino has sued the Department of Justice for knowingly leaking private information about him to Mr. Ashenfelter, which resulted in the publication of that information. It was the act of giving the private information to Mr. Ashenfelter, not his subsequent publication of it, that is at issue in Mr. Convertino's suit. As such, the scope of relevant information is anything that could help Mr. Convertino identify the circumstances leading to the leak, and those responsible, which is exactly the information he designed his subpoena to obtain.

Relevance is a broad standard that encompasses anything "reasonably calculated to lead to the discovery of admissible evidence." *Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc.*, 332 F.3d 976, 982 (6th Cir. 2003); see also F.R.E. 401 (defining "relevant evidence" as evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence). "Relevant" information includes information related to "any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case." *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 341 (1978). In his subpoena, Mr. Convertino requested:

- (1) All documents which directly or indirectly identify, discuss or reference any source of information related to Mr. Richard Convertino;
- (2) All documents directly or indirectly related to any newspaper stories you wrote about Mr. Convertino;
- (3) All documents which directly or indirectly identify any

confidential source of information about Mr. Convertino. ... This document request includes documents in either your possession or control.

All of the requested information could lead to significant admissible evidence.

Documents related to sources that have provided information about Mr. Convertino, including but not limited to correspondence, memoranda, drafts of articles, and other such work product, could show who has provided Free Press reporters with information about Mr. Convertino in the past, which officials at the Detroit USAO had relationships with Mr. Ashenfelter or other reporters, which Detroit USAO officials Mr. Ashenfelter/other reporters contacted most often, which officials had previously provided information about Mr. Convertino to the Free Press, and other circumstantial evidence as to the source(s) of the leak.

Similarly, newspaper stories about Mr. Convertino (whether before or after the leak), would reveal which reporters have written articles about Mr. Convertino, and which officials within the Department of Justice have spoken on the record to those reporters about Mr. Convertino. This information could allow Mr. Convertino to determine which officials had relationships with which members of the press, which officials had spoken about him on other occasions, what sort of information they revealed about him, and other information that could lead to circumstantial evidence as to the source of the leak. The requested documents could also lead to information that might impeach the testimony of witnesses already deposed by Mr. Convertino, or lead to other individuals who might have relevant information regarding Mr. Ashenfelter's source(s).

Moreover, as the Free Press has already demonstrated, it is fully capable of identifying responsive documents. In its brief, the Free Press states that it has identified 151 articles that appear responsive to his request. Identifying further responsive documents, such as those related

to the source(s) of those articles, is not unduly burdensome in comparison to Mr. Convertino's need for the information.

II. THE FREE PRESS MUST DESIGNATE A CORPORATE REPRESENTATIVE AND ADEQUATELY PREPARE HIM TO RESPOND TO MR. CONVERTINO'S SUBPOENA

Pursuant to Fed. R. Civ. P. 30(b)(6), the Free Press must comply with Mr. Convertino's subpoena by designating a corporate representative to testify as to responsive information that is "reasonably available" to the Free Press. Information that is "reasonably available" to a corporation includes all information contained in corporate records, all information known to current or former employees that is related to their employment, and any other information reasonably within the corporations possession or control. *See, e.g., United Techs. Motor Sys., Inc. v. Borg-Warner Auto., Inc.*, 1998 U.S. Dist. LEXIS 21837, *4-5 (E.D. Mich. Sept. 4, 1998) (that "a corporation indicates that it no longer employs individuals who have memory of a distant event or that such individuals are deceased... do[es] not relieve a corporation from preparing its Rule 30(b)(6) designee to the extent matters are reasonably available, whether from documents, past employees, or other sources."); *In re Auction Houses Antitrust Litigation*, 196 F.R.D. 444, 447 (S.D.N.Y. 2000) (holding that information and documents in possession of a former employee were reasonably available to the corporation).

Moreover, the Free Press may designate any individual as its representative, including those who are not current employees and who have no personal knowledge of the requested information, so long as it adequately prepares him to answer questions regarding the information reasonably available to the corporation. *Dravo Corp. v. Liberty Mut. Ins. Co.*, 164 F.R.D. 70, 75 (D. Neb. 1995) ("If the persons designated by the corporation do not possess personal knowledge of the matters set out in the deposition notice, the corporation is obligated to prepare the

designees so that they may give knowledgeable and binding answers for the corporation.”); *Buycks-Roberson v. Citibank Fed. Savings Bank*, 162 F.R.D. 338, 343 (N.D. Ill. 1995)(stating that the duty to present and prepare a Rule 30(b)(6) designee goes beyond matters personally known to that designee or to matters in which that designee was personally involved); *Alexander v. FBI*, 186 F.R.D. 137, 141 (D.D.C. 1998) (noting that, while the designated representative need not have first hand experience with the requested information, he “has the duty of being knowledgeable on the subject matter identified as the area of inquiry”); ABA Civil Discovery Standards (Aug. 1999), § 19(f) (“Counsel for the [corporation] should prepare the designated witness to be able to provide meaningful information about any designated area(s) of inquiry.”).

Accordingly, even if Mr. Ashenfelter is the only current and/or former employee of the Free Press who knows the identity of his source(s), the Free Press may nonetheless have responsive information that will at least provide Mr. Convertino with circumstantial evidence as to their identities. To properly respond to Mr. Convertino’s subpoena *duces tecum*, the Free Press must conduct an exhaustive investigation of its corporate records/files (including all email sent using company accounts/computers) and its current/former employees to determine what responsive information is within its control. Once complete, the Free Press must designate and adequately prepare a corporate representative to testify as to the results of this investigation and provide whatever information responsive to Mr. Convertino’s subpoena *duces tecum* is reasonably available to the Free Press.

A. Other Current and/or Former Free Press Employees May Have Responsive Information

Despite the Free Press’ assertions to the contrary, it is entirely possible that other current or former employees of the Free Press know the identity of Mr. Ashenfelter’s source(s), or at

least have information that could provide circumstantial evidence or otherwise lead to their identity. In fact, Mr. Ashenfelter's invocation of the Fifth Amendment in response to questions related to the identities of his editors suggests that other Free Press employees do have such information. Similarly, the fact that the Free Press has made no mention of any investigation as to the knowledge of past employees implies that such individuals may have responsive information.

Nor is Mr. Convertino required to rely on the Free Press' non-testimonial assertion that it cannot produce a knowledgeable corporate representative. *Cf. United States v. Kordel*, 397 U.S. 1, 9 (explaining that corporation's representation that no employee was able to answer interrogatories was insufficient to show lack of corporate knowledge). Even if the Free Press truly cannot produce responsive information, it must still designate a corporate representative to at very least testify to that effect and risk contempt if the Free Press fails to honor its obligations. *Id.*; *Basiru Kanaji v. Phila. Child Guidance Ctr. of Children's Hosp.*, 2001 U.S. Dist. LEXIS 8670, *6 (E.D. Pa. June 20, 2001) (even a corporation's claimed lack of knowledge is generally not sufficient to merit a protective order freeing it from its obligation to designate a representative, as the other side should be able to test this claim by deposing the representative).

Finally, while Mr. Ashenfelter may be the most knowledgeable employee of the Free Press as to information related to his source(s), the Free Press cannot designate Mr. Ashenfelter as its corporate representative if doing so would cause him to once again assert the Fifth Amendment. *City of Chicago v. Wolf*, 1993 U.S. Dist. LEXIS 6810, *3 (N.D. Ill. 1993).

B. Mr. Ashenfelter's Work Product is "Reasonably Available" to the Free Press

Even assuming, *arguendo*, that no other current or former employee of the Free Press knows the identity of Mr. Ashenfelter's source(s), and has no other information in its possession

that could lead to their identity, this information may still be “reasonably available” to the Free Press via Mr. Ashenfelter’s work product.

Under U.S. copyright law, Mr. Ashenfelter’s Article is a “work for hire,” created for his employer, the Free Press. *See* 17 U.S.C. § 201(b). All of the materials Mr. Ashenfelter prepared in the course of creating his Article were likewise prepared for his employer. As such, the Free Press “is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.” *Id.* As such, unless Mr. Ashenfelter’s employment contract explicitly provides otherwise, all of Mr. Ashenfelter’s notes, memoranda, drafts, and other documents related to the Article are the property of the Free Press.

As the “custodian” of corporate property, Mr. Ashenfelter has the duty to return the property to the corporation upon demand, and as such, has the same obligation to comply with discovery as the corporation itself. *Braswell v. United States*, 487 U.S. 99, 111 (1988). Moreover, “the custodian has no privilege to refuse production although [the] contents [of the corporate records] tend to criminate him. In assuming their custody he has accepted the incident obligation to permit inspection.” *Id.* at 110. Thus, even if Mr. Ashenfelter has the only copies of this information, it is nonetheless within the “control” of the Free Press as, in that case, Mr. Ashenfelter would merely be the “custodian” of corporate property.

In response to Mr. Convertino’s subpoena to him, Mr. Ashenfelter produced a privilege log of responsive documents, including many that might reveal the identity of his source(s) for the Article, and/or for prior or subsequent articles about Mr. Convertino. To the extent that these, or any other materials in Mr. Ashenfelter’s possession, were produced in the course of writing articles for the Free Press, they are owned by the Free Press and must be disclosed. Just

as a company president in *Braswell* could not rely on the Fifth Amendment to keep from turning over corporate property in his possession, neither can Mr. Ashenfelter refuse to produce any relevant records in his possession responsive to Mr. Convertino's subpoena to the Free Press. *See Braswell*, 487 U.S. at 111.

C. The Free Press Cites No Authority Permitting It to Avoid Designating a Corporate Representative

The Free Press' own supporting cases, none of which are published or issued from a court in the Sixth Circuit, refute the suggestion that Mr. Ashenfelter's assertion of privilege frees the Free Press from its obligation to designate a corporate representative to respond to Mr. Convertino's subpoena. For example, the Free Press cites to *City of Chicago v. Wolf*, 1993 U.S. Dist. LEXIS 6810 (N.D. Ill. 1993). That case, however, holds that a corporation cannot avoid designating a representative, even if every employee can invoke the Fifth Amendment to avoid giving testimony. *Id.* at *3 ("[t]he corporations, however, can be compelled to answer the questions through an agent who will not invoke the privilege . . . [t]his includes, if necessary, retaining a person not previously associated with the corporation"). Though the *Wolf* court noted that an employee could not be compelled to disclose to the corporate representative incriminating information that existed only within his personal memory, the information *could* be compelled if it was "implied by a document." *Id.* at *4. In the instant case, the existence of information responsive to Mr. Convertino's subpoena is more than implied by the contents of the Article, and of Mr. Ashenfelter's privilege log. Whomever the Free Press designates as its representative, it must adequately prepare them to answer questions as to these matters.

The Free Press' reliance on *Martinez v. Viatical Benefactors, LLC*, is similarly flawed. *See* 2008 U.S. Dist. LEXIS 6121 (S.D. Fla. Jan. 28, 2008). The *Martinez* court, citing as its

CERTIFICATE OF SERVICE

I hereby certify that on June 9, 2009, I electronically filed the foregoing paper(s) with the Clerk of the Court using the ECF system, which shall send notice to all counsel of record.

/s/ Erik D. Snyder

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