35th Annual Media and the Law Conference
April 20-21, 2023 in Kansas City, MO

Witness for the Prosecution? Reexamining journalists' cooperation with authorities

Moderator: **Carol LoCicero**, Partner, Thomas & LoCicero, Tampa, FL

Panelists:

Jean Peters Baker, Jackson County Prosecutor, Kansas City, MO
Damon E. Dunn, Attorney, Funkhouser Vegosen Liebman & Dunn, Chicago, IL
Alex Holder, Filmmaker, AJH Films, Los Angeles, CA
Russell Smith, Partner, SmithDehn, Los Angeles, CA

Materials prepared with assistance by Elizabeth Ernest of Thomas & LoCicero

1. The Fight to Enact the PRESS Act
    a. PRESS Act, H.R. 4330, 117th Cong. (2022).
2. Department of Justice Policies and Regulations
    a. Memorandum from Merrick Garland, Att'y Gen. of the United States, to the Deputy Att'y Gen., Assoc. Att'y Gen., Heads of Dep't Components, United States Att'ys, and Fed. Prosecutors (July 19, 2021).
    b. 28 C.F.R. § 50 (regulations codifying temporary policy outlined in July 19, 2021 Memorandum from Merrick Garland).
    c. Memorandum of Law in Support of Motion to Quash Trial Subpoena or for a Protective Order, *U.S. v. Brand*, No. 1:20-cr-10306-GAO (D. Mass. Nov. 3, 2022), ECF No. 187.
3. House Committee Subpoena to Alex Holder
    a. Subpoena from Select Committee to Investigate the January 6th Attack on the United State Capitol, House of Representatives, to Alex Holder, for testimony at deposition and for raw video footage (June 15, 2022).
    b. Maggie Haberman, *Documentary Filmmaker Emerges as Potentially Key Jan. 6 Witness*, N.Y. TIMES (June 23, 2022), https://www.nytimes.com/2022/06/23/us/politics/alex-holder-jan-6-trump-documentary.html.
4. The R. Kelly Case (The DeRogatis Subpoena)
    a. Notice of Filing and Non-Party James Derogatis's Opposition to Defendant's Motion for Leave to Issue Subpoenas to Reporter and Offer of Proof, *State v. Kelly*, No. 02 CR 14952 (Ill. Cir. Ct. May 29, 2008).

   b. Emergency Motion to Quash Subpoena to Reporter and/or for Protective Order, *United States v. Kelly*, No. 19 CR 567 (N.D. Ill. Sept. 6, 2022), ECF No. 310.

5. The Nevada Shield Law and the German/Telles Case

   a. NEV. REV. STAT. ANN. § 49.275 (West 2021).

   b. Order to Show Cause Why Appeal Should Not Be Summarily Reversed and Remanded and Order Imposing Temporary Injunction, *Las Vegas Review-Journal, Inc. v. State*, No. 85634 (Nev. Nov. 14, 2022), Dkt. No. 22-35782.

   c. Filed District Court Order Denying Plaintiff's Second Ex Parte Application for an Emergency Temporary Restraining Order and Request for Preliminary Injunction Hearing on Order Shortening Time, *Las Vegas Review-Journal, Inc. v. State*, No. 85634 (Nev. Feb. 2, 2023), Dkt. No. 23-03297.

6. Doe v. Roman Catholic Bishop of Springfield (The Parnass Subpoena)

   a. Larry Parnass's Motion for Reconsideration (Oral Argument Requested), *Doe v. Roman Catholic Bishop of Springfield*, No. 2179CV00049 (Mass. Super. Ct. Aug. 29, 2022), Dkt. No. 58.

   b. Memorandum and Order on Motion for Reconsideration, *Doe v. Roman Catholic Bishop of Springfield*, No. 2179CV00049 (Mass. Super. Ct. Oct. 3, 2022), Dkt. No. 69.

7. The Kansas Shield Law and the KMBC-TV Subpoena

   a. KAN. STAT. ANN. § 60-480, *et seq.* (West 2022).

   b. Notice of Intent to Issue Business Record Subpoena, *Pfannenstiel v. Kansas*, No. 5:21-cv-04006-HLT (D. Kan. Oct. 26, 2022), ECF No. 166.

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IIB

117TH CONGRESS
2D SESSION

H. R. 4330

IN THE SENATE OF THE UNITED STATES

SEPTEMBER 20, 2022
Received; read twice and referred to the Committee on the Judiciary

AN ACT

To maintain the free flow of information to the public by establishing appropriate limits on the federally compelled disclosure of information obtained as part of engaging in journalism, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

1 **SECTION 1. SHORT TITLE.**

2 This Act may be cited as the "Protect Reporters from
3 Exploitative State Spying Act" or the "PRESS Act".

4 **SEC. 2. DEFINITIONS.**

5 In this Act:

6 (1) COVERED JOURNALIST.—The term "covered
7 journalist" means a person who regularly gathers,
8 prepares, collects, photographs, records, writes,
9 edits, reports, investigates, or publishes news or in-
10 formation that concerns local, national, or inter-
11 national events or other matters of public interest
12 for dissemination to the public.

13 (2) COVERED SERVICE PROVIDER.—

14 (A) IN GENERAL.—The term "covered
15 service provider" means any person that, by an
16 electronic means, stores, processes, or transmits
17 information in order to provide a service to cus-
18 tomers of the person.

19 (B) INCLUSIONS.—The term "covered
20 service provider" includes—

21 (i) a telecommunications carrier and a
22 provider of an information service (as such
23 terms are defined in section 3 of the Com-
24 munications Act of 1934 (47 U.S.C. 153));

25 (ii) a provider of an interactive com-
26 puter service and an information content

1 provider (as such terms are defined in section 230 of the Communications Act of 1934 (47 U.S.C. 230));

(iii) a provider of remote computing service (as defined in section 2711 of title 18, United States Code); and

(iv) a provider of electronic communication service (as defined in section 2510 of title 18, United States Code) to the public.

(3) DOCUMENT.—The term "document" means writings, recordings, and photographs, as those terms are defined by Federal Rule of Evidence 1001 (28 U.S.C. App.).

(4) FEDERAL ENTITY.—The term "Federal entity" means an entity or employee of the judicial or executive branch or an administrative agency of the Federal Government with the power to issue a subpoena or issue other compulsory process.

(5) JOURNALISM.—The term "journalism" means gathering, preparing, collecting, photographing, recording, writing, editing, reporting, investigating, or publishing news or information that concerns local, national, or international events or

1 other matters of public interest for dissemination to
2 the public.
3 (6) PERSONAL ACCOUNT OF A COVERED JOUR-
4 NALIST.—The term "personal account of a covered
5 journalist" means an account with a covered service
6 provider used by a covered journalist that is not pro-
7 vided, administered, or operated by the employer of
8 the covered journalist.
9 (7) PERSONAL TECHNOLOGY DEVICE OF A COV-
10 ERED JOURNALIST.—The term "personal technology
11 device of a covered journalist" means a handheld
12 communications device, laptop computer, desktop
13 computer, or other internet-connected device used by
14 a covered journalist that is not provided or adminis-
15 tered by the employer of the covered journalist.
16 (8) PROTECTED INFORMATION.—The term
17 "protected information" means any information
18 identifying a source who provided information as
19 part of engaging in journalism, and any records,
20 contents of a communication, documents, or infor-
21 mation that a covered journalist obtained or created
22 as part of engaging in journalism.

1 **SEC. 3. LIMITS ON COMPELLED DISCLOSURE FROM COV-**
2 **ERED JOURNALISTS.**

3 In any matter arising under Federal law, a Federal
4 entity may not compel a covered journalist to disclose pro-
5 tected information, unless a court in the judicial district
6 in which the subpoena or other compulsory process is, or
7 will be, issued determines by a preponderance of the evi-
8 dence, after providing notice and an opportunity to be
9 heard to the covered journalist that—

10 (1) disclosure of the protected information is
11 necessary to prevent, or to identify any perpetrator
12 of, an act of terrorism against the United States; or

13 (2) disclosure of the protected information is
14 necessary to prevent a threat of imminent violence,
15 significant bodily harm, or death, including specified
16 offenses against a minor (as defined by section
17 111(7) of the Adam Walsh Child Protection and
18 Safety Act of 2006 (34 U.S.C. 20911(7))).

19 **SEC. 4. LIMITS ON COMPELLED DISCLOSURE FROM COV-**
20 **ERED SERVICE PROVIDERS.**

21 (a) CONDITIONS FOR COMPELLED DISCLOSURE.—In
22 any matter arising under Federal law, a Federal entity
23 may not compel a covered service provider to provide testi-
24 mony or any document consisting of any record, informa-
25 tion, or other communications stored by a covered provider
26 on behalf of a covered journalist, including testimony or

1 any document relating to a personal account of a covered
2 journalist or a personal technology device of a covered
3 journalist, unless a court in the judicial district in which
4 the subpoena or other compulsory process is, or will be,
5 issued determines by a preponderance of the evidence that
6 there is a reasonable threat of imminent violence unless
7 the testimony or document is provided, and issues an
8 order authorizing the Federal entity to compel the disclo-
9 sure of the testimony or document.

10 (b) NOTICE TO COURT.—A Federal entity seeking to
11 compel the provision of testimony or any document de-
12 scribed in subsection (a) shall inform the court that the
13 testimony or document relates to a covered journalist.

14 (c) NOTICE TO COVERED JOURNALIST AND OPPOR-
15 TUNITY TO BE HEARD.—

16 (1) IN GENERAL.—A court may authorize a
17 Federal entity to compel the provision of testimony
18 or a document under this section only after the Fed-
19 eral entity seeking the testimony or document pro-
20 vides the covered journalist on behalf of whom the
21 testimony or document is stored pursuant to sub-
22 section (a)—

23 (A) notice of the subpoena or other com-
24 pulsory request for such testimony or document
25 from the covered service provider not later than

1 the time at which such subpoena or request is
2 issued to the covered service provider; and
3 (B) an opportunity to be heard before the
4 court before the time at which the provision of
5 the testimony or document is compelled.
6 (2) EXCEPTION TO NOTICE REQUIREMENT.—
7 (A) IN GENERAL.—Notice and an oppor-
8 tunity to be heard under paragraph (1) may be
9 delayed for not more than 45 days if the court
10 involved determines there is clear and con-
11 vincing evidence that such notice would pose a
12 clear and substantial threat to the integrity of
13 a criminal investigation, or would present an
14 imminent risk of death or serious bodily harm,
15 including specified offenses against a minor (as
16 defined by section 111(7) of the Adam Walsh
17 Child Protection and Safety Act of 2006 (34
18 U.S.C. 20911(7))).
19 (B) EXTENSIONS.—The 45-day period de-
20 scribed in subparagraph (A) may be extended
21 by the court for additional periods of not more
22 than 45 days if the court involved makes a new
23 and independent determination that there is
24 clear and convincing evidence that providing no-
25 tice to the covered journalist would pose a clear

1 and substantial threat to the integrity of a
2 criminal investigation, or would present an im-
3 minent risk of death or serious bodily harm
4 under current circumstances.

5 **SEC. 5. LIMITATION ON CONTENT OF INFORMATION.**

6 The content of any testimony, document, or protected
7 information that is compelled under sections 3 or 4 shall—
8 (1) not be overbroad, unreasonable, or oppres-
9 sive, and as appropriate, be limited to the purpose
10 of verifying published information or describing any
11 surrounding circumstances relevant to the accuracy
12 of such published information; and
13 (2) be narrowly tailored in subject matter and
14 period of time covered so as to avoid compelling the
15 production of peripheral, nonessential, or speculative
16 information.

17 **SEC. 6. RULE OF CONSTRUCTION.**

18 Nothing in this Act shall be construed to—
19 (1) apply to civil defamation, slander, or libel
20 claims or defenses under State law, regardless of
21 whether or not such claims or defenses, respectively,
22 are raised in a State or Federal court; or
23 (2) prevent the Federal Government from pur-
24 suing an investigation of a covered journalist or or-
25 ganization that is—

1 (A) suspected of committing a crime;
2 (B) a witness to a crime unrelated to en-
3 gaging in journalism;
4 (C) suspected of being an agent of a for-
5 eign power, as defined in section 101 of the
6 Foreign Intelligence Surveillance Act of 1978
7 (50 U.S.C. 1801);
8 (D) an individual or organization des-
9 ignated under Executive Order 13224 (50
10 U.S.C. 1701 note; relating to blocking property
11 and prohibiting transactions with persons who
12 commit, threaten to commit, or support ter-
13 rorism);
14 (E) a specially designated terrorist, as that
15 term is defined in section 595.311 of title 31,
16 Code of Federal Regulations (or any successor
17 thereto); or
18 (F) a terrorist organization, as that term
19 is defined in section 212(a)(3)(B)(vi)(II) of the

1 Immigration and Nationality Act (8 U.S.C.
2 1182(a)(3)(B)(vi)(II)).

Passed the House of Representatives September 19, 2022.

Attest: CHERYL L. JOHNSON,

Clerk.

Office of the Attorney General
Washington, D.C. 20530

July 19, 2021

MEMORANDUM FOR THE DEPUTY ATTORNEY GENERAL
THE ASSOCIATE ATTORNEY GENERAL
HEADS OF DEPARTMENT COMPONENTS
UNITED STATES ATTORNEYS
FEDERAL PROSECUTORS

FROM: THE ATTORNEY GENERAL

SUBJECT: USE OF COMPULSORY PROCESS TO OBTAIN INFORMATION FROM, OR RECORDS OF, MEMBERS OF THE NEWS MEDIA

Because a free and independent press is vital to the functioning of our democracy, the Department of Justice has long employed procedural protections and a balancing test to restrict the use of compulsory process to obtain information from or records of members of the news media.

There are, however, shortcomings to any balancing test in this context. The United States has, of course, an important national interest in protecting national security information against unauthorized disclosure. But a balancing test may fail to properly weight the important national interest in protecting journalists from compelled disclosure of information revealing their sources, sources they need to apprise the American people of the workings of their government. To better protect that interest, the Department is now adopting the following policy:

A. Prohibition on the Use of Compulsory Process

1. The Department of Justice will no longer use compulsory legal process for the purpose of obtaining information from or records of members of the news media acting within the scope of newsgathering activities, as set out below.

2. This new prohibition applies to compulsory legal process issued to reporters directly, to their publishers or employers, and to third-party service providers of any of the foregoing. It extends to the full range of compulsory process covered by the current regulations, specifically, subpoenas, warrants, court orders issued pursuant to 18 U.S.C. § 2703(d) and § 3123, and civil investigative demands. Further, it applies regardless of whether the compulsory legal process seeks testimony, physical documents, telephone toll records, metadata, or digital content.

3. As with the current regulations, this prohibition on compulsory process does not apply to obtaining information from or records of a member of the news media who is the subject or target of an investigation when that status is not based on or within the scope of newsgathering activities.

a. The prohibition does not apply when a member of the news media is under investigation for a violation of criminal law, such as insider trading. Nor does it apply to a member of the news media who has used criminal methods, such as breaking and entering, to obtain government information.

b. The prohibition does apply when a member of the news media has, in the course of newsgathering, only possessed or published government information, including classified information. This does not, however, affect the Department's traditional ability to use compulsory legal process to obtain information from or records of, for example, a government employee (rather than a member of the news media) who has unlawfully disclosed government information.

4. As with the current regulations, this prohibition also does not apply:

a. to an entity or individual who comes within the small category of those to which the protections of the current regulations do not extend, such as an agent of a foreign power or a member of a foreign terrorist organization;

b. when the member of the news media agrees to provide or consents to the provision of the requested information or records with a subpoena or other form of compulsory process; or when the Department seeks already-published information or records for the purpose of authentication; or

c. when the use of compulsory legal process is necessary to prevent an imminent risk of death or serious bodily harm, including terrorist acts, kidnappings, specified offenses against a minor (as defined in 34 U.S.C. § 20911(7)), or incapacitation or destruction of critical infrastructure (as defined in 42 U.S.C. § 5195c(e)).

5. In the limited circumstances in which it remains permissible to use compulsory legal process for the purpose of obtaining information from or records of a member of the news media, current exhaustion and component approval requirements continue to apply. Further, as an interim measure while regulations are drafted, additional advance approval must also be obtained from the Deputy Attorney General for any use of compulsory legal process for the purpose of obtaining information from or records of a member of the news media. If there is any uncertainty about the applicability of this memorandum to a particular circumstance, the Deputy Attorney General must be consulted before process is sought.

6. Other issues currently addressed by Department regulations, but not subject to the prohibition of this Part, will be addressed in the review process discussed in Part B.

B. Regulations and Legislation

1. Because the goal is to protect members of the news media in a manner that will be enduring, I am asking the Deputy Attorney General to undertake a review process to further explain,

develop, and codify the above protections in regulations, after consulting with the relevant internal and external stakeholders.

2. As part of that review, the Deputy Attorney General will examine existing regulations to determine how those regulations should be tightened in the limited circumstances in which it remains permissible to use compulsory legal process for obtaining information from or records of a member of the news media. That review will also determine whether there are additional forms of legal process to which further restrictions should be extended consistent with the intent of this memorandum.

3. Also as part of that review, the Deputy Attorney General will examine the procedures used to safeguard information from or records of members of the news media obtained by compulsory legal process in the limited circumstances in which that remains permissible, as well as such information or records that were previously obtained. That examination will include developing procedures for the appropriate destruction or return of such information or records, as permitted by law.

4. Finally, to ensure that protections regarding the use of compulsory legal process for obtaining information from or records of members of the news media continue in succeeding Administrations, the Department will support congressional legislation to embody protections in law.

BILLING CODE: 4410-14

DEPARTMENT OF JUSTICE

28 CFR Part 50

Docket No. OAG 179; AG Order No. 5524-2022

Policy Regarding Obtaining Information From or Records of Members of the News Media; and Regarding Questioning, Arresting, or Charging Members of the News Media

AGENCY: Office of the Attorney General, Department of Justice.

ACTION: Final rule.

SUMMARY: This rule amends the regulations setting forth the policy of the Department of Justice regarding the use of compulsory legal process, including subpoenas, search warrants, and certain court orders for the purpose of obtaining information from or records of members of the news media. The rule also amends the Department's regulations establishing its policy regarding questioning, arresting, or charging members of the news media.

DATES: This rule is effective on [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Ashley Dugger, Acting Director, Office of Enforcement Operations, Criminal Division, (202) 514-6809.

SUPPLEMENTARY INFORMATION:

Discussion

On July 19, 2021, the Attorney General issued a memorandum revising the Department's policy regarding the use of compulsory legal process for the purpose of obtaining information from or records of members of the news media. The memorandum asked the Deputy Attorney General to undertake a review process to further explain, develop, and codify in regulations the

protections provided for in the memorandum. After the conclusion of that review and consultation with relevant internal and external stakeholders, the Attorney General is issuing this final rule to revise the existing provisions in the Department's regulations at 28 CFR 50.10.

The revisions replace the regulations' prior balancing test and codify the Attorney General's July 2021 directive that the Department of Justice will no longer use compulsory legal process for the purpose of obtaining information from or records of members of the news media acting within the scope of newsgathering, except in limited circumstances. Other revisions are intended to clarify the scope of the policy, specify the approvals required in the circumstances in which compulsory legal process is allowed, tighten procedures for the review and safeguarding of information, and fill gaps in the previous regulations.

Regulatory Certifications

Administrative Procedure Act, 5 U.S.C. 553

Because, for purposes of the Administrative Procedure Act, this regulation concerns general statements of policy, or rules of agency organization, procedure, or practice, notice and comment and a delayed effective date are not required. See 5 U.S.C. 553(b)(A), (d).

Regulatory Flexibility Act

Because this final rule is not promulgated as a final rule under 5 U.S.C. 553 and was not required under that section to be published as a proposed rule, the requirements for the preparation of a regulatory flexibility analysis under 5 U.S.C. 604(a) do not apply. In any event, the Attorney General, in accordance with 5 U.S.C. 605(b), has reviewed this regulation and by approving it certifies that this regulation will not have a significant economic impact on a substantial number of small entities because it pertains to administrative matters affecting the Department.

Executive Orders 12866 and 13563 - Regulatory Planning and Review

This action has been drafted and reviewed in accordance with Executive Order 12866 of September 30, 1993, Regulatory Planning and Review, section 1(b), Principles of Regulation.

This rule is limited to agency organization, management, or personnel matters as described by section 3(d)(3) of Executive Order 12866, and therefore is not a "regulation" as defined by that Executive Order. Accordingly, this action has not been reviewed by the Office of Management and Budget.

Executive Order 12988 - Civil Justice Reform

This regulation meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988 of February 5, 1996.

Executive Order 13132 - Federalism

This regulation will not have substantial direct effects on the States, on the relationship between the national government and the States, or on distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132 of August 4, 1999, this rule does not have sufficient federalism implications to warrant the preparation of a federalism assessment.

Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995, Public Law 104-4.

Congressional Review Act

This action pertains to agency management and does not substantially affect the rights or obligations of non-agency parties; accordingly, this action is not a "rule" as that term is used by the Congressional Review Act (Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA)). Therefore, the reporting requirement of 5 U.S.C. 801 does not apply.

List of Subjects in 28 CFR Part 50

Administrative practice and procedure, Crime, News, Media, Subpoena, Search warrants.

Accordingly, for the reasons stated in the preamble, part 50 of title 28 of the Code of Federal Regulations is amended as follows:

PART 50 – STATEMENTS OF POLICY

1. The authority citation for part 50 continues to read as follows:

Authority: 5 U.S.C. 301; 18 U.S.C. 1162; 28 U.S.C. 509, 510, 516, and 519; 42 U.S.C. 1921 *et seq.*, 1973c; and Pub. L. 107-273, 116 Stat. 1758, 1824.

2. Section 50.10 is revised to read as follows:

§ 50.10 Policy regarding obtaining information from or records of members of the news media; and regarding questioning, arresting, or charging members of the news media.

(a) *Statement of principles.*

(1) A free and independent press is vital to the functioning of our democracy. Because freedom of the press can be no broader than the freedom of members of the news media to investigate and report the news, the Department's policy is intended to provide protection to members of the news media from certain law enforcement tools and actions, whether criminal or civil, that might unreasonably impair newsgathering. The policy is not intended to shield from accountability members of the news media who are subjects or targets of a criminal investigation

for conduct outside the scope of newsgathering.

(2) The Department recognizes the important national interest in protecting journalists from compelled disclosure of information revealing their sources, sources they need to apprise the American people of the workings of their government. For this reason, with the exception of certain circumstances set out below, the Department of Justice will not use compulsory legal process for the purpose of obtaining information from or records of members of the news media acting within the scope of newsgathering.

(3) In determining whether to seek, when permitted by this policy, information from or records of members of the news media, the Department must consider several vital interests: protecting national security, ensuring public safety, promoting effective law enforcement and the fair administration of justice, and safeguarding the essential role of a free press in fostering government accountability and an open society, including by protecting members of the news media from compelled disclosure of information revealing their sources. These interests have long informed the Department's view that the use of compulsory legal process to seek information from or records of non-consenting members of the news media constitutes an extraordinary measure, not a standard investigatory practice.

(b) *Scope and definitions.*

(1) Covered persons and entities. This policy governs the use of certain law enforcement tools and actions, whether criminal or civil, to obtain information from or records of members of the news media.

(2) Definitions.

(i) "Compulsory legal process" consists of subpoenas, search warrants, court orders issued pursuant to 18 U.S.C. 2703(d) and 3123, interception orders issued pursuant to 18 U.S.C.

2518, civil investigative demands, and mutual legal assistance treaty requests—regardless of whether issued to members of the news media directly, to their publishers or employers, or to others, including third-party service providers of any of the forgoing, for the purpose of obtaining information from or records of members of the news media, and regardless of whether the compulsory legal process seeks testimony, physical or electronic documents, telephone toll or other communications records, metadata, or digital content.

(ii) "Newsgathering" is the process by which a member of the news media collects, pursues, or obtains information or records for purposes of producing content intended for public dissemination.

(A) Newsgathering includes the mere receipt, possession, or publication by a member of the news media of government information, including classified information, as well as establishing a means of receiving such information, including from an anonymous or confidential source.

(B) Except as provided in paragraph (b)(2)(ii)(A) of this section, newsgathering does not include criminal acts committed in the course of obtaining information or using information, such as: breaking and entering; theft; unlawfully accessing a computer or computer system; unlawful surveillance or wiretapping; bribery; extortion; fraud; insider trading; or aiding or abetting or conspiring to engage in such criminal activities, with the requisite criminal intent.

(3) Exclusions.

(i) The protections of this policy do not extend to any person or entity where there is a reasonable ground to believe the person or entity is:

(A) A foreign power or agent of a foreign power, as those terms are defined in section 101 of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801);

(B) A member or affiliate of a foreign terrorist organization designated under section 219(a) of the Immigration and Nationality Act (8 U.S.C. 1189(a));

(C) Designated as a Specially Designated Global Terrorist by the Department of the Treasury under Executive Order 13224 of September 23, 2001 (66 FR 49079);

(D) A specially designated terrorist as that term is defined in 31 CFR 595.311 (or any successor thereto);

(E) A terrorist organization as that term is defined in section 212(a)(3)(B)(vi) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(3)(B)(vi));

(F) Committing or attempting to commit a crime of terrorism, as that offense is described in 18 U.S.C. 2331(5) or 2332b(g)(5);

(G) Committing or attempting to commit the crimes of providing material support or resources to terrorists or designated foreign terrorist organizations, providing or collecting funds to finance acts of terrorism, or receiving military-type training from a foreign terrorist organization, as those offenses are defined in 18 U.S.C. 2339A, 2339B, 2339C, and 2339D; or

(H) Aiding, abetting, or conspiring in illegal activity with a person or organization described in paragraphs (b)(3)(i)(A) through (G) of this section.

(ii) The determination that an exclusion in paragraph (b)(3)(i) of this section applies must be made by the Assistant Attorney General for National Security.

(c) *Compulsory legal process for the purpose of obtaining information from or records of a member of the news media acting within the scope of newsgathering.* Compulsory legal process for the purpose of obtaining information from or records of a member of the news media acting within the scope of newsgathering is prohibited except under the circumstances set forth in paragraphs (c)(1) through (3). (Note that this prohibition on using compulsory legal process

applies when a member of the news media has, in the course of newsgathering, only received, possessed, or published government information, including classified information, or has established a means of receiving such information, including from an anonymous or confidential source.) The Department may only use compulsory legal process for the purpose of obtaining information from or records of a member of the news media acting within the scope of newsgathering, as follows:

(1) To authenticate for evidentiary purposes information or records that have already been published, in which case the authorization of a Deputy Assistant Attorney General for the Criminal Division is required;

(2) To obtain information or records after a member of the news media agrees to provide or consents to the provision of the requested records or information in response to the proposed compulsory legal process, in which case authorization as described in paragraph (i) of this section is required; or

(3) When necessary to prevent an imminent or concrete risk of death or serious bodily harm, including terrorist acts, kidnappings, specified offenses against a minor (as defined in 34 U.S.C. 20911(7)), or incapacitation or destruction of critical infrastructure (as defined in 42 U.S.C. 5195c(e)), in which case the authorization of the Attorney General is required.

(d) *Compulsory legal process for the purpose of obtaining information from or records of a member of the news media not acting within the scope of newsgathering.*

(1) The Department may only use compulsory legal process for the purpose of obtaining information from or records of a member of the news media who is not acting within the scope of newsgathering:

(i) When the member of the news media is the subject or target of an investigation and

suspected of having committed an offense;

(ii) To obtain information or records of a non-member of the news media, when the non-member is the subject or target of an investigation and the information or records are in a physical space, device, or account shared with a member of the news media;

(iii) To obtain purely commercial, financial, administrative, technical, or other information or records unrelated to newsgathering; or for information or records relating to personnel not involved in newsgathering;

(iv) To obtain information or records related to public comments, messages, or postings by readers, viewers, customers, or subscribers, over which a member of the news media does not exercise editorial control prior to publication;

(v) To obtain information or records of a member of the news media who may be a victim of or witness to crimes or other events, or whose premises may be the scene of a crime, when such status (as a victim or witness or crime scene) is not based on or within the scope of newsgathering; or

(vi) To obtain only subscriber and other information described in 18 U.S.C. 2703(c)(2)(A), (B), (D), (E), and (F).

(2) Compulsory legal process under paragraph (d)(1) of this section requires the authorization of a Deputy Assistant Attorney General for the Criminal Division, except that:

(i) To obtain information or records after a member of the news media agrees to provide or consents to the provision of the requested records or information in response to the proposed compulsory legal process, such compulsory legal process requires authorization as described in paragraph (i) of this section governing voluntary questioning and compulsory legal process following consent by a member of the news media; and

(ii) To seek a search warrant for the premises of a news media entity requires authorization by the Attorney General.

(e) *Matters where there is a close or novel question as to the person's or entity's status as a member of the news media or whether the member of the news media is acting within the scope of newsgathering.*

(1) When there is a close or novel question as to the person's or entity's status as a member of the news media, the determination of such status must be approved by the Assistant Attorney General for the Criminal Division.

(2) When there is a close or novel question as to whether the member of the news media is acting within the scope of newsgathering, the determination of such status must be approved by the Assistant Attorney General for the Criminal Division. When the Assistant Attorney General finds that there is genuine uncertainty as to whether the member of the news media is acting within the scope of newsgathering, the determination of such status must be approved by the Attorney General.

(f) *Compelled testimony.*

(1) Except as provided in paragraph (f)(2) of this section, members of the Department must obtain the authorization of the Deputy Attorney General when seeking to compel grand jury or trial testimony otherwise permitted by this section from any member of the news media.

(2) When the compelled testimony under paragraph (f)(1) of this section has no nexus to the person's or entity's activities as a member of the news media, members of the Department must obtain the authorization of a Deputy Assistant Attorney General for the Criminal Division and provide prior notice to the Deputy Attorney General.

(3) Such authorization may only be granted when all other requirements of this policy

regarding compulsory legal process have been satisfied.

(g) *Exhaustion.*

(1) Except as provided in paragraph (g)(2) of this section, the official authorizing the compulsory legal process must find the following exhaustion conditions are met:

(i) The Government has exhausted all reasonable avenues to obtain the information from alternative, non-news-media sources.

(ii) The Government has pursued negotiations with the member of the news media in an attempt to secure the member of the news media's consent to the production of the information or records to be sought through compulsory legal process, unless the authorizing official determines that, for compelling reasons, such negotiations would pose a clear and substantial threat to the integrity of the investigation or pose the risks described in paragraph (c)(3) of this section. Where the nature of the investigation permits, the Government must have explained to the member of the news media the Government's need for the information sought in a particular investigation or prosecution, as well as its willingness or ability to address the concerns of the member of the news media.

(iii) The proposed compulsory legal process is narrowly drawn. It must be directed at material and relevant information regarding a limited subject matter, avoid interference with unrelated newsgathering, cover a reasonably limited period of time, avoid requiring production of a large volume of material, and give reasonable and timely notice of the demand as required by paragraph (j) of this section.

(2) When the process is sought pursuant to paragraphs (d)(1), (i), or (l) of this section, the authorizing official is not required to find that the exhaustion conditions in paragraphs (g)(1)(i)–(ii) of this section have been satisfied, but should consider requiring those conditions as

appropriate.

(h) *Standards for authorizing compulsory legal process.*

(1) In all matters covered by this section, the official authorizing the compulsory legal process must take into account the principles set forth in paragraph (a) of this section.

(2) Except as provided in paragraph (h)(3) of this section, when the member of the news media is not the subject or target of an investigation and suspected of having committed an offense, the official authorizing the compulsory legal process must take into account the following considerations:

(i) In criminal matters, there must be reasonable grounds to believe, based on public information or information from non-news-media sources, that a crime has occurred, and that the information sought is essential to a successful investigation or prosecution. The compulsory legal process may not be used to obtain peripheral, nonessential, or speculative information.

(ii) In civil matters, there must be reasonable grounds to believe, based on public information or information from non-news-media sources, that the information sought is essential to the successful completion of the investigation or litigation in a case of substantial importance. The compulsory legal process may not be used to obtain peripheral, nonessential, cumulative, or speculative information.

(3) When paragraph (h)(2) of this section would otherwise apply, but the compulsory legal process is sought pursuant to paragraphs (i) or (l) of this section, the authorizing official is not required to, but should, take into account whether the information sought is essential to a successful investigation, prosecution, or litigation as described in paragraphs (h)(2)(i)–(ii) of this section.

(4) When the member of the news media is the subject or target of an investigation and

suspected of having committed an offense, before authorizing compulsory legal process, the authorizing official is not required to, but should, take into account the considerations set forth in paragraphs (h)(2)(i)–(ii) of this section as appropriate.

(i) *Voluntary questioning and compulsory legal process following consent by a member of the news media.*

(1) When the member of the news media is not the subject or target of an investigation and suspected of having committed an offense, authorization by a United States Attorney or Assistant Attorney General responsible for the matter must be obtained in order to question a member of the news media on a voluntary basis, or to use compulsory legal process if the member of the news media agrees to provide or consents to the provision of the requested records or information in response to the proposed process. When there is any nexus to the person's activities as a member of the news media, such authorization must be preceded by consultation with the Criminal Division.

(2) When the member of the news media is the subject or target of an investigation and suspected of having committed an offense, authorization by a Deputy Assistant Attorney General for the Criminal Division must be obtained in order to question a member of the news media on a voluntary basis, or to use compulsory legal process if the member of the news media agrees to provide or consents to the provision of the requested records or information in response to the proposed process.

(j) *Notice of compulsory legal process to the affected member of the news media.*

(1) Members of the Department must provide notice to the affected member of the news media prior to the execution of authorized compulsory legal process under paragraph (c) of this section unless the authorizing official determines that, for compelling reasons, such notice would

pose the risks described in paragraph (c)(3) of this section.

(2) Members of the Department must provide notice prior to the execution of compulsory legal process authorized under paragraphs (d)(1)(ii)–(vi) of this section to a member of the news media that is not the subject or target of an investigation and suspected of having committed an offense, unless the authorizing official determines that, for compelling reasons, such notice would pose a clear and substantial threat to the integrity of the investigation or would pose the risks described in paragraph (c)(3) of this section and so informs the Deputy Attorney General in advance.

(3) If the member of the news media has not been given notice under paragraphs (j)(1) or (j)(2) of this section, the United States Attorney or Assistant Attorney General responsible for the matter must provide notice to the member of the news media as soon as it is determined that such notice would no longer pose the concerns described in paragraphs (j)(1) or (j)(2) of this section, as applicable.

(4) In any event, such notice must be given to the affected member of the news media within 45 days of the Government's receipt of a complete return made pursuant to all forms of compulsory legal process included in the same authorizing official's authorization under paragraphs (c) or (d)(1)(ii)–(vi), except that the authorizing official may authorize delay of notice for one additional 45-day period if the official determines that, for compelling reasons, such notice continues to pose the same concerns described in paragraphs (j)(1) or (j)(2) of this section, as applicable.

(5) Members of the Department are not required to provide notice to the affected member of the news media of compulsory legal process that was authorized under paragraph (d)(1)(i) of this section if the affected member of the news media is the subject or target of an investigation

and suspected of having committed an offense.

(i) The authorizing official may nevertheless direct that notice be provided to the affected member of the news media.

(ii) If the authorizing official does not direct that such notice be provided, the official must so inform the Deputy Attorney General, and members of the Department who are responsible for the matter must provide the authorizing official with an update every 90 days regarding the status of the investigation. That update must include an assessment of any harm to the investigation that would be caused by providing notice to the member of the news media. The authorizing official will consider such update in determining whether to direct that notice be provided.

(6) Notice under this policy may be given to the affected member of the news media or a current employer of that member if that employer is also a member of the news media.

(7) A copy of any notice to be provided to a member of the news media shall be provided to the Director of the Office of Public Affairs and to the Director of the Criminal Division's Office of Enforcement Operations at least 10 business days before such notice is provided, and immediately after such notice is provided to the member of the news media.

(k) *Non-disclosure orders.*

(1) In seeking authorization to use compulsory legal process to obtain information from or the records of a member of the news media, members of the Department must indicate whether they intend to seek an order directing the recipient of the compulsory legal process not to disclose the existence of the compulsory legal process to any other person or entity and shall articulate the need for such non-disclosure order.

(2) An application for a non-disclosure order sought in connection with compulsory legal

process under paragraph (c) of this section may only be authorized if the authorizing official determines that, for compelling reasons, disclosure would pose the risks described in paragraph (c)(3) of this section and the application otherwise complies with applicable statutory standards and Department policies.

(3) An application for a non-disclosure order sought in connection with compulsory legal process under paragraphs (d)(1)(ii)–(vi) of this section regarding a member of the news media that is not the subject or target of an investigation and suspected of having committed an offense may only be authorized if the authorizing official determines that, for compelling reasons, disclosure would pose a clear and substantial threat to the integrity of the investigation or would pose the risks described in paragraph (c)(3) of this section and the application otherwise complies with applicable statutory standards and Department policies.

(4) An application for a non-disclosure order sought in connection with compulsory legal process under paragraph (d)(1)(i) of this section regarding a member of the news media that is a subject or target of an investigation and suspected of having committed an offense may be authorized if the application otherwise complies with applicable statutory standards and Department policies.

(5) Members of the Department must move to vacate any non-disclosure order when notice of compulsory legal process to the affected member of media is required (after any extensions permitted) by paragraph (j) of this section.

(l) *Exigent circumstances involving risk of death or serious bodily harm.*

(1) A Deputy Assistant Attorney General for the Criminal Division may authorize the use of compulsory legal process that would otherwise require authorization from the Attorney General or the Deputy Attorney General if the Deputy Assistant Attorney General for the

Criminal Division determines that:

(i) The exigent use of such compulsory legal process is necessary to prevent the risks described in paragraph (c)(3) of this section; and

(ii) Those exigent circumstances require the use of such compulsory legal process before the authorization of the Attorney General or the Deputy Attorney General can, with due diligence, be obtained.

(2) In authorizing the exigent use of compulsory legal process, a Deputy Assistant Attorney General for the Criminal Division should take into account the principles set forth in paragraph (a) of this section; ensure that the proposed process is narrowly tailored to retrieve information or records required to prevent or mitigate the associated imminent risk; and require members of the Department to comply with the safeguarding protocols described in paragraph (p) of this section.

(3) As soon as possible after the approval by a Deputy Assistant Attorney General for the Criminal Division of a request under paragraph (l)(1) of this section, the Deputy Assistant Attorney General must provide notice to the designated authorizing official, the Deputy Attorney General, and the Director of the Office of Public Affairs. Within 10 business days of the authorization under paragraph (l)(1) of this section, the United States Attorney or Assistant Attorney General responsible for the matter shall provide a statement to the designated authorizing official containing the information that would have been provided in a request for prior authorization.

(m) *Arresting or charging a member of the news media.*

(1) Except as provided in paragraph (m)(2) of this section or in circumstances in which prior authorization is not possible, members of the Department must obtain the authorization of

the Deputy Attorney General to seek a warrant for an arrest, conduct an arrest, present information to a grand jury seeking a bill of indictment, or file an information against a member of the news media.

(2) Except in circumstances in which prior authorization is not possible, when the arrest or charging of a member of the news media under paragraph (m)(1) of this section has no nexus to the person's or entity's activities as a member of the news media, members of the Department must obtain the authorization of a Deputy Assistant Attorney General for the Criminal Division and provide prior notice to the Deputy Attorney General.

(3) When prior authorization was not possible, the member of the Department must ensure that the designated authorizing official is notified as soon as possible.

(n) *Applications for authorizations under this section.*

(1) Whenever any authorization is required under this section, the application must be personally approved in writing by the United States Attorney or Assistant Attorney General responsible for the matter.

(2) Whenever the authorizing official under this section is the Attorney General or the Deputy Attorney General, the application must also be personally approved in a memorandum by the Assistant Attorney General for the Criminal Division.

(3) The member of the Department requesting authorization must provide all facts and applicable legal authority necessary for the authorizing official to make the necessary determinations, as well as copies of the proposed compulsory legal process and any other related filings.

(4) Whenever an application for any authorization is made to the Attorney General or the Deputy Attorney General under this section, the application must also be provided to the

Director of the Office of Public Affairs for consultation.

(o) *Filter protocols.*

(1) In conjunction with the use of compulsory legal process, the use of filter protocols, including but not limited to keyword searches and filter teams, may be necessary to minimize the potential intrusion into newsgathering-related materials that are unrelated to the conduct under investigation.

(2) While the use of filter protocols should be considered in all matters involving a member of the news media, the use of such protocols must be balanced against the need for prosecutorial flexibility and the recognition that investigations evolve, and should be tailored to the facts of each investigation.

(3) Unless compulsory legal process is sought pursuant to paragraphs (i) or (l) of this section, members of the Department must use filter protocols when the compulsory legal process relates to a member of the news media acting within the scope of newsgathering or the compulsory legal process could potentially encompass newsgathering-related materials that are unrelated to the conduct under investigation. The Attorney General or the Deputy Attorney General may waive the use of filter protocols only upon an express finding that there is a *de minimis* risk that newsgathering-related materials that are unrelated to the conduct under investigation would be obtained pursuant to the compulsory legal process and that any filter protocol would pose a substantial and unwarranted investigative burden.

(4) Members of the Department should consult the Justice Manual for guidance regarding the use of filter protocols to protect newsgathering-related materials that are unrelated to the conduct under investigation.

(p) *Safeguarding.* Any information or records that might include newsgathering-related

materials obtained from a member of the news media or from third parties pursuant to this policy must be closely held so as to prevent disclosure of the information to unauthorized persons or for improper purposes. Members of the Department must consult the Justice Manual for specific guidance regarding the safeguarding of information or records obtained from a member of the news media or from third parties pursuant to this section and regarding the destruction and return of information or records as permitted by law.

(q) *Privacy Protection Act.* All authorizations pursuant to this section must comply with the provisions of the Privacy Protection Act (PPA), 42 U.S.C. 2000aa(a) et seq. Members of the Department must consult the Justice Manual for specific guidance on complying with the PPA. Among other things, members of the Department are not authorized to apply for a warrant to obtain work product materials or other documentary materials of a member of the news media under the PPA suspect exception, see 42 U.S.C. 2000aa(a)(1) and (b)(1), if the sole purpose is to further the investigation of a person other than the member of the news media.

(r) *Anti-circumvention.* Members of the Department shall not direct any third party to take any action that would violate a provision of this section if taken by a member of the Department.

(s) *Failure to comply.* Failure to obtain the prior authorization required by this section may constitute grounds for an administrative reprimand or other appropriate disciplinary action.

(t) *General provision.* This section is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United

States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

10.26.22
Date

Merrick B. Garland
Attorney General

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES,

v.

PETER BRAND and
JIE "JACK" ZHAO,

Defendants.

Case No. 1:20-cr-10306-GAO

MEMORANDUM OF LAW OF JOSHUA MILLER IN SUPPORT OF MOTION TO QUASH TRIAL SUBPOENA OR FOR A PROTECTIVE ORDER

Joshua Miller ("Miller"), a non-party subpoenaed witness, submits this memorandum of law in support of his motion to quash the trial subpoena served on him by the government or for a protective order.

INTRODUCTION

On April 4, 2019, the Boston Globe published an online article written by Miller headlined "He bought the fencing coach's house. Then his son got into Harvard" (the "Article"). See **Exhibit B** to Declaration of Joshua Miller ("Miller Dec."). The Article contained statements made by Defendant Jie "Jack" Zhao during an April 2, 2019, interview conducted by Miller at the Hilton Boston Logan Airport. The interview was recorded with Zhao's consent. Miller Dec. ¶ 3. In November 2020, some 19 months after the Article, the government charged Zhao and Brand with engaging in a scheme in which Zhao allegedly made various payments to and for the

benefit of Brand as bribes, in exchange for Brand's facilitating the admission of Zhao's sons to Harvard as recruited fencers.[1]

Miller respectfully requests that the subpoena be quashed on the grounds that his testimony is not central to or essential to the government's case. The government has charged and proceeded with this case based on its own ample investigatory powers. Miller's testimony would be largely redundant of the documentary evidence and testimony already obtained by the government, including the anticipated testimony Alex Ryjik, a cooperating witness who has personal knowledge of the transactions at issue. Should the Court find that the government has carried its burden of demonstrating that Miller's First Amendment interests are outweighed by the government's interest in obtaining statements made by Zhao, Miller requests that the Court follow the procedure endorsed by the First Circuit in United States v. LaRouche Campaign, 841 F.2d 1176, 1182 (1st Cir. 1988) and review the interview recording *in camera* to determine whether and to what extent Zhao's statements are relevant and admissible. If the Court finds that any portion of the recording is admissible, Miller's testimony still would be unnecessary because the recording may be admitted by lay witnesses familiar with Zhao's voice, including but not limited to cooperating witness Ryjik. See Fed. R. Evid. 901(b)(5); United States v. Panico, 435 F.3d 47 (1st Cir. 2005); United States v. Garcia-Alvarez, 541 F.3d 8 (1st Cir. 2008).

STATEMENT OF FACTS

A. Summary of the Evidence Obtained by the Government

Court filings summarize extensive evidence obtained by the government in support of its charges. See, e.g., n.1, supra. The principal purpose of the alleged conspiracy, according to the

[1] See ECF No. 172 at 1 (Joint Pre-Trial Memorandum; *see also* ECF No. 3-1 (affidavit of special agent Elizabeth Keating in support of criminal complaint); ECF No. 56 (Superseding Indictment ("Indictment" or "S.I.")).

government, was for Brand to facilitate the admission of Zhao's sons to Harvard in exchange for bribes totaling more than $1.5 million. S.I. ¶¶ 7, 8(b). Cooperating witness Ryjik allegedly aided the plan by communicating with Brand on behalf of Zhao. Id. ¶¶ 10-12, 15-18; ECF No. 172 at 2 (identifying Ryjik as the cooperating witness). The information Ryjik provided "has been corroborated by other evidence, including documents, emails, and text messages." ECF no. 3-1 at page 5 n.2. Ryjik is on the government's witness list. ECF No. 172 at 8.

1. The Government's Evidence of Communications Concerning the Admission of Zhao's Older Son

On or about May 2, 2012, Brand allegedly sent the following text message to Ryjik: "Jack doesn't need to take me anywhere and his boys don't have to be great fencers. All I need is a good incentive to recruit them[.] You can tell him that[.]" S.I. ¶ 10. Two months later, Ryjik texted Brand asking: "Is there space for[...] your favorite Chinese supporter?" Brand replied: "Of course as long as Z[h]ao cones [sic] through with the financial support[.]" Brand added: "He is my no 1 recruit as long as my future us [sic] secured." Id. ¶ 11. Later that month, Brand texted Ryjik to inquire whether he had "spoken to Zhao yet." Ryjik responded: "Off [sic] course call me when u can[.]" Id. ¶ 12.

In October 2013, Brand texted Ryjik saying, "I can use the donation to the foundation after tomorrow." Id. ¶ 14. The following day, after receiving an email informing him that Harvard had deemed the admission of Zhao's son as "likely," Brand texted the confidential informant: "Your man is good to go. Don't say anything to him until he receives the call from admissions." Id. ¶ 16. In December 2013, Zhao emailed Brand an acceptance letter that Zhao's son had received from Harvard that day. Zhao wrote: "Hi Boss...It is official now. I just want to thank you for what you did, really appreciate." Id. ¶ 18.

2. The Government's Evidence of Payments Made by Zhao

In February 2013, Zhao contributed approximately $1 million to Ryjik's fencing charity as a "purported donation[.]" Id. ¶ 13. In October 2014, shortly after Zhao's son began studies at

Harvard, the fencing charity contributed $100,000 to the Peter Brand Foundation. The payment was funded by Zhao's $1 million dollar contribution. Id. ¶¶ 14, 19.

In June and July 2015, Zhao wrote two checks to Penn State University in the total amount of $8,428.66 to pay for Brand's son's tuition. Id. ¶ 20. He also (a) wrote a check to the U.S. Department of Education in the amount of $32,339.92, to pay Brand's son's educational loans, id. ¶ 21; (b) made payments totaling $119,051.52 to pay off the mortgage on Brand's home in Needham, Massachusetts, id. ¶ 22; (c) paid $2,573.45 to pay the Needham water and sewer bill for Brand's home and $34,563.25 to GM Financial to pay Brand's car loan, id. ¶¶ 23-24; and (d) paid $50,000 into an escrow account for Brand's purchase of a condominium in Cambridge, Massachusetts, id. ¶ 25. In May 2016, Zhao bought Brand's Needham home for $989,500, "well above its assessed value." Id. ¶ 26. Brand used the sales proceeds to fund his purchase of the Cambridge condominium. Id.

3. The Government's Evidence Concerning the Admission of Zhao's Younger Son

In June 2016, Brand emailed an Associate Director of Harvard Athletics, stating that he had offered recruiting slots to Zhao's younger son and four other prospective students. Id. ¶ 27. Brand later emailed Zhao's son to inform him he should send in a completed application by September 15 in order to be considered for a "likely" letter. Id. ¶ 28. Zhao's son received the "likely" letter in September 2016. Id. ¶ 29. Between August 2016 and April 2017—"during the period in which Zhao's son's Harvard application was pending"—Zhao paid a Massachusetts-based residential construction company at least $154,626.41 for renovations to Brand's Cambridge condominium. Id. ¶ 30.

B. Miller's Boston Globe Article

The Article reported that the Globe interviewed Zhao at the Hilton Boston Logan Airport after flying from Virginia to Boston "because he wanted to explain everything in person, and, in his words, look the reporter in the eye." Miller Dec., **Exhibit B** at 2. With Zhao's consent,

Miller recorded the Logan Airport interview, which is approximately 50 minutes long. Id. ¶ 3. The Article attributed the following quoted statements to Zhao from the interview:

- [Referring to Defendant Brand:] "We have a freshman weekend or whatever that we went to the fencing room, sit down, talk with him[.] . . . The more we talk, I really like this guy."
- "He did not ask me, 'Jack, can you buy me a house?' No. No. No. That is just not the situation[.]"
- "From my perspective, I'm just making his life better plus making a good investment[.]"
- [Referring to Brand's house:] "pretty cozy[.]"
- "You can ask me why didn't you check the market value of the house? I did not because I trust him[.] . . . He gave me the price. . . . I said, 'fine.'"
- "[W]hy would I use my own name" [on the real estate documents if he had seen a conflict with the admissions process and the purchase].
- "If I know the policies that the coach cannot sell to students or parents of student, I would not do it. I have no idea, right? I don't think there's any violation or anything[.]"
- [Referring to his instructions to a real estate agent in 2017:] "I told him: Sell the first one who gives the offer!"
- "Nerdy boys and we want them to be athletes, right?"
- "You know, I am the only one flying people business class to those because I pay big respect to the coaches[.]"
- "[Alex Ryjik] always introduced the parents to Brand[.]"

ARGUMENT

A. The First Amendment and Federal Common Law Protect the Press from Compelled Disclosure of Newsgathering Information and Materials.

In order to "enable members of society to cope with the exigencies of their period," the Amendment necessarily provides structural protections for all of the activities needed to gather and disseminate information to the public. See Thornhill v. Alabama, 310 U.S. 88, 102 (1940). See generally Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 576 (1980) ("[w]ithout

some protection for seeking out the news, freedom of the press could be eviscerated."). Thus, "[t]he press is not only shielded when its speaks out, but when it performs all the myriad tasks necessary for it to gather and disseminate the news." Brennan, Address, 32 Rutgers L. Rev. 173, 177 (1979).

These principles have led to the widespread recognition that the First Amendment protects journalists from the needless disclosure of sources, investigative techniques, and both confidential and non-confidential work product. "Courts afford journalists a measure of protection from discovery initiatives in order not to undermine their ability to gather and disseminate information. [Citation omitted]. Journalists are the personification of a free press, and to withhold such protection would invite a 'chilling effect on speech,' ... and destabilize the First Amendment." In re Cusumano, 162 F.3d 708, 714 (1st Cir. 1998). See also United States v. LaRouche Campaign, 841 F.2d 1176, 1182 (routine compulsion of even non-confidential information threatens First Amendment interests). See generally Branzburg v. Hayes, 408 U.S. 665, 710 (1972) (Powell, J. concurring); Bruno & Stillman, Inc. v. Globe Newspaper Co., 633 F.2d 583, 598-99 (1st Cir. 1980).[2]

In Cusumano, for example, the First Circuit affirmed a trial court order quashing the subpoenas of two academic authors in the United States' antitrust case against Microsoft. After learning that two authors were writing a book in which employees of a Microsoft competitor were quoted as attributing their company's economic problems to "self-inflicted wounds" rather than to anti-competitive behavior, Microsoft subpoenaed the author's manuscript and underlying interview notes and tape recordings. Reviewing the trial court's order quashing the subpoena, the First Circuit found that Microsoft's need for the subpoenaed materials "admittedly is

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[2] See also Shoen v. Shoen, 48 F.3d 412, 418 (9th Cir. 1995) and Gonzales v. National Broadcasting Co., Inc., 194 F.3d 29, 30 (2d Cir. 1999)("Shoen II") (First Amendment protects against unnecessary discovery of even non-confidential journalistic work product).

substantial in the sense that relevant information likely exists" concerning the company's "primary defense." 162 F.3d at 716. Nevertheless, because Microsoft could have obtained the same information by direct discovery of the persons interviewed by the authors, and in view of the fact that forced disclosure would harm the author's future research efforts, as well as those of other similarly situated authors, the First Circuit held that the trial court "acted well within its discretion" in denying the discovery. 162 F.3d at 717. See also In re Request from the United Kingdom Pursuant to the Treaty, 718 F.3d 13, 24 (1st Cir. 2013) ("A balancing of First Amendment concerns vis-à-vis the concerns asserted in favor of the compelled disclosure of academic and journalistic information is the law in this circuit for all First Amendment cases and, as explained in our analysis above, 'at least in situations distinct from Branzburg [i.e., grand jury subpoenas]," there is room for courts to require direct relevance.").

In LaRouche, the First Circuit recognized that routinely requiring journalists to produce "outtakes, notes, and other unused information, even if non-confidential" threatens at least four legitimate newsgathering interests: (1) "the risk of "'judicial intrusion' into the newsgathering . . . process"; (2) "the disadvantage of a journalist appearing to be . . . a research tool of government"; (3) creating a "disincentive to 'compile and preserve non-broadcast material'"; and (4) "the burden on journalists' time and resources in responding to subpoenas." 841 F.2d at 1182 (emphasis added). In the Court's words:

> To the extent that compelled disclosure becomes commonplace, it seems likely indeed that internal policies of destruction of materials may be devised and choices as to subject matter made, which could be keyed to avoiding disclosure requests or compliance therewith rather than to the basic function of providing news and comment. In addition, frequency of subpoenas would not only preempt the otherwise productive time of journalists and other employees, but measurably increase expenditures for legal fees.

Id. See also id. ("Finally, observing Justice Powell's essential concurring opinion in Branzburg, 'certainly, we do not hold . . . that state and federal authorities are free to annex the news media as an investigative arm of government.'") (citation and some internal quotation marks omitted).

The LaRouche Court also endorsed "sensitive district court conduct of in camera reviews to respond to the generalized First Amendment concerns that would be triggered by too easy and routine a resort to compelled disclosure of nonconfidential material." Id. at 1183. In camera review, the Court noted, would allow district courts "to balance the competing constitutional interests, limiting disclosure of journalistic products to those cases where their use would, in fact, be of significant utility." Id. (citing United States v. Burke, 700 F.2d 70, 78 n. 9 (2d Cir. 1983) ("We encourage the courts to inspect potentially sensitive documents, especially in situations where, as here, the record reveals that the [media's] work papers were not sufficiently voluminous to render in camera review impracticable.")).[3]

The Department of Justice recognized similar principles in its recently amended "Policy regarding obtaining information from, or records of, members of the news media; and regarding questioning, arresting, or charging members of the news media." See **Exhibit A** hereto. The Policy declares that "the use of compulsory legal process to seek information from or records of non-consenting members of the news media constitutes an extraordinary measure, not a standard investigatory practice." Id. at 5. Other than in circumstances not present here, the Department may only use compulsory process for the purpose of obtaining information from or records of a member of the news media "acting within the scope of newsgathering" to "authenticate for evidentiary purposes information or records that have already been published, in which case the authorization of a Deputy Assistant Attorney General for the Criminal Division is required[.]" Id. at 9.[4] The Policy also requires the official authorizing compulsory legal process to find that

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[3] See also United States v. Shay, No. 92–10369–RWZ, 1993 WL 263493, *2 (D. Mass. 1993) (ordering in camera review of news outtakes pursuant to LaRouche).

[4] The Policy permits the use of compulsory process in cases where the news media consents or when necessary to prevent imminent or concrete risk of death or serious injury, or incapacitation or destruction of critical infrastructure. Id.

(a) the government has exhausted all reasonable alternative, non-media sources for the information; (b) the subpoena is "narrowly drawn," directed at "material and relevant information regarding a limited subject matter"; and (c) "avoid[s] interference with unrelated newsgathering[.]" Id. at 12.

The balancing process required in considering a motion to quash a subpoena of a journalist thus includes consideration of the following factors:

1. Whether the party seeking disclosure has met its burden of demonstrating that the information sought is truly relevant, and that its request is not a "fishing expedition." Bruno & Stillman, 633 F.2d at 597; Cusumano, 162 F.3d at 716.

2. If the party seeking disclosure meets its initial burden, the court next considers whether the objecting party has shown a basis for withholding the information, as for example, by demonstrating either a reasonable expectation of harm that would result from disclosure. Bruno & Stillman, 633 F.2d at 597; Cusumano, 162 F.3d at 716. See also Larouche, 841 F.2d at 1182. See generally Herbert v. Lando, 441 U.S. 153, 174 (1979).

3. Finally, the court considers whether the asserted interest in disclosure outweighs the resulting harm to the free flow of information and whether the competing interests may be accommodated by measures such as requiring the exhaustion of alternative sources. Bruno & Stillman, 633 F.2d at 597-98; Cusumano, 162 F.3d at 716-17; United Kingdom, 718 F.3d at 24.

"While obviously the discretion of the trial judge has wide scope, it is a discretion informed by an awareness of First Amendment values and the precedential effect which decision in any one case would be likely to have." Bruno & Stillman, 633 F.2d at 598. Where, as here, testimony is sought from a non-party witness, "concern for the unwarranted burden thrust upon non-parties is a factor entitled to special weight in evaluating the balance of competing needs." Cusumano, 162 F.3d at 717. "Mindful that important First Amendment values are at stake," id. at 710, "detailed findings of fact and explanation of the decision would be appropriate." Bruno & Stillman, 633 F.2d at 598.

B. The First Amendment Interests in Avoiding the Compelled Testimony of Reporters Outweighs the Interest in Miller's Testimony.

As the First Circuit recognized in LaRouche, a non-party such as Miller may be at a disadvantage in attempting to address the specific evidentiary arguments in a case to which it is a stranger. 841 F.2d at 1183. That does not relieve the government of demonstrating that the testimony it seeks from a reporter is directly relevant, not cumulative of other evidence in the case, and cannot be obtained from another witness (such as Ryjik). For example, Miller has no unique evidence about the payments made by Zhao (which presumably may be proven by financial records) or communications (both oral and electronic) between Zhao, Ryjik, and Brand. See ECF No. 3-1 at 14, ¶ 61 (describing meeting between Zhao and Ryjik shortly after publication of Globe Article); see generally Cusumano, 612 F.3d at 716-717 (interests of non-party witnesses are entitled to "special weight" and existence of alternative sources favors non-disclosure by the press). Nor is the subpoena, but its terms, limited to "authentic[ating] for evidentiary purposes information or records that have already been published." See Exhibit A at 8.[5]

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[5] Judge Rakoff's decision in United States v. Treacy, 603 F. Supp. 2d 670 (S.D.N.Y. 2009), cited by the government in the parties' joint pre-trial memorandum, does not dictate a contrary result. ECF No. 172 at 4. Treacy recognized that the protection for journalists "applies to both confidential and non-confidential information, as well as to both published and unpublished information." Id. at 672 (citations omitted). After considering the relevance of the information sought and the ability to obtain the information from another source, the court narrowly circumscribed the permissible areas of inquiry. Id. at 673. The fact-intensive nature of the inquiry was emphasized in a subsequent decision by Judge Rakoff granting a motion to quash a subpoena of a reporter for published information concerning the circumstances of an arrest. See Lebowitz v. City of New York, 948 F.Supp.2d 392, 394-95 (S.D.N.Y. 2013). As Judge Rakoff stated: "the reporter's privilege stems from a desire to protect journalists from being regularly subpoenaed, and thus from being transformed, in effect, into the investigative agents of courts and litigants." Id. at 395. "That rationale applies with equal force to information gleaned from personal observations as to information obtained from interviews or other newsgathering activities." Id.

Should the Court decide that the statements made by Zhao to Miller are directly relevant and neither cumulative nor readily available from other sources, Miller respectfully requests that, as in LaRouche, the Court conduct an in camera review of the recorded interview in order to "to balance the competing constitutional interests, limiting disclosure of journalistic products to those cases where their use would, in fact, be of significant utility." 841 F.3d at 1183.

If the in camera review establishes that any of Zhao's statements on the recording are admissible and grants the parties access to those portions of the recording, Miller's testimony still would not be needed. The Federal Rules of Evidence permit authentication of a tape recording by any lay witness who is familiar with the speaker's voice. Fed. R. Evid. 901 provides:

> (a) In General. To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.
>
> (b) Examples. The following are examples only--not a complete list--of evidence that satisfies the requirement:
>
> ***
>
> (5) Opinion About a Voice. An opinion identifying a person's voice--whether heard firsthand or through mechanical or electronic transmission or recording--based on hearing the voice at any time under circumstances that connect it with the alleged speaker.

Fed. R. Civ. P. 901 (a) and (b)(5). As the Advisory Committee Notes explain: "Since aural voice identification is not a subject of expert testimony, the requisite familiarity may be acquired either before or after the particular speaking which is the subject of the identification, in this respect resembling visual identification of a person rather than identification of handwriting." Id., Advisory Committee Notes, Example 5.

In Panico, for example, two state troopers identified a voice on a telephone recording as the defendant. 435 F.3d 47. The Court concluded that lay witness identification, "based on a witness's prior familiarity with a voice, is a common place way in which voices are identified." Id. at 49 (citing Fed. R. Evid. 901(b)(5) and Weinstein's Federal Evidence, § 901.06[1]). "It is not enough to bar an identification, either of voices or faces, that the procedures were

'suggestive'' it must also be shown that, under the 'totality of the circumstances,' the identification was 'unreliable.'" Id. (emphasis in original) (citations omitted). See also Garcia-Alvarez, 541 F.3d at 14-15 (upholding identification based on lineup and having the defendant repeat an alleged threat, despite that defendant was the only person in the lineup who had a Dominican accent as described by victim).

In this case, assuming that Zhao does not stipulate to the recording, Rule 901 authorizes Ryjik to authenticate the statements made by Zhao on the recording. The record shows that Ryjik, who was the high school fencing coach for Zhao's two sons, has had numerous communications with Zhao over the years. See, e.g., ECF No. 3-1 at 14, ¶ 61 (describing a meeting between Zhao and Ryjik shortly after the Article was published); see also id. at 3, 6, 7. There may be other government witnesses familiar with Zhao's voice who also can authenticate the recording. In all events, there should be no need for Miller to testify even if the Court deems any statements on the recording relevant and admissible.

CONCLUSION

For the foregoing reasons, Joshua Miller respectfully requests that his motion to quash trial subpoena be granted or, in the alternative, a protective order issue providing for an in camera review of the recording of Miller's interview and, should the Court determine that the recording contains relevant, non-cumulative evidence, further providing that the recording should be authenticated by a witness or witnesses other than Miller.

JOSHUA MILLER,

By his attorneys,

/s/ Jonathan M. Albano

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Dated: November 3, 2022

CERTIFICATE OF SERVICE

I, Jonathan M. Albano, hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on November 3, 2022.

/s/Jonathan M. Albano
Jonathan M. Albano

EXHIBIT A

Office of the Attorney General
Washington, D. C. 20530

October 26, 2022

MEMORANDUM TO ALL DEPARTMENT EMPLOYEES

FROM: THE ATTORNEY GENERAL

SUBJECT: NEW REGULATIONS REGARDING OBTAINING INFORMATION FROM OR RECORDS OF MEMBERS OF THE NEWS MEDIA; AND REGARDING QUESTIONING, ARRESTING, OR CHARGING MEMBERS OF THE NEWS MEDIA

A free and independent press is vital to the functioning of our democracy. In recognition of the important national interest in a free and independent press, on July 19, 2021, I issued a memorandum revising the Department's policy regarding the use of compulsory legal process for the purpose of obtaining information from or records of members of the news media. I also asked the Deputy Attorney General to undertake a review to further explain, develop, and codify protections for the news media in regulations. After the conclusion of that review, which involved consultation with relevant internal and external stakeholders, including federal prosecutors and members of the media, I am today issuing the revised regulations, which can be found at 28 CFR 50.10.

The revisions codify the July 2021 directive that the Department will no longer use compulsory legal process for the purpose of obtaining information from or records of members of the news media acting within the scope of newsgathering, except in limited circumstances. Other revisions are intended to clarify the scope of the policy, specify the standards and approvals required in matters in which compulsory legal process is still permitted, tighten procedures for the review and safeguarding of information, and fill gaps in the previous regulations.

To ensure consistent application and understanding of this policy throughout the Department, the relevant Justice Manual provisions will be updated with further guidance, and the Criminal Division's Office of Enforcement Operations will provide comprehensive training across the Department regarding the new policy's substance, standards, approval levels, and consultation requirements.

I am grateful to the many Department personnel who participated in the review process that resulted in the revised regulations.

BILLING CODE: 4410-14

DEPARTMENT OF JUSTICE

28 CFR Part 50

Docket No. OAG 179; AG Order No. 5524-2022

Policy Regarding Obtaining Information From or Records of Members of the News Media; and Regarding Questioning, Arresting, or Charging Members of the News Media

AGENCY: Office of the Attorney General, Department of Justice.

ACTION: Final rule.

SUMMARY: This rule amends the regulations setting forth the policy of the Department of Justice regarding the use of compulsory legal process, including subpoenas, search warrants, and certain court orders for the purpose of obtaining information from or records of members of the news media. The rule also amends the Department's regulations establishing its policy regarding questioning, arresting, or charging members of the news media.

DATES: This rule is effective on [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Ashley Dugger, Acting Director, Office of Enforcement Operations, Criminal Division, (202) 514-6809.

SUPPLEMENTARY INFORMATION:

Discussion

On July 19, 2021, the Attorney General issued a memorandum revising the Department's policy regarding the use of compulsory legal process for the purpose of obtaining information from or records of members of the news media. The memorandum asked the Deputy Attorney General to undertake a review process to further explain, develop, and codify in regulations the

protections provided for in the memorandum. After the conclusion of that review and consultation with relevant internal and external stakeholders, the Attorney General is issuing this final rule to revise the existing provisions in the Department's regulations at 28 CFR 50.10.

The revisions replace the regulations' prior balancing test and codify the Attorney General's July 2021 directive that the Department of Justice will no longer use compulsory legal process for the purpose of obtaining information from or records of members of the news media acting within the scope of newsgathering, except in limited circumstances. Other revisions are intended to clarify the scope of the policy, specify the approvals required in the circumstances in which compulsory legal process is allowed, tighten procedures for the review and safeguarding of information, and fill gaps in the previous regulations.

Regulatory Certifications

Administrative Procedure Act, 5 U.S.C. 553

Because, for purposes of the Administrative Procedure Act, this regulation concerns general statements of policy, or rules of agency organization, procedure, or practice, notice and comment and a delayed effective date are not required. See 5 U.S.C. 553(b)(A), (d).

Regulatory Flexibility Act

Because this final rule is not promulgated as a final rule under 5 U.S.C. 553 and was not required under that section to be published as a proposed rule, the requirements for the preparation of a regulatory flexibility analysis under 5 U.S.C. 604(a) do not apply. In any event, the Attorney General, in accordance with 5 U.S.C. 605(b), has reviewed this regulation and by approving it certifies that this regulation will not have a significant economic impact on a substantial number of small entities because it pertains to administrative matters affecting the Department.

Executive Orders 12866 and 13563 - Regulatory Planning and Review

This action has been drafted and reviewed in accordance with Executive Order 12866 of September 30, 1993, Regulatory Planning and Review, section 1(b), Principles of Regulation.

This rule is limited to agency organization, management, or personnel matters as described by section 3(d)(3) of Executive Order 12866, and therefore is not a "regulation" as defined by that Executive Order. Accordingly, this action has not been reviewed by the Office of Management and Budget.

Executive Order 12988 - Civil Justice Reform

This regulation meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988 of February 5, 1996.

Executive Order 13132 - Federalism

This regulation will not have substantial direct effects on the States, on the relationship between the national government and the States, or on distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132 of August 4, 1999, this rule does not have sufficient federalism implications to warrant the preparation of a federalism assessment.

Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995, Public Law 104-4.

Congressional Review Act

This action pertains to agency management and does not substantially affect the rights or obligations of non-agency parties; accordingly, this action is not a "rule" as that term is used by the Congressional Review Act (Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA)). Therefore, the reporting requirement of 5 U.S.C. 801 does not apply.

List of Subjects in 28 CFR Part 50

Administrative practice and procedure, Crime, News, Media, Subpoena, Search warrants.

Accordingly, for the reasons stated in the preamble, part 50 of title 28 of the Code of Federal Regulations is amended as follows:

PART 50 — STATEMENTS OF POLICY

1. The authority citation for part 50 continues to read as follows:

Authority: 5 U.S.C. 301; 18 U.S.C. 1162; 28 U.S.C. 509, 510, 516, and 519; 42 U.S.C. 1921 *et seq.*, 1973c; and Pub. L. 107-273, 116 Stat. 1758, 1824.

2. Section 50.10 is revised to read as follows:

§ 50.10 Policy regarding obtaining information from or records of members of the news media; and regarding questioning, arresting, or charging members of the news media.

(a) *Statement of principles.*

(1) A free and independent press is vital to the functioning of our democracy. Because freedom of the press can be no broader than the freedom of members of the news media to investigate and report the news, the Department's policy is intended to provide protection to members of the news media from certain law enforcement tools and actions, whether criminal or civil, that might unreasonably impair newsgathering. The policy is not intended to shield from accountability members of the news media who are subjects or targets of a criminal investigation

for conduct outside the scope of newsgathering.

(2) The Department recognizes the important national interest in protecting journalists from compelled disclosure of information revealing their sources, sources they need to apprise the American people of the workings of their government. For this reason, with the exception of certain circumstances set out below, the Department of Justice will not use compulsory legal process for the purpose of obtaining information from or records of members of the news media acting within the scope of newsgathering.

(3) In determining whether to seek, when permitted by this policy, information from or records of members of the news media, the Department must consider several vital interests: protecting national security, ensuring public safety, promoting effective law enforcement and the fair administration of justice, and safeguarding the essential role of a free press in fostering government accountability and an open society, including by protecting members of the news media from compelled disclosure of information revealing their sources. These interests have long informed the Department's view that the use of compulsory legal process to seek information from or records of non-consenting members of the news media constitutes an extraordinary measure, not a standard investigatory practice.

(b) *Scope and definitions.*

(1) Covered persons and entities. This policy governs the use of certain law enforcement tools and actions, whether criminal or civil, to obtain information from or records of members of the news media.

(2) Definitions.

(i) "Compulsory legal process" consists of subpoenas, search warrants, court orders issued pursuant to 18 U.S.C. 2703(d) and 3123, interception orders issued pursuant to 18 U.S.C.

2518, civil investigative demands, and mutual legal assistance treaty requests—regardless of whether issued to members of the news media directly, to their publishers or employers, or to others, including third-party service providers of any of the forgoing, for the purpose of obtaining information from or records of members of the news media, and regardless of whether the compulsory legal process seeks testimony, physical or electronic documents, telephone toll or other communications records, metadata, or digital content.

(ii) "Newsgathering" is the process by which a member of the news media collects, pursues, or obtains information or records for purposes of producing content intended for public dissemination.

(A) Newsgathering includes the mere receipt, possession, or publication by a member of the news media of government information, including classified information, as well as establishing a means of receiving such information, including from an anonymous or confidential source.

(B) Except as provided in paragraph (b)(2)(ii)(A) of this section, newsgathering does not include criminal acts committed in the course of obtaining information or using information, such as: breaking and entering; theft; unlawfully accessing a computer or computer system; unlawful surveillance or wiretapping; bribery; extortion; fraud; insider trading; or aiding or abetting or conspiring to engage in such criminal activities, with the requisite criminal intent.

(3) Exclusions.

(i) The protections of this policy do not extend to any person or entity where there is a reasonable ground to believe the person or entity is:

(A) A foreign power or agent of a foreign power, as those terms are defined in section 101 of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801);

(B) A member or affiliate of a foreign terrorist organization designated under section 219(a) of the Immigration and Nationality Act (8 U.S.C. 1189(a));

(C) Designated as a Specially Designated Global Terrorist by the Department of the Treasury under Executive Order 13224 of September 23, 2001 (66 FR 49079);

(D) A specially designated terrorist as that term is defined in 31 CFR 595.311 (or any successor thereto);

(E) A terrorist organization as that term is defined in section 212(a)(3)(B)(vi) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(3)(B)(vi));

(F) Committing or attempting to commit a crime of terrorism, as that offense is described in 18 U.S.C. 2331(5) or 2332b(g)(5);

(G) Committing or attempting to commit the crimes of providing material support or resources to terrorists or designated foreign terrorist organizations, providing or collecting funds to finance acts of terrorism, or receiving military-type training from a foreign terrorist organization, as those offenses are defined in 18 U.S.C. 2339A, 2339B, 2339C, and 2339D; or

(H) Aiding, abetting, or conspiring in illegal activity with a person or organization described in paragraphs (b)(3)(i)(A) through (G) of this section.

(ii) The determination that an exclusion in paragraph (b)(3)(i) of this section applies must be made by the Assistant Attorney General for National Security.

(c) *Compulsory legal process for the purpose of obtaining information from or records of a member of the news media acting within the scope of newsgathering.* Compulsory legal process for the purpose of obtaining information from or records of a member of the news media acting within the scope of newsgathering is prohibited except under the circumstances set forth in paragraphs (c)(1) through (3). (Note that this prohibition on using compulsory legal process

applies when a member of the news media has, in the course of newsgathering, only received, possessed, or published government information, including classified information, or has established a means of receiving such information, including from an anonymous or confidential source.) The Department may only use compulsory legal process for the purpose of obtaining information from or records of a member of the news media acting within the scope of newsgathering, as follows:

(1) To authenticate for evidentiary purposes information or records that have already been published, in which case the authorization of a Deputy Assistant Attorney General for the Criminal Division is required;

(2) To obtain information or records after a member of the news media agrees to provide or consents to the provision of the requested records or information in response to the proposed compulsory legal process, in which case authorization as described in paragraph (i) of this section is required; or

(3) When necessary to prevent an imminent or concrete risk of death or serious bodily harm, including terrorist acts, kidnappings, specified offenses against a minor (as defined in 34 U.S.C. 20911(7)), or incapacitation or destruction of critical infrastructure (as defined in 42 U.S.C. 5195c(e)), in which case the authorization of the Attorney General is required.

(d) *Compulsory legal process for the purpose of obtaining information from or records of a member of the news media not acting within the scope of newsgathering.*

(1) The Department may only use compulsory legal process for the purpose of obtaining information from or records of a member of the news media who is not acting within the scope of newsgathering:

(i) When the member of the news media is the subject or target of an investigation and

suspected of having committed an offense;

(ii) To obtain information or records of a non-member of the news media, when the non-member is the subject or target of an investigation and the information or records are in a physical space, device, or account shared with a member of the news media;

(iii) To obtain purely commercial, financial, administrative, technical, or other information or records unrelated to newsgathering; or for information or records relating to personnel not involved in newsgathering;

(iv) To obtain information or records related to public comments, messages, or postings by readers, viewers, customers, or subscribers, over which a member of the news media does not exercise editorial control prior to publication;

(v) To obtain information or records of a member of the news media who may be a victim of or witness to crimes or other events, or whose premises may be the scene of a crime, when such status (as a victim or witness or crime scene) is not based on or within the scope of newsgathering; or

(vi) To obtain only subscriber and other information described in 18 U.S.C. 2703(c)(2)(A), (B), (D), (E), and (F).

(2) Compulsory legal process under paragraph (d)(1) of this section requires the authorization of a Deputy Assistant Attorney General for the Criminal Division, except that:

(i) To obtain information or records after a member of the news media agrees to provide or consents to the provision of the requested records or information in response to the proposed compulsory legal process, such compulsory legal process requires authorization as described in paragraph (i) of this section governing voluntary questioning and compulsory legal process following consent by a member of the news media; and

(ii) To seek a search warrant for the premises of a news media entity requires authorization by the Attorney General.

(e) *Matters where there is a close or novel question as to the person's or entity's status as a member of the news media or whether the member of the news media is acting within the scope of newsgathering.*

(1) When there is a close or novel question as to the person's or entity's status as a member of the news media, the determination of such status must be approved by the Assistant Attorney General for the Criminal Division.

(2) When there is a close or novel question as to whether the member of the news media is acting within the scope of newsgathering, the determination of such status must be approved by the Assistant Attorney General for the Criminal Division. When the Assistant Attorney General finds that there is genuine uncertainty as to whether the member of the news media is acting within the scope of newsgathering, the determination of such status must be approved by the Attorney General.

(f) *Compelled testimony.*

(1) Except as provided in paragraph (f)(2) of this section, members of the Department must obtain the authorization of the Deputy Attorney General when seeking to compel grand jury or trial testimony otherwise permitted by this section from any member of the news media.

(2) When the compelled testimony under paragraph (f)(1) of this section has no nexus to the person's or entity's activities as a member of the news media, members of the Department must obtain the authorization of a Deputy Assistant Attorney General for the Criminal Division and provide prior notice to the Deputy Attorney General.

(3) Such authorization may only be granted when all other requirements of this policy

regarding compulsory legal process have been satisfied.

(g) *Exhaustion.*

(1) Except as provided in paragraph (g)(2) of this section, the official authorizing the compulsory legal process must find the following exhaustion conditions are met:

(i) The Government has exhausted all reasonable avenues to obtain the information from alternative, non-news-media sources.

(ii) The Government has pursued negotiations with the member of the news media in an attempt to secure the member of the news media's consent to the production of the information or records to be sought through compulsory legal process, unless the authorizing official determines that, for compelling reasons, such negotiations would pose a clear and substantial threat to the integrity of the investigation or pose the risks described in paragraph (c)(3) of this section. Where the nature of the investigation permits, the Government must have explained to the member of the news media the Government's need for the information sought in a particular investigation or prosecution, as well as its willingness or ability to address the concerns of the member of the news media.

(iii) The proposed compulsory legal process is narrowly drawn. It must be directed at material and relevant information regarding a limited subject matter, avoid interference with unrelated newsgathering, cover a reasonably limited period of time, avoid requiring production of a large volume of material, and give reasonable and timely notice of the demand as required by paragraph (j) of this section.

(2) When the process is sought pursuant to paragraphs (d)(1), (i), or (l) of this section, the authorizing official is not required to find that the exhaustion conditions in paragraphs (g)(1)(i)–(ii) of this section have been satisfied, but should consider requiring those conditions as

appropriate.

(h) *Standards for authorizing compulsory legal process.*

(1) In all matters covered by this section, the official authorizing the compulsory legal process must take into account the principles set forth in paragraph (a) of this section.

(2) Except as provided in paragraph (h)(3) of this section, when the member of the news media is not the subject or target of an investigation and suspected of having committed an offense, the official authorizing the compulsory legal process must take into account the following considerations:

(i) In criminal matters, there must be reasonable grounds to believe, based on public information or information from non-news-media sources, that a crime has occurred, and that the information sought is essential to a successful investigation or prosecution. The compulsory legal process may not be used to obtain peripheral, nonessential, or speculative information.

(ii) In civil matters, there must be reasonable grounds to believe, based on public information or information from non-news-media sources, that the information sought is essential to the successful completion of the investigation or litigation in a case of substantial importance. The compulsory legal process may not be used to obtain peripheral, nonessential, cumulative, or speculative information.

(3) When paragraph (h)(2) of this section would otherwise apply, but the compulsory legal process is sought pursuant to paragraphs (i) or (l) of this section, the authorizing official is not required to, but should, take into account whether the information sought is essential to a successful investigation, prosecution, or litigation as described in paragraphs (h)(2)(i)–(ii) of this section.

(4) When the member of the news media is the subject or target of an investigation and

suspected of having committed an offense, before authorizing compulsory legal process, the authorizing official is not required to, but should, take into account the considerations set forth in paragraphs (h)(2)(i)–(ii) of this section as appropriate.

(i) *Voluntary questioning and compulsory legal process following consent by a member of the news media.*

(1) When the member of the news media is not the subject or target of an investigation and suspected of having committed an offense, authorization by a United States Attorney or Assistant Attorney General responsible for the matter must be obtained in order to question a member of the news media on a voluntary basis, or to use compulsory legal process if the member of the news media agrees to provide or consents to the provision of the requested records or information in response to the proposed process. When there is any nexus to the person's activities as a member of the news media, such authorization must be preceded by consultation with the Criminal Division.

(2) When the member of the news media is the subject or target of an investigation and suspected of having committed an offense, authorization by a Deputy Assistant Attorney General for the Criminal Division must be obtained in order to question a member of the news media on a voluntary basis, or to use compulsory legal process if the member of the news media agrees to provide or consents to the provision of the requested records or information in response to the proposed process.

(j) *Notice of compulsory legal process to the affected member of the news media.*

(1) Members of the Department must provide notice to the affected member of the news media prior to the execution of authorized compulsory legal process under paragraph (c) of this section unless the authorizing official determines that, for compelling reasons, such notice would

pose the risks described in paragraph (c)(3) of this section.

(2) Members of the Department must provide notice prior to the execution of compulsory legal process authorized under paragraphs (d)(1)(ii)–(vi) of this section to a member of the news media that is not the subject or target of an investigation and suspected of having committed an offense, unless the authorizing official determines that, for compelling reasons, such notice would pose a clear and substantial threat to the integrity of the investigation or would pose the risks described in paragraph (c)(3) of this section and so informs the Deputy Attorney General in advance.

(3) If the member of the news media has not been given notice under paragraphs (j)(1) or (j)(2) of this section, the United States Attorney or Assistant Attorney General responsible for the matter must provide notice to the member of the news media as soon as it is determined that such notice would no longer pose the concerns described in paragraphs (j)(1) or (j)(2) of this section, as applicable.

(4) In any event, such notice must be given to the affected member of the news media within 45 days of the Government's receipt of a complete return made pursuant to all forms of compulsory legal process included in the same authorizing official's authorization under paragraphs (c) or (d)(1)(ii)–(vi), except that the authorizing official may authorize delay of notice for one additional 45-day period if the official determines that, for compelling reasons, such notice continues to pose the same concerns described in paragraphs (j)(1) or (j)(2) of this section, as applicable.

(5) Members of the Department are not required to provide notice to the affected member of the news media of compulsory legal process that was authorized under paragraph (d)(1)(i) of this section if the affected member of the news media is the subject or target of an investigation

and suspected of having committed an offense.

(i) The authorizing official may nevertheless direct that notice be provided to the affected member of the news media.

(ii) If the authorizing official does not direct that such notice be provided, the official must so inform the Deputy Attorney General, and members of the Department who are responsible for the matter must provide the authorizing official with an update every 90 days regarding the status of the investigation. That update must include an assessment of any harm to the investigation that would be caused by providing notice to the member of the news media. The authorizing official will consider such update in determining whether to direct that notice be provided.

(6) Notice under this policy may be given to the affected member of the news media or a current employer of that member if that employer is also a member of the news media.

(7) A copy of any notice to be provided to a member of the news media shall be provided to the Director of the Office of Public Affairs and to the Director of the Criminal Division's Office of Enforcement Operations at least 10 business days before such notice is provided, and immediately after such notice is provided to the member of the news media.

(k) *Non-disclosure orders.*

(1) In seeking authorization to use compulsory legal process to obtain information from or the records of a member of the news media, members of the Department must indicate whether they intend to seek an order directing the recipient of the compulsory legal process not to disclose the existence of the compulsory legal process to any other person or entity and shall articulate the need for such non-disclosure order.

(2) An application for a non-disclosure order sought in connection with compulsory legal

process under paragraph (c) of this section may only be authorized if the authorizing official determines that, for compelling reasons, disclosure would pose the risks described in paragraph (c)(3) of this section and the application otherwise complies with applicable statutory standards and Department policies.

(3) An application for a non-disclosure order sought in connection with compulsory legal process under paragraphs (d)(1)(ii)–(vi) of this section regarding a member of the news media that is not the subject or target of an investigation and suspected of having committed an offense may only be authorized if the authorizing official determines that, for compelling reasons, disclosure would pose a clear and substantial threat to the integrity of the investigation or would pose the risks described in paragraph (c)(3) of this section and the application otherwise complies with applicable statutory standards and Department policies.

(4) An application for a non-disclosure order sought in connection with compulsory legal process under paragraph (d)(1)(i) of this section regarding a member of the news media that is a subject or target of an investigation and suspected of having committed an offense may be authorized if the application otherwise complies with applicable statutory standards and Department policies.

(5) Members of the Department must move to vacate any non-disclosure order when notice of compulsory legal process to the affected member of media is required (after any extensions permitted) by paragraph (j) of this section.

(l) *Exigent circumstances involving risk of death or serious bodily harm.*

(1) A Deputy Assistant Attorney General for the Criminal Division may authorize the use of compulsory legal process that would otherwise require authorization from the Attorney General or the Deputy Attorney General if the Deputy Assistant Attorney General for the

Criminal Division determines that:

(i) The exigent use of such compulsory legal process is necessary to prevent the risks described in paragraph (c)(3) of this section; and

(ii) Those exigent circumstances require the use of such compulsory legal process before the authorization of the Attorney General or the Deputy Attorney General can, with due diligence, be obtained.

(2) In authorizing the exigent use of compulsory legal process, a Deputy Assistant Attorney General for the Criminal Division should take into account the principles set forth in paragraph (a) of this section; ensure that the proposed process is narrowly tailored to retrieve information or records required to prevent or mitigate the associated imminent risk; and require members of the Department to comply with the safeguarding protocols described in paragraph (p) of this section.

(3) As soon as possible after the approval by a Deputy Assistant Attorney General for the Criminal Division of a request under paragraph (l)(1) of this section, the Deputy Assistant Attorney General must provide notice to the designated authorizing official, the Deputy Attorney General, and the Director of the Office of Public Affairs. Within 10 business days of the authorization under paragraph (l)(1) of this section, the United States Attorney or Assistant Attorney General responsible for the matter shall provide a statement to the designated authorizing official containing the information that would have been provided in a request for prior authorization.

(m) *Arresting or charging a member of the news media.*

(1) Except as provided in paragraph (m)(2) of this section or in circumstances in which prior authorization is not possible, members of the Department must obtain the authorization of

the Deputy Attorney General to seek a warrant for an arrest, conduct an arrest, present information to a grand jury seeking a bill of indictment, or file an information against a member of the news media.

(2) Except in circumstances in which prior authorization is not possible, when the arrest or charging of a member of the news media under paragraph (m)(1) of this section has no nexus to the person's or entity's activities as a member of the news media, members of the Department must obtain the authorization of a Deputy Assistant Attorney General for the Criminal Division and provide prior notice to the Deputy Attorney General.

(3) When prior authorization was not possible, the member of the Department must ensure that the designated authorizing official is notified as soon as possible.

(n) *Applications for authorizations under this section.*

(1) Whenever any authorization is required under this section, the application must be personally approved in writing by the United States Attorney or Assistant Attorney General responsible for the matter.

(2) Whenever the authorizing official under this section is the Attorney General or the Deputy Attorney General, the application must also be personally approved in a memorandum by the Assistant Attorney General for the Criminal Division.

(3) The member of the Department requesting authorization must provide all facts and applicable legal authority necessary for the authorizing official to make the necessary determinations, as well as copies of the proposed compulsory legal process and any other related filings.

(4) Whenever an application for any authorization is made to the Attorney General or the Deputy Attorney General under this section, the application must also be provided to the

Director of the Office of Public Affairs for consultation.

(o) *Filter protocols.*

(1) In conjunction with the use of compulsory legal process, the use of filter protocols, including but not limited to keyword searches and filter teams, may be necessary to minimize the potential intrusion into newsgathering-related materials that are unrelated to the conduct under investigation.

(2) While the use of filter protocols should be considered in all matters involving a member of the news media, the use of such protocols must be balanced against the need for prosecutorial flexibility and the recognition that investigations evolve, and should be tailored to the facts of each investigation.

(3) Unless compulsory legal process is sought pursuant to paragraphs (i) or (l) of this section, members of the Department must use filter protocols when the compulsory legal process relates to a member of the news media acting within the scope of newsgathering or the compulsory legal process could potentially encompass newsgathering-related materials that are unrelated to the conduct under investigation. The Attorney General or the Deputy Attorney General may waive the use of filter protocols only upon an express finding that there is a *de minimis* risk that newsgathering-related materials that are unrelated to the conduct under investigation would be obtained pursuant to the compulsory legal process and that any filter protocol would pose a substantial and unwarranted investigative burden.

(4) Members of the Department should consult the Justice Manual for guidance regarding the use of filter protocols to protect newsgathering-related materials that are unrelated to the conduct under investigation.

(p) *Safeguarding.* Any information or records that might include newsgathering-related

materials obtained from a member of the news media or from third parties pursuant to this policy must be closely held so as to prevent disclosure of the information to unauthorized persons or for improper purposes. Members of the Department must consult the Justice Manual for specific guidance regarding the safeguarding of information or records obtained from a member of the news media or from third parties pursuant to this section and regarding the destruction and return of information or records as permitted by law.

(q) *Privacy Protection Act.* All authorizations pursuant to this section must comply with the provisions of the Privacy Protection Act (PPA), 42 U.S.C. 2000aa(a) et seq. Members of the Department must consult the Justice Manual for specific guidance on complying with the PPA. Among other things, members of the Department are not authorized to apply for a warrant to obtain work product materials or other documentary materials of a member of the news media under the PPA suspect exception, see 42 U.S.C. 2000aa(a)(1) and (b)(1), if the sole purpose is to further the investigation of a person other than the member of the news media.

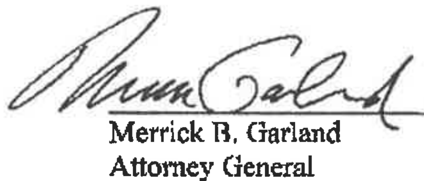
(r) *Anti-circumvention.* Members of the Department shall not direct any third party to take any action that would violate a provision of this section if taken by a member of the Department.

(s) *Failure to comply.* Failure to obtain the prior authorization required by this section may constitute grounds for an administrative reprimand or other appropriate disciplinary action.

(t) *General provision.* This section is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United

States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

10.26-22
Date



Merrick B. Garland
Attorney General

SUBPOENA

BY AUTHORITY OF THE HOUSE OF REPRESENTATIVES OF THE CONGRESS OF THE UNITED STATES OF AMERICA

To Alex Holder

You are hereby commanded to be and appear before the

Select Committee to Investigate the January 6th Attack on the United States Capitol

of the House of Representatives of the United States at the place, date, and time specified below.

☑ **to produce the things identified on the attached schedule** touching matters of inquiry committed to said committee or subcommittee; and you are not to depart without leave of said committee or subcommittee.

Place of production: United States Capitol Building, Washington, D.C. 20515

Date: June 16, 2022 Time: 12:00 p.m. EDT

☑ **to testify at a deposition** touching matters of inquiry committed to said committee or subcommittee; and you are not to depart without leave of said committee or subcommittee.

Place of testimony: United States Capitol Building, Washington D.C. 20515 or via videoconference

Date: June 21, 2022 Time: 10:00 a.m. EDT

☐ **to testify at a hearing** touching matters of inquiry committed to said committee or subcommittee; and you are not to depart without leave of said committee or subcommittee.

Place of testimony: ____________

Date: ____________ Time ____________

To any authorized staff member or the United States Marshals Service

____________ to serve and make return.

Witness my hand and the seal of the House of Representatives of the United States, at

the city of Washington, D.C. this 15th day of June, 2022.

Chairman or Authorized Member

Attest:

Clerk

SCHEDULE

In accordance with the attached definitions and instructions, you, Alex Holder, are hereby required to produce the following items in your possession, custody, or control:

1. Any raw footage you or your colleagues took in Washington, D.C., on January 6, 2021.

2. Any raw footage of interviews with the following individuals from September 2020 through the present:

   a. President Donald J. Trump;
   b. Donald J. Trump, Jr.;
   c. Ivanka Trump;
   d. Eric Trump;
   e. Jared Kushner; and
   f. Vice President Mike Pence.

3. Any raw footage pertaining to discussions of election fraud or election integrity surrounding the November 2020 presidential election.

BENNIE G. THOMPSON, MISSISSIPPI
CHAIRMAN

ZOE LOFGREN, CALIFORNIA
ADAM B. SCHIFF, CALIFORNIA
PETE AGUILAR, CALIFORNIA
STEPHANIE N. MURPHY, FLORIDA
JAMIE RASKIN, MARYLAND
ELAINE G. LURIA, VIRGINIA
LIZ CHENEY, WYOMING
ADAM KINZINGER, ILLINOIS

U.S. House of Representatives
Washington, DC 20515

january6th.house.gov
(202) 225-7800

One Hundred Seventeenth Congress

Select Committee to Investigate the January 6th Attack on the United States Capitol

June 15, 2022

VIA ELECTRONIC MAIL

Alex Holder
c/o Russell Smith, Esq.
654 San Juan Avenue
Los Angeles, CA 90291
rsmith@smithdehn.com

Dear Mr. Holder:

Pursuant to the authorities set forth in House Resolution 503 and the rules of the House of Representatives, the Select Committee to Investigate the January 6th Attack on the United States Capitol ("Select Committee") hereby transmits a subpoena that compels you to produce the documents set forth in the accompanying schedule by June 16, 2022.

The Select Committee is investigating the facts, circumstances, and causes of the January 6th attack and issues relating to the peaceful transfer of power, in order to identify and evaluate lessons learned and to recommend to the House and its relevant committees corrective laws, policies, procedures, rules, or regulations. The inquiry includes examination of how various individuals and entities coordinated their activities leading up to the events of January 6, 2021. We understand you have raw footage depicting the January 6th attack and of President Trump and others discussing the November 2020 presidential election results.

Accordingly, the Select Committee seeks through the attached subpoena raw footage and a deposition regarding these and other matters that are within the scope of the Select Committee's inquiry. A copy of the rules governing Select Committee depositions, and document production definitions and instructions are attached. Please contact staff for the Select Committee at 202-225-7800 to arrange for the production of documents and to discuss the location of the deposition. As indicated on the subpoena, the deposition will be held in person on the U.S. Capitol grounds or via videoconference.

Sincerely,

Bennie G. Thompson
Chairman

Enclosures.

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CRIMINAL DIVISION

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff,	)	No. 02 CR 14952
v.	)	
	)	Judge Vincent Gaughan
ROBERT KELLY,	)	
	)	
Defendant.	)	

NOTICE OF FILING

TO: Shauna Boliker, Esq.
States Attorney of Cook County, Illinois
2600 South California Avenue
Chicago, Illinois 60608

Edward M. Genson, Esq.
Mark W. Martin, Esq.
Genson & Gillespie
53 West Jackson Blvd., Suite 1420
Chicago, Illinois 60604

PLEASE TAKE NOTICE that on Thursday, May 29, 2008, we filed with the Clerk of the Circuit Court of Cook County, Criminal Division, **Non-Party James DeRogatis's Opposition To Motion For Leave To Issue Subpoenas To Reporter and for Offer of Proof**, a copy of which is attached hereto and served upon you.

Respectfully submitted,

JAMES DEROGATIS, Non-Party Respondent

By: ______________________

One of his attorneys

Damon E. Dunn, Esq.
Neil M. Rosenbaum, Esq.
Funkhouser Vegosen Liebman & Dunn Ltd
55 West Monroe Street, Suite 2300
Chicago, Illinois 60603-5008
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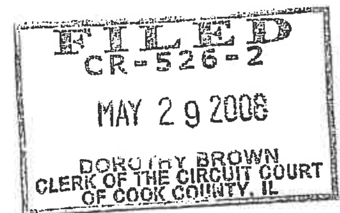
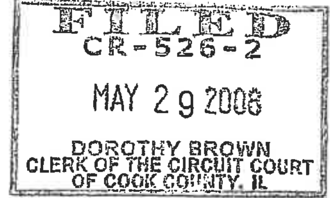


IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CRIMINAL DIVISION

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff,	)	No. 02 CR 14952
v.	)	
	)	Judge Vincent Gaughan
ROBERT KELLY,	)	
	)	Room 500
Defendant.	)	



NON-PARTY JAMES DEROGATIS'S OPPOSITION TO DEFENDANT'S MOTION FOR LEAVE TO ISSUE SUBPOENAS TO REPORTER AND OFFER OF PROOF

NON-PARTY JAMES DEROGATIS ("Respondent") through his undersigned attorneys, submits pursuant to 735 ILCS 5/8-904, 907(2) his opposition to the Motion For Leave to Issue Subpoena to Reporter and Offer of Proof filed by Defendant Robert Kelly (the "Motion"), and in support thereof, states as follows:

ARGUMENT

Defendant has applied to subpoena Respondent, a reporter for the *Chicago Sun-Times* who is neither a party to this case nor an eyewitness to the charged offense. Defendant apparently wishes to prove that the reporter harbors a bias and seeks to compel testimony and unpublished notes regarding Respondent's sources. In Illinois, "the legislature intended divestiture of a reporter's privilege to be the last resort to get the sought after information." *In re Subpoena Duces Tecum to Arya,* 226 Ill.App.3d 848, 862, 589 N.E.2d 832, 841 (4th Dist. 1992). Respondent's testimony is neither relevant nor necessary and there has been no showing that other potential witnesses, several of whom have already testified, are dead, incapacitated or unavailable. Accordingly, Respondent has asserted the Illinois Reporter's Privilege, along with all other applicable privileges and objections, to Defendant's subpoenas.

Defendant's dilatory Motion has not and cannot meet his burden to divest any of Respondent's applicable privileges. Unlike the federal system, Illinois courts are governed by a statutory Reporter's Privilege. See 735 ILCS 5/8-901, *et seq* (the "Act"). Even absent the Act, other privileges extend to protect Respondent's reporting. *See, e.g., People v. Palacio,* 240 Ill.App.3d 1078, 1101-02, 607 N.E.2d 1375, 1384 (4th Dist. 1993) (where statutory Reporter's Privilege might be inapplicable reporters are protected by common law "special witness" privilege); *Branzburg v. Hayes*, 408 U.S. 665, 707-08 (1972) (First Amendment protects against subpoenas issued in "bad faith"); *People v. Edgeston*, 157 Ill.2d 201, 220-21, 623 N.E.2d 329 (1993) (Fifth Amendment).

I. Defendant's Motion Is Dilatory

This Court need not address the merits of the Motion because it is unarguably dilatory. *See People v. Smith*, 248 Ill.App.3d 351, 356-57, 617 N.E.2d 837, 843-44 (2d Dist. 1993) (lack of diligence in procuring witness demonstrated by delays in the proceedings from January 1991 until September 1991); *People v. Robinson*, 13 Ill.App.3d 506, 510-11, 301 N.E.2d 55, 57-58 (1st Dist. 1973) (court must determine whether defendant had acted diligently in his attempts to obtain the evidence). Defendant's delay is particularly prejudicial to justice in this case because the Act expressly provides that no ruling to divest the privilege can be enforced until a "final order" is rendered upon exhaustion of all appeals. 735 ILCS 5/8-908. Despite this requirement, Defendant delayed nearly two years in bringing the Motion, until the eve of his case in chief.

The Motion does not inform the Court of the full history of this dispute. Defendant first subpoenaed Respondent on June 14, 2006, with a return date of July 6. *See* **Exhibit A**. On June, 30, 2006, Respondent objected, raising the Act and other applicable privileges. *See* **Exhibit B.** Among other things, Respondent advised Defendant to comply with the statutory requirements of the Act.

Despite Respondent's express assertion of the Reporter's Privilege, Defendant did nothing during the next two years to comply with the Act.

Instead, on May 2, 2008, Defendant served a second subpoena. *See* **Exhibit C.** Defendant again failed to file an application to divest the Reporter's Privilege before serving the subpoena. Nevertheless, on May 6, 2008, Respondent again advised Defendant that Respondent would not waive the Reporter's Privilege and even offered to accommodate Defendant's schedule should he file an application. *See* **Exhibit D.**

Rather than move expeditiously, Defendant waited another two weeks, until May 19, 2008, to finally file a "Motion for Leave to Issue Subpoenas to Reporter." Even then Defendant neglected to serve his Motion on Respondent or his counsel, although a fax was transmitted subsequently on May 20, 2008. The Motion, moreover, omitted the statement of requested testimony, and much else, required by the Act.

Not until Tuesday, May 27, 2008, twenty-three months after the privilege was first raised, did Defendant file his supplemental brief. Consequently, despite nearly two years' advance notice, Defendant did not finish filing his Motion until four days before the hearing date set by this Court. Sandbagging the Respondent to this degree is inexcusable but it is particularly egregious that Defendant delayed his Motion with the knowledge that the appeals process could not possibly be completed before this trial concluded.

II. Defendant's Motion Does Not Comply With The Act's Requirements For Divesture Of The Reporter's Privilege

"The reporter's privilege has evolved from a common law recognition that the compelled disclosure of a reporter's sources could compromise the news media's first amendment right to freely gather and disseminate information." *In re Special Grand Jury Investigation of Alleged Violation of the Juvenile Court Act,* 104 Ill.2d 419, 424, 474 N.E.2d 450, 452 (1984). Illinois

courts have repeatedly recognized that compelling a reporter to testify about source material and news gathering imposes a chilling effect on all journalists and their sources. *Cukier v. Am. Medical Ass'n*, 259 Ill.App.3d 159, 163, 630 N.E.2d 1198 (1st Dist. 1994). Consequently, the Act protects reporters acting in the course of their employment against the compelled divestiture of their source material.[1]

Contrary to Defendant's assumptions, the Act protects testimony and documents regarding sources and news gathering *regardless* of whether the source is confidential. *Arya*, 226 Ill.App.3d at 853, 589 N.E.2d at 835 (privilege applies whether reporter's sources are confidential or non-confidential). Moreover, the Act broadly defines "source" to explicitly protect not just witness identities but also the "means" that reporters use to gather information. 735 ILCS 5/8-902(c) (defining "source" as "the person *or means* from or through which the news or information was obtained.") (emph. added). "By defining 'source' to include a 'means,'" the legislature extended the Reporter's Privilege beyond witness interviews and notes to include the physical evidence obtained in support of the reporter's newsgathering, such as the videotape in this case. *People v. Slover*, 323 Ill.App.3d 620, 624, 753 N.E.2d 554, 557-58 (4th Dist. 2001) (reversing order to produce reporter's photographs).[2] This is because "the compelled production of a reporter's resource materials is equally as invidious as the compelled disclosure of his confidential informants." *Gulliver's Periodicals, Ltd. v. Chas Levy Cir. Co.*, 455 F. Supp. 1197, 1203 (N.D. Ill. 1978) (quoting *Loadholtz v. Fields*, 389 F. Supp. 1299, 1303

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[1] Defendant's reliance on *Branzburg*, 408 U.S. 665, is misplaced. The Supreme Court stated in *Branzburg* that it "goes without saying, of course, that we are powerless to bar state courts from responding in their own way and construing their own constitutions so as to recognize a newsman's privilege, either qualified or absolute." *Id.* at 706. Illinois has enacted such a privilege.

[2] Defendant's assertion that, notwithstanding the statutory definition for source material, Respondent "waived" his privilege via an editorial written by an anonymous editor is, to put it mildly, "reaching." See *infra*. Defendant produced no legal authority supporting this assertion.

(M.D.Fla.1975)); *see also Neal v. City of Harvey* 173 F.R.D. 231, 234 (N.D. Ill 1997) ("the policy which underlies the existence of journalistic privilege would be equally undermined by compelling reporters to reveal factual information surrounding investigations.").

A. Defendant Did Not State The Specific Information Sought, Its Relevancy To The Trial, And A Specific Public Interest Which Would Be Adversely Affected If The Factual Information Were Not Disclosed

The Act's requirements for an application to divest the Reporter's Privilege are explicit. For example, any application must include (5/8-904):

> "[t]he name of the reporter and of the news medium with which he or she was connected at the time the information sought was obtained; the specific information sought and its relevancy to the proceedings; and . . . a specific public interest which would be adversely affected if the factual information were not disclosed."

The application must satisfy these statutory requirements with respect to *each fact* to be elicited. *In re Subpoena Duces Tecum to Arya,* 226 Ill.App.3d at 862, 589 N.E.2d at 841 (divesture of privilege for "any and all information" was overbroad because "[w]hen divesting a reporter of his privilege, the court should narrowly tailor the order to require production of only that information for which the petitioner . . . has met all the statutory prerequisites."). Defendant's Motion, however, fails to satisfy any of these requirements.

(a) Defendant does not specifically state the testimony sought

First, a party subpoenaing a reporter "must specifically state the testimony the party expects to elicit from the reporter." *Palacio*, 240 Ill.App.3d at 1102, 607 N.E.2d at 1390.[3] Defendant did not comply. Instead, Defendant's belated "offer of proof," filed only this Tuesday, recited proposed questions with none of the specific answers, *i.e.*, the actual "proof."

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[3] Defendant asserts that the subpoena is "seeking information relating to Mr. DeRogatis' receipt and submission of the videotape to the police." Motion at ¶ 12. The subpoena *duces tecum* demands "any and all documents in relation to any interview of Stephanie Edwards, aka Sparkle, on or about February 4, 2002."

See People v. Andrews, 146 Ill.2d 413, 421-22, 588 N.E.2d 1126, 1131-32 (1992) ("Defense counsel's statement amounted to no more than mere speculation as to what she believed the relevancy of the testimony might be, without any reference to what the testimony would actually consist of."). The sole purpose of posing questions without answers is to "fish" for information. Yet, "disclosure in the course of a fishing expedition is ruled out in [a] First Amendment case." *Gulliver's Periodicals,* 455 F. Supp. at 1203 (following Illinois law) (quoting *Silkwood v. Kerr-McGee Corp.,* 563 F.2d 433, 438 (10th Cir. 1977)). Allowing a party to subpoena a reporter in the course of a fishing expedition would essentially "annex the news media as an investigative arm of government." *Branzburg*, 408 U.S. at 709 (Powell, J., concurring).

The Act requires applications to recite in writing "the specific information sought" so that the appellate court may review the application in a discrete appeal without having to incorporate the entire trial proceedings in the record on appeal. Accordingly, the Act necessitates, at a minimum, an adequate offer of proof, which is absent on this record. Defendant's speculative and conclusory proffer shirks this obligation despite this Court's prompting. At a minimum, Defendant must comply with the Illinois Supreme Court's rule that (*Andrews,* 146 Ill.2d at 421, 588 N.E.2d at 1131-32 (citations omitted)):

> [A]n adequate offer of proof is made if counsel makes known to the trial court, with particularity, the substance of the witness' anticipated answer. An offer of proof that merely summarizes the witness' testimony in a conclusory manner is inadequate. Neither will the unsupported speculation of counsel as to what the witness would say suffice. Rather, in making the offer of proof, counsel must explicitly state what the excluded testimony would reveal and may not merely allude to what might be divulged by the testimony. The offer serves no purpose if it does not demonstrate, both to the trial court and to reviewing courts, the admissibility of the testimony which was foreclosed by the sustained objection.

As demonstrated by the table attached as **Exhibit E,** Defendant's proffer is procedurally and substantively inadequate under both the Act and *Andrews* because it fails to specify the substance, relevance and admissibility of the expected testimony.

(b) Defendant does not demonstrate actual relevance of the potential testimony

Second, Defendant fails to demonstrate the relevance of his proffers. Even in the federal system, which lacks a statutory reporter's privilege, courts insist on a specific showing of actual relevance.. *See, e.g., Neal,* 173 F.R.D. at 234 ("there must be a showing of actual relevance; a showing of potential relevance will not suffice."); *U.S. v. Lopez*, No. 86 CR 513, 1987 WL 26051 at *2 (N.D. Ill. Nov. 30, 1987) (defendant "has not satisfied her burden of making a *specific showing* of how the out-takes she seeks are 'highly material' to her case.") (emphasis in original); *see also Palacio,* 240 Ill.App.3d at 1101-02, 607 N.E.2d at 1390 (under common law, party must "specifically state why that testimony is not only relevant, but *necessary* to the party's case.") (emph. in original).

Defendant asserts that Respondent is "the only witness" to finding the tape and giving it to the police and that "his actions were the spark that ultimately ignited the indictment in this case." Motion at ¶ 12. If this were sufficient to divest Reporter's Privilege, there would be no privilege. *United States ex. rel. Vutton Et Fils S.A. v. Karen Bags, Inc.,* 600 F. Supp. 667, 670(S.D.N.Y. 1985) (recognizing danger of "trigger[ing] a media duty to grant access to news files."). Defendant's proposed exception would also punish the most valuable investigative reports – those that expose evidence of crime. *Lopez*, 1987 WL 26051 at *1 (interests served by Reporter's Privilege are "particularly compelling in criminal cases, since reporters are to be encouraged to investigate and expose evidence of criminal wrongdoing.").

Ultimately, Defendant cannot explain how Respondent's testimony might prove that Defendant did not videotape himself urinating on his goddaughter. *Cf. Karen Bags, Inc.* 600 F. Supp. at 671 (denying divesture of privilege where defendant's motion was "at most based on a hypothesis or 'hunch,' lacking a logical basis."). Defendant does not suggest that Respondent can answer the question of who put the envelope in his mailbox any better than forensics can or explain how identifying this anonymous source might exonerate him. *Cf.* 735 ILCS 5/8-907 (requiring finding that "that all other available sources of information have been exhausted" before divesting privilege). Certainly, Defendant's questions do not suggest Respondent tampered with the chain of custody *after* the newspaper handed People's Exhibit 1 to the police.

(c) Defendant does not prove that a public interest would be served by divestiture

Finally, Defendant does not identify a "public" interest served by divesting the privilege as required by 735 ILCS 5/8-904. *See also* § 5/8-907 (to divest privilege, a court must find that "the information obtained by the reporter is ***essential*** to protect the public interest involved") (emph. supplied). The only interest asserted is in a fair trial but this interest is both personal to Defendant and present in every criminal case. The Motion does not bother to demonstrate how Defendant's trial would be "unfair" if the Reporter's Privilege is enforced. Apparently, just because Defendant would *prefer* for Respondent to testify, it is "essential" to a fair trial.

If merely invoking a "fair trial" sufficed, the Reporter's Privilege would be meaningless. Any party who subpoenas a reporter obviously prefers to compel testimony. *In re Special Grand Jury Investigation,* 104 Ill.2d at 428-29, 472 N.E.2d at 454 ("We think it clear that the statute requires more than a showing of inconvenience … before a reporter can be compelled to disclose his sources"). *Compare Neal*, 173 F.R.D. at 233 (the First Amendment interest inherent in the

reporter's privilege "is an interest of sufficient social importance to justify some incidental sacrifice of sources of facts needed in the administration of justice.").

Finally, Defendant suggests that Respondent might impeach certain witnesses in some fashion, albeit on trivial issues. Using impeachment as a justification would eviscerate the public interest requirement because reporters routinely interview witnesses. *Gulliver's Periodicals,* 455 F. Supp. at 1203 (following Illinois law and denying a subpoena seeking to compel a reporter to impeach a source). It would also compromise the ability of the press to perform its constitutionally protected tasks and transform reporters into appendages of the judicial system. *Id*; *Branzburg*, 408 U.S. at 709.

B. Defendant Has Not Shown That Divestiture Is Appropriate Or That He Has Exhausted All Possible Non-Journalistic Sources Of The Information

Even where an application complies with the Act, a court may deny the application given the nature of particular case. Section 735 ILCS 5/8-906 provides that:

> In granting or denying divestiture of the privilege provided in Part 9 of Article VIII of this Act the court shall have due regard to the nature of the proceedings, the merits of the claim or defense, the adequacy of the remedy otherwise available, if any, the relevancy of the source, and the possibility of establishing by other means that which it is alleged the source requested will tend to prove.

In this case, Defendant filed a dilatory application that failed to identify either the testimony or a legitimate defense, let alone prove that Respondent can help exonerate the Defendant.

With respect to the "other means," a court must make an independent written finding that the applicant has exhausted all other potential sources of information. See 735 ILCS 5/8-907. This requirement is particularly strict. *See Arya,* 226 Ill.App.3d at 851, 589 N.E.2d at 834 (petitioner failed to satisfy exhaustion requirement even though investigation already yielded 12,000 to 15,000 pages of discovery); *Baker v. F & F Investment,* 470 F.2d 778, 780 (2d Cir.

1972) (disclosure could not be compelled despite the fact that exhausting alternative sources might require that plaintiff depose as many as 60 others.).

The legislature deliberately imposed a difficult evidentiary burden in order to discourage compelled testimony. *Arya,* 226 Ill.App.3d at 862, 589 N.E.2d at 841 ("We acknowledge that with regard to the issue of exhaustion, this burden amounts to requiring the petitioner to prove a negative. Nonetheless, that is the burden the legislature imposed."). Consequently, the Court cannot divest the Reporter's Privilege until after Defendant has located and called all other potential witnesses on each proposed topic of inquiry. Otherwise Defendant must submit evidence, such as investigator reports, to demonstrate why his efforts to exhaust other sources proved unsuccessful.

In *Special Grand Jury Investigation,* for example, a special grand jury investigating the leak of confidential juvenile court transcripts subpoenaed reporters who had received the transcripts. One reporter said he had received the transcripts in an envelope without a return address and did not know who sent them, while the other said that he knew the identity of the source but invoked the Reporter's Privilege. 104 Ill.2d at 423, 472 N.E.2d at 451-52. The Supreme Court held that the reporter who knew the source's identity could not be forced to disclose it because the grand jury had not first called all non-journalists who had might have relevant information to testify. *Id.* at 428-29, 472 N.E.2d at 454.

Here, Defendant admits that potential sources exist, acknowledging that the State will introduce expert testimony authenticating the videotape and stating that "three days after turning over the video to the police, DeRogatis met with a potential witness in this case. That person informed police that she and DeRogatis watched the video in DeRogatis's office. Motion, ¶3. Moreover, the Motion contains no affidavits or testimony with respect to these topics and fails to

include the relevant investigative, forensic and police reports to demonstrate why Respondent's testimony is the only testimony available on these topics.

Finally, Defendant has not demonstrated why he cannot introduce other sources. Defendant presumably has access to expert testimony, and certainly to his own testimony and that of the girl to dispute the provenance of the videotape and explain why it appears to depict the couple performing sex acts in Defendant's own home. *People v. Childers,* 94 Ill.App.3d 104, 418 N.E.2d 959 (3d Dist. 1981) (application for divestiture regarding report on defendant's interrogation denied where police officers, defendant's relatives, and defendant himself were present at the alleged incident). To the extent the interviews have some relevance to the case, Ms. Edwards and the police obviously are available to testify about their interaction with Respondent. *Neal*, 173 F.R.D. at 233 ("Defendants' statement that any knowledge [the reporter] possesses . . . is hers alone and would not be obtainable through any other sources is frivolous" where interviewees, rather than interviewer, could testify regarding interview); *Lopez*, 1987 WL 26051 at *1 (defendant had not "satisfied her burden of showing that the information she seeks is not available from a non-journalistic source" where she and another witness were present at the interview and had knowledge of the contents of the outtakes she subpoenaed.) Under these circumstances, it is impossible for the Defendant to demonstrate exhaustion in compliance with the Act.

C. Respondent Has Not Waived His Reporter's Privilege

Unable to satisfy the Act's requirements, Defendant attempts to circumvent it by alleging "waiver" and "crime fraud." Neither argument is accompanied by any relevant legal or factual support. The Act itself, because it applies to both confidential and nonconfidential sources, allows for no such exception. Moreover, finding that reporters waive their privilege under these

circumstances would unavoidably undercut *Branzburg* by penalizing reporters for "doing something" about a crime. 408 U.S. at 691-92.

Reporters do not "waive" their privilege by revealing source material to outsiders, even law enforcement officials. *Scott v. Silverstein*, 89 Ill.App.3d 1039, 1042, 412 N.E.2d 692, 695 (1st Dist. 1980) *rev'd on other grounds* 87 Ill. 2d 167, 429 N.E.2d 483 (1981), found that a reporter had not waived his privilege by discussing his sources with an Assistant Attorney General. The court stated that "to find that Currie waived his privilege, simply because he revealed some of his sources to the Special Assistant Attorney General, would defeat the express purpose of this legislation" which protects both confidential and non-confidential sources. *Id.*; *Arya*, 226 Ill.App.3d at 853, 589 N.E.2d at 835 . Defendant's suggestion that Respondent did so by "embedding" himself in this case is contrary to law and logic, particularly where Respondent did less than the reporter in *Silverstein*.

Defendant simply miscites *Bond v. Ultreras*, No. 04 C 2617, 2006 WL 2494759 (N.D. Ill Aug. 23, 2006), because *Bond* was a federal decision not decided under the Act. The case also is factually inapposite. Unlike Respondent, the "embedded" reporter in *Bond* participated in the litigation by assisting the plaintiff in securing counsel, working closely with counsel throughout the case, agreeing to testify for the plaintiff and providing depositions for one party. *See also Bond v. Ultreras*, No. 04 C 2617, 2006 WL 1806387 (N.D. Ill. June 27, 2006) (recitation of facts provided in prior proceeding). Here, Respondent never provided litigation assistance to either party, particularly after the indictment, and conducted himself as an independent investigative reporter throughout.

Similarly, no Illinois court has accepted Defendant's reliance on the attorney client privilege's "crime fraud" exception in this context. The Act recognizes no similar exception to

the Reporter's Privilege. *Silverstein*, 89 Ill.App.3d at 1043, 412 N.E.2d at 695 (rejecting attempt to analogize Reporter's Privilege to attorney-client privilege). Consequently, Defendant misplaces reliance on *In re Marriage of Granger*, 197 Ill.App.3d 363, 554 N.E.2d 586 (4th Dist. 1990), which involved an attorney counseling his client to commit perjury. Defendant submitted no evidence that Respondent counseled anyone to film People's Exhibit 1. In any event, Defendant waived this contention by omitting all of the necessary testimony and reports, even after filing a supplemental brief.

Respondent is not on trial. Defendant is grandstanding to distract from his own evident criminality. Defendant never explains how one lone reporter's alleged "bias" against child pornography is relevant to whether Defendant filmed Peoples Exhibit 1. *Cf. Neal,* 173 F.R.D. at 234. Not even Defendant suggests that Respondent entered Defendant's residence to film pornography, with or without Defendant's cooperation. If, however, the State's Attorney nevertheless believes that the investigative reporting in this case constituted a crime, then due process requires that a grand jury, not this Court, make that initial determination. 725 ILCS 5/112-4.

III. Alternatively, Defendant Cannot Overcome the "Special Witness" Privilege

Even if Defendant was correct that Reporter's Privilege was somehow inapplicable, he has failed to overcome the equally strict Special Witness Doctrine at common law. *People v. Palacio*, 240 Ill.App.3d 1078, 1092-93, 607 N.E.2d at 1384. In *Palacio*, the court held that "reporters are entitled to special protections when subpoenaed to testify." Therefore subpoenas to reporters must comply with the same Special Witness Doctrine that governs subpoenas to judges and prosecutors. See *People v. Willis*, 349 Ill.App.3d 1, 16-18, 811 N.E.2d 202, 214 (1st Dist. 2004) (favorably citing *Palacio*).

As might be expected, the three primary components to the Special Witness Doctrine set out in *Palacio* are analogous to the burdens imposed by the Act itself (240 Ill.App.3d at 1102, 607 N.E.2d at 1390) (emph. in original):

> First, the party subpoenaing the reporter must specifically state the testimony the party expects to elicit from the reporter. Second, that party must specifically state why that testimony is not only relevant, but *necessary* to the party's case. Finally, that party must specifically state the efforts that party has made to secure the same evidence through alternative means.

The common law doctrine is even stricter than the Act, however, because it requires the petitioner to prove that the evidence is not only "relevant" but also "necessary" to the case. Defendant here has not begun to shoulder this heavier burden.

The special witness doctrine also illuminates the fundamental weakness of Defendant's Motion. Defendant has no greater right to call Respondent than he does the Ms. Boliker to pursue fanciful accusations of "bias" and evidence tampering against all and sundry.

IV. Defendant Subpoenaed Respondent In "Bad Faith" As Part Of An Ongoing Effort To Harass Witnesses And Inhibit Respondent's Ability To Cover This Trial

In *Branzburg*, The United States Supreme Court recognized that "[o]fficial harassment of the press undertaken not for purposes of law enforcement but to disrupt a reporter's relationship with his news sources would have no justification." 408 U.S. at 707-08; *id.* at 709-10 (Powell, J., concurring) ("no harassment of newsmen will be tolerated."). Defendant's subpoenas violate the First Amendment as well as due process because they serve only to harass Respondent personally and discourage journalists generally from reporting on Defendant's misconduct with children.

Illinois courts go further than *Branzburg*, so that subpoenas having the effect of harassing reporters will be quashed *regardless* of whether the harassment was intentional. For example, in

Palacio, the court stated (240 Ill.App.3d at 1101-02, 607 N.E.2d at 1389-90) (emphasis supplied):

> The impact of this experience on [reporters] - its extreme unpleasantness and its expense (fees for counsel to seek to quash the subpoena and to impose other objections; lost time away from the job) - might well result in the reporter's 'getting the message' that if he 'messes with' a particular attorney's case or sensibilities, he might again find himself subject to an equally frivolous and groundless subpoena. We are mindful of the concerns expressed in *Shain* and *Branzburg* about harassing reporters and efforts to disrupt their relationships with news sources . . . We emphasize that we need not and do not conclude that defense counsel in the case before us in fact had any hidden agenda in subpoenaing [the reporter] to testify. Whatever defense counsel's true intentions may have been, we merely observe that the *outcome,* as measured by the likely or potential effect upon [reporters], is precisely the same: ***an implicit threat that if the reporter speaks or writes something about the attorney's client or case, the attorney will find "some ground" to subpoena the reporter to force him to testify under oath on the witness stand. Such an outcome is intolerable*** in a free society that depends on a vigorous, untrammeled press, and ***we hold that courts have a duty not to permit their process - which, after all, a subpoena is - to be abused,*** as it was here.

It is obvious that Defendant's subpoenas serve a "hidden agenda" forbidden by the First Amendment. As discussed above, Defendant sandbagged Respondent for two years and then filed a belated application that did not pretend to satisfy the Act. Even then, Defendant submitted no admissible evidence that authenticate his efforts to obtain specific information (which is not even identified) from non-journalistic sources. These dilatory litigation tactics ensure that either the Court denies the subpoenas or that the jury returns before resolution of Respondent's statutory appeal. Either way, the delay has manufactured grounds for appellate reversal that could have been mooted in 2006.

Moreover, Defendant offers no legitimate reason to call Respondent in this case. Tellingly, whatever "evidence" Defendant apparently hopes to elicit from Respondent is unnecessary to any realistic defense. Respondent's allegedly "biased" investigative reporting does not make Respondent an eyewitness to Defendant sexually abusing a minor in Defendant's

own home. Defendant's speculation that a mere reporter could have "morphed" the videotape is unserious. Defendant has proffered no admissible evidence that 1) the videotape was "morphed," 2) that Respondent, a reporter, had the means to perform seamless CGI using simulacrums of Defendant and his nude goddaughter that not only has stumped the FBI and but also exceeds the ability of major motion picture studios even today and finally 3) that Respondent managed to distribute the "morphed" videotapes to potential witnesses throughout Chicago and its suburbs before delivering his copy to the police. Obviously, no witness is ever going to testify to these facts.

More troubling are indications that the subpoenas constitute part of a pattern of influencing witnesses. On information and belief, witnesses and victims, possibly including the victim in this case, have been influenced not to cooperate with authorities through either money or threats. The Court has sealed transcripts over the objections of Respondent's employer and others that may reveal yet another conspiracy in which a witness was suborned so that key evidence against Defendant could be destroyed before it fell into the hands of the authorities.[4]

In this context, the subpoenas evidence a pernicious pattern of intimidation and harassment. Respondent's newspaper has been threatened with legal action by Defendant's representatives. Immediately after Respondent published his news report, a slug was fired through the front door of Respondent's home. Now, to further inhibit adverse reporting, Defendant coupled spurious subpoenas with baseless accusations of criminality solely to induce Respondent to invoke the Fifth Amendment.

---

[4] Respondent objects to Defendant's Motion on due process grounds because Respondent has been denied access to the sealed transcripts to help make his *Branzburg* and *Palacio* showing that the subpoenas are issued in bad faith, including identification of possible witnesses. Should the Court entertain Defendant's Motion on the merits, Respondent renews the Intervenors' motion for access to the sealed transcript on due process grounds as well as under the First Amendment pursuant to the applicable law cited in the Intervenors' motion for access.

V. Compelled Testimony Violates Respondent's Fifth Amendment Rights

Defendant simultaneously takes the position that the videotape *is not* child pornography while advocating that most of the witnesses in this Case be charged with crimes for having viewed the videotape before this fact is established. Similarly, Defendant accuses Respondent of a crime because, before Defendant was indicted, Respondent in his role as an investigative reporter tried to verify through sources (as required by defamation and privacy laws) whether the videotape truly depicted Defendant with an underage female. Motion, ¶ 9.

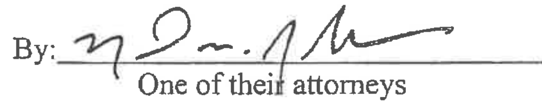
Even though this issue has been pending for six years and will ultimately be resolved by the jury, Defendant nevertheless frames his questions to force an innocent reporter to chose between revealing source material or "taking the Fifth" out of an abundance of caution. *People v. Edgeston*, 157 Ill.2d 201, 220-21, 623 N.E.2d 329 (1993) ("A witness in a criminal case may, under the aegis of the fifth amendment, refuse to answer questions which might incriminate him."). "A defendant's sixth amendment right to compulsory process does not include the right to compel a witness to waive his fifth amendment privileges." *Id.* See also *U.S. v. Doe*, 465 U.S. 605, 617 (1984); (act of producing incriminating documents privileged by Fifth Amendment). Respondent submits that the conclusion is inescapable on this record that all of these subpoenas and maneuvers are simply a charade to force Respondent to appear on the stand as a bogyman and goad him into invoking the fifth amendment privileges.

CONCLUSION

Defendant has failed to meet its burden to divest Respondent's Reporter's Privilege. The subpoenas serve no purpose aside from harassment and revenge. For the foregoing reasons, this Court should deny the Motion or, in the alternative, quash the subpoena under the First Amendment.

Date: May 29, 2008

Respectfully submitted,

By: 
One of their attorneys

Damon E. Dunn, Esq.
Neil M. Rosenbaum, Esq.
Funkhouser Vegosen Liebman & Dunn Ltd.
55 West Monroe Street, Suite 2300
Chicago, Illinois 60603-5008
Telephone: (312) 701-6800
Facsimile: (312) 701-6801
Attorneys for Plaintiff
Firm ID# 38572

EXHIBIT A

(Rev. 1/8/98) CCCR 0066 A

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

THE PEOPLE OF THE STATE OF ILLINOIS

v.

Robert Kelly

No. 02 CR 14952

SUBPOENA - SUBPOENA DUCES TECUM

The People of the State of Illinois to all Peace Officers in the State - GREETING:

WE COMMAND THAT YOU SUMMON James DeRogatis of the Chicago Sun-Times c/o Prentice Hall Corporation, 33 N. Lasalle St. Suite 1925 Chicago, IL 60602.

to appear to testify before the Honorable Judge Gaughn on July 6, 2006 in Room 500, Circuit Court, 26th Street and California Avenue, Chicago, Illinois, at 9:00 a.m.

YOU ARE COMMANDED ALSO to bring the following:

In lieu of appearance, please provide the documents listed in the attached Rider.

in your possession or control.

YOUR FAILURE TO APPEAR IN RESPONSE TO THIS SUBPOENA WILL SUBJECT YOU TO PUNISHMENT FOR CONTEMPT OF THIS COURT.

Atty. No.: 91741
Name: Edward M. Genson
Attorney for: Robert Kelly
Address: 53 W. Jackson Blvd, Ste. 1420
City/Zip: Chicago, IL 60604
Telephone: (312) 726-9015

WITNESS, Dorothy Brown
Clerk of Court

DIRECT INQUIRIES TO: Dorothy Brown
Clerk of the Circuit Court
Criminal Division
2650 South California, Chicago, Illinois 60608

NON-APPLICABLE - Strike out Title which does not apply - Subpoena or Subpoena Duces Tecum.

DOROTHY BROWN, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

(OVER)

RIDER

Definitions

"Document" or "Documents" means the original and any identical or non-identical copy, regardless of origin or location, of any writing or record of any type or description, including, but not limited to, the original and any copy of any book, pamphlet, periodical, letter, memorandum, telegram, report, record, study, handwritten or other note, working paper, chart, paper, graph, correspondence, table, analysis, schedule, diary, message(including, but not limited to reports of telephone conversations or conferences, magazine, booklet circular, bulletin, instruction, minutes, other communications), questionnaire, survey, contract, option to purchase, memorandum of agreement assignment, license, book of account, order, invoice, statement, bill, (including, but not limited to, telephone bills), check, voucher, notebook, film, photograph, photographic negative, tape recording, wire recording, transcript of recordings, drawing, catalogue, brochure, data on any electrical, electronic, or magnetic storage device, printouts or readouts from any magnetic storage device or any other data compilations from which information can be obtained and translated if necessary, or any other written, recorded, transcribed, punched, taped, filed or graphic matter, however produced or reproduced.

Materials to be Produced:

Any and all Documents, including but not limited to video tapes which purport to have some connection to Robert S. Kelly ("R. Kelly") received between January 2000 and March 2002, including but not limited to any tape received from Canoga Park, CA on or about January, 2001.

All Documents and tapes should be produced to the attorney listed on the subpoena on or before June 20, 2006 at 12:00 noon.

EXHIBIT B

FUNKHOUSER VEGOSEN LIEBMAN & DUNN LTD.
[illegible]
[illegible]

June 30, 2006

FVLD

Damon E. Dunn
312.701.6825
ddunn@fvldlaw.com

VIA FACSIMILE: (312) 939-3654

Edward M. Genson, Esq.
Genson & Gillespie
53 W. Jackson Blvd., Suite 1420
Chicago, IL 60604

Re: *People v. Kelly*, No. 02 CR 14952 - Subpoena Duces Tecum

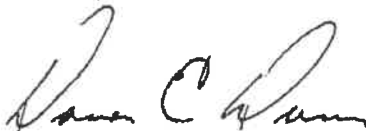
Dear Mr. Genson:

The Chicago Sun-Times has referred to me a copy of a subpoena issued on behalf of the defendant in the above- referenced case and directed to James DeRogatis, one of its reporters. The rider to the subpoena calls for the production of "[a]ny and all Documents" received by Mr. DeRogatis over a more than two year period having "some connection to Robert S. Kelly." As you know, Robert S. Kelly is a prominent public figure who as been the subject of extensive news coverage by Mr. DeRogatis in his capacity as a reporter for the newspaper. The subpoena therefore expressly seeks to compel disclosure of a reporter's source(s) of information without first complying with the preconditions for such compulsion under Illinois Law.

The Illinois legislature and courts discourage the issuance of subpoenas to newspapers and their reporters, in part, because such subpoenas operate to chill First Amendment freedoms. Moreover, it has long been the position of the newspaper and its reporters that they will not volunteer information in response to any subpoena that does not comply with the requirements of the Illinois Reporters Privilege, the First Amendment, the Illinois Constitution or Illinois common law doctrines protecting the journalistic process. In particular, the newspaper and its journalists object to and will not voluntarily respond to invalid subpoenas that, as here, do not comply with the statutory prerequisites for compelling the disclosure of source information under the Illinois Reporters Privilege.

If you have any questions regarding the above, please do not hesitate to contact me.

Very truly yours,



Damon E. Dunn

DED/sdl
cc: James E. McDonough, Esq.

EXHIBIT C

(Rev. 1/8/98) CCCR 0066 A

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

THE PEOPLE OF THE STATE OF ILLINOIS

v.

Robert Kelly

No. 02 CR 14952

SUBPOENA - SUBPOENA DUCES TECUM

The People of the State of Illinois to all Peace Officers in the State - GREETING:

WE COMMAND THAT YOU SUMMON James DeRogatis C/O Michael Cooke Chicago Sun-Times, 350 N. Orleans St.

to appear to testify before the Honorable Judge Vincent Gaughan on May 9, 2008 in Room 500, Circuit Court, 26th Street and California Avenue, Chicago, Illinois, at 9:00 a m.

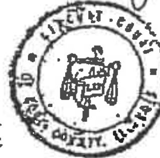
YOU ARE COMMANDED ALSO to bring the following:

in your possession or control.

YOUR FAILURE TO APPEAR IN RESPONSE TO THIS SUBPOENA WILL SUBJECT YOU TO PUNISHMENT FOR CONTEMPT OF THIS COURT.

Atty. No.: 91741
Name: Edward M. Genson
Attorney for: Robert Kelly
Address: 53 W. Jackson Blvd., Ste. 1420
City/Zip: Chicago, IL 60604
Telephone: (312) 726-9015

WITNESS, Dorothy Brown
Clerk of Court



DIRECT INQUIRIES TO: Dorothy Brown
Clerk of the Circuit Court
Criminal Division
2650 South California, Chicago, Illinois 60608

NON-APPLICABLE - Strike out Title which does not apply - Subpoena or Subpoena Duces Tecum.

DOROTHY BROWN, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

(OVER)

EXHIBIT D

FUNKHOUSER VEGOSEN LIEBMAN & DUNN LTD.
[illegible]
[illegible]

May 6, 2008

FVLD

Damon E. Dunn
312.701.6825
ddunn@fvldlaw.com

VIA FACSIMILE: (312) 939-3654

Mark Martin, Esq.
Genson & Gillespie
53 W. Jackson Blvd., Suite 1420
Chicago, IL 60604

Re: *People v. Kelly*, No. 02 CR 14952 - Subpoena

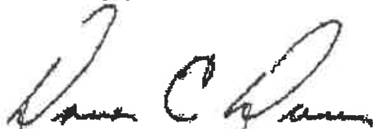
Dear Mark:

The Chicago Sun-Times has referred to me a copy of a subpoena issued on behalf of the defendant in the above- referenced case and directed to James DeRogatis. As you may know, we objected to an earlier subpoena in a June 30, 2006, letter to Mr. Genson because Mr. DeRogatis' knowledge concerning the case was obtained entirely in his capacity as a reporter. We reassert all applicable privileges, including the Illinois Reporter's Privilege, with respect to the current subpoena.

The subpoena therefore must comply with the statutory, constitutional and common law preconditions for compelling testimony from a reporter referenced in my letter to Mr. Genson. My understanding is that none of the preconditions for issuing a subpoena to a reporter have been satisfied by either party during the intervening years.

If the subpoena was issued out of an abundance of caution, I understand and would appreciate confirmation that the defendant has no present intention to call Mr. DeRogatis as a witness. If, however, the defendant presently intends to call Mr. DeRogatis, I encourage you to call me as soon as possible so that we can arrange a mutually convenient time for you to present the petition for divestiture and work out a briefing schedule that will not delay the trial.

Very truly yours,



Damon E. Dunn

DED/sdl
cc: James M. McDonough, Esq.

EXHIBIT E

Question	Relevance/Lack of Privilege	Reporter Opposition
Please state your name?	The jury is entitled to know "who the witness is, where he lives and what his business is." *Alford v. United States*, 282 U.S. 687, 688-89 (1931); see also *Smith v. Illinois*, 390 U.S. 129, 132 (1968). The question does not require DeRogatis to disclose the source of any information.	This question is relevant only if Respondent is compelled to testify as a witness and has something substantive and different to say. The Court should deny subpoenas calling for cumulative testimony regarding irrelevant collateral matters, regardless of the Reporter's Privilege. *People v. West*, 102 Ill.App.3d 50, 429 N.E.2d 599 (2d Dist. 1981); *U.S. v. Garza*, 664 F.2d 135 (7th Cir. 1981). Notwithstanding the irrelevance to this trial, Respondent's name can be ascertained through several obvious alternative sources.
What do you do for a living?	Same as above.	Same as above. Respondent's current occupation can be ascertained through several obvious alternative sources.
Were you a reporter for the Sun-Times in December 2000, as well as February 2002?	Same as above.	Same as above. Employment status 6-8 years ago has no bearing on Defendant's guilt or innocence of the offenses charged. To the extent this question means to establish foundation for facts admissible at trial, Defendant must identify with specificity the ultimate fact(s) he intends to prove through such line of questioning. *People v. Andrews*, 146 Ill.2d 413, 588 N.E.2d 1126, 1131-32 (1992); *People v. Palacio,* 240 Ill.App.3d 1078, 1092-93, 607 N.E.2d 1375 (4th

Question	Relevance/Lack of Privilege	Reporter Opposition
		Dist. 1993). This question is objectionable in both form and substance—it is both ambiguous and compound.
Directing your attention to December 2000, did you, without getting into the contents of the article, author an article critical of Robert Kelly?	Exposure of a witness' "bias is almost always relevant because the jury ... has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness' testimony." *United States v. Abel*, 469 U.S. 45, 52 (1984);. see also *People v. Foskey*, 136 Ill. 2d 66, 93 (1990). The jury is entitled to know that the person who provided the critical piece of evidence against Mr. Kelly is biased. The question does not require DeRogatis to disclose the source of any information.	This question puts the cart before the horse. Whether a music "critic" authored an article "critical" of Defendant is irrelevant to Defendant's innocence. Absent evidence that Respondent was an eye witness to Defendant performing the sex acts depicted on People's Exhibit 1, his opinion of Defendant is irrelevant. Defendant's justification for this question is misleading because Respondent has not vouched for the authenticity of People's Exhibit 1 in this trial and therefore is not "the person who provided the critical piece of evidence" any more than the pedestrian who stumbles across a firearm after a robbery and turns it over to the police. In any event, the referenced article was an account of allegations against Defendant based on a newspaper's investigation. When the topic covered by a newspaper is also the subject of a criminal indictment, the Reporter's Privilege may not be divested for the sake of convenience. *In re Special Grand Jury Investigation of Alleged Violation of the Juvenile Court*

Question	Relevance/Lack of Privilege	Reporter Opposition
		Act, 104 Ill. 2d 419, 428-29, 474 N.E.2d 450, 452 (1984); *U.S. v. Lopez*, No. 86 CR 515, 1987 WL 26051, * 1 (N.D.Ill. 1987) ("reporters are to be encouraged to investigate and expose evidence of criminal wrongdoing."). This question is objectionable in both form and substance because the characterization of an article as "critical" is vague and ambiguous and the statements in the article are inadmissible hearsay.
Have you at other times written articles for the *Sun-Times* or other publications that were critical of Mr. Kelly?	Same as above.	Same as above.
Directing your attention to early February 2002, did the videotape marked as People's Exhibit 1 anonymously appear in your mailbox at work?	In published articles, DeRogatis has stated that the videotape was anonymously placed in his mailbox at work. See DeRogatis article appearing in September 2002 edition of GQ Magazine (Exhibit B); DeRogatis' Sun-Times article dated June 9, 2002 (Exhibit C). In a published editorial dated June 17, 2002, the Sun-Times asserted that there was no "source" to protect. See Exhibit A. The question, therefore, does not require DeRogatis to disclose the source of any information.	The question requires disclosure of source information under the statutory definition of "source," which extends to reporters' "means" of newsgathering, regardless of whether a witness is involved. 735 ILCS 5/8-902(c) (defining "source" as "the person *or means* from or through which the news or information was obtained.") (emph. added). *People v. Slover*, 323 Ill.App.3d 620, 624, 753 N.E.2d 554, 557-58 (4th Dist. 2001) ("By defining 'source' to include a 'means,' the legislature clearly intended the privilege to protect more than simply the names and identities of witnesses, informants, and other persons providing news to a reporter.").

Question	Relevance/Lack of Privilege	Reporter Opposition
		The answer to this question has no apparent bearing on the Defendant's innocence, even if the messenger could be identified. Unless Defendant confesses to depositing People's Exhibit 1 in the mailbox, the source(s) necessarily are third parties. Defendant therefore fails to establish the testimony's relevance or necessity at trial. *Cf.* 735 ILCS 5/8-904 (requiring showing of relevance to divest Reporter's Privilege).
You did not see who placed the videotape in your mailbox?	Same as above.	Same as above. The question is cumulative and redundant. To the extent that Defendant expects an answer different from the previous question, it calls for source information protected by the Reporter's Privilege. 735 ILCS 5/8-902(c).
You do not have any personal knowledge of the identity of the person who placed that videotape in your mailbox?	Same as above.	Same as above. The question is cumulative and redundant and calls for source information.
Did you cause the videotape you anonymously received in early February 2002 to be provided to the police within hours after receiving it? What date did that occur? Was that the same day you received the videotape?	Obviously, possession of the videotape and its tender to the police are relevant. In his June 9, 2002 Sun-Times article, DeRogatis stated that the Sun Times received the tape in early February 2002 and "[h]ours after receiving the tape, the Sun-Times turned it over to police." Exhibit C.	These three questions seek information regarding the means of newsgathering, which constitutes a "source" under the Act. 735 ILCS 5/8-902(c). Defendant fails to explain why *Respondent's* delivery of the videotape to the police exonerates Defendant. Any other citizen could have turned over a copy of the same tape, including several witnesses who

Question	Relevance/Lack of Privilege	Reporter Opposition
	The questions do not require DeRogatis to disclose the source of any information.	have already testified. If Defendant believes that timing is significant (see below), he has offered no factual foundation to support the theory that Respondent altered the evidence in any material respect. *Cf.* 735 ILCS 5/8-904. Defendant is required to exhaust all possible non-journalistic sources before subpoenaing a reporter. 735 ILCS 5/8-907. Defendant can establish when the videotape was turned over through the officers who received the tape and undoubtedly recorded the event in a business record.
Did you maintain exclusive possession of the videotape before giving it to Investigator Everett?	The circumstances surrounding possession of the videotape in question *before* it was obtained by Investigator Everett are highly relevant. Without objection from the State, the defense has cross-examined State witnesses (including Simha Jamison, Delores Gibson, Bennie Edwards, Sr., Mary Kay Jerit, and Stephanie Edwards) about their alleged possession of the videotape before it was tendered to the police, as well as their knowledge or lack thereof concerning copying of the videotape. 5/21/08 a.m. Tr. 37; 5/21/08 p.m. Tr. 85, 116; 5/22/08 a.m. Tr. 5 1-52; S. Edwards Tr. 99. With possession of the videotape comes opportunity to alter the videotape. Neither the defense nor the jury is obligated to	Whether Respondent consulted with editors or fellow reporters in the course of newsgathering constitutes source information. 735 ILCS 5/8-902(c). Defendant argues that "[w]ith possession of the videotape comes opportunity to alter the videotape." If Defendant means to imply that Respondent altered People's Exhibit 1 (and presumably provided each of the multiple witnesses with a copy) then Defendant must apprise the Court and the parties of the anticipated answer to this question and offer evidence to support his speculation. Defendant, however, omits any foundation for the theory that Respondent had the resources and technical capability under

Question	Relevance/Lack of Privilege	Reporter Opposition
	accept opinions of State witnesses that People's Exhibit 1 was not ever altered, and the defense is entitled to present its case to the jury. The jury is entitled to hear DeRogatis testify, and examine for itself the credibility of any explanation he may give relative to his receipt and possession of the main item of evidence in the case, People's Exhibit 1. The question does not require DeRogatis to disclose the source of any information.	any feasible set of circumstances to 1) "morph" Defendant joined with his goddaughter 2) over a videotaped background depicting the same room in Defendant's residence that was featured in a previous sex tape depicting defendant and a minor and 3) insert a then contemporaneous radio soundtrack with 4) a degree of skill that convinced FBI forensic technicians. Defendant also fails to cite specific testimony or forensic evidence to support this theory (and no copies of the transcripts or reports were attached to the Motion). Conjecture is insufficient to divest the newsgathering elements of the Reporter's Privilege. 735 ILCS 5/8-902(c). Even under federal law, where the statutory privilege does not apply, "there must be a showing of actual relevance; a showing of potential relevance will not suffice." *Neal v. City of Harvey* 173 F.R.D. 231, 234 (N.D. Ill 1997). *See also People v. Palacio,* 240 Ill.App.3d 1078, 1101-02, 607 N.E.2d 1375 (4th Dist. 1993) (party subpoenaing reporter "must specifically state the testimony the party expects to elicit from the reporter."); *United States ex. Rel. Vutton Et Fils S.A. v. Karen Bags, Inc.* 600 F. Supp. 667, 671 (S.D.N.Y. 1985) (denying divesture of privilege where defendant's motion was "at

Question	Relevance/Lack of Privilege	Reporter Opposition
		most based on a hypothesis or 'hunch,' lacking a logical basis.") Common sense dictates that the defense has invested significant resources over the past six years to ascertain whether the People's Exhibit 1 has been altered, **yet the Motion offers no facts to support the notion that the Exhibit has been altered by anyone**. The alteration of the exhibit would be within the scope of expert testimony and, if the defense wishes to contradict testimony that People's Exhibit 1 is genuine, Defendant is presumably free to retain any witness qualified to offer such testimony. Defendant has made no showing that this alternative evidence is unavailable. This question also is objectionable in both form and substance—it is ambiguous as to what is meant by "exclusive possession."
Did you perform any alterations or changes to the videotape, or cause anyone else to perform any alterations or changes?	Same as above.	Same as above.
Did you ever possess any copies of the videotape other than the one provided to the police? If so, explain?	Investigator Everett testified that he received the videotape from the Sun Times on February 1, 2002. 5/20/08 Tr. 66. Everett further testified that, on February 4, 2002, Stephanie Edwards told him that she had just left DeRogatis' office	This question implicates obvious source information involving newsgathering techniques under 735 ILCS 5/8-902(c).

Question	Relevance/Lack of Privilege	Reporter Opposition
	where she had viewed the videotape in question.5/20/08 Tr. 135. Stephanie Edwards admitted that DeRogatis contacted her on February 4, 2001. S. Edwards Tr. 23-24. Stephanie Edwards also testified that she went to DeRogatis' office and viewed a videotape that depicted what she had allegedly viewed in her apartment in December 2001. S. Edwards Tr. 24. After some probing, Stephanie Edwards said that DeRogatis informed her that the videotape had been "mysteriously dropped off in a mailbox." S. Edwards Tr. 95. Stephanie Edwards also testified that, on February 4 or 5, 2002, she met Investigator Everett, and informed him that she had recently viewed the videotape with DeRogatis in DeRogatis' office. S. Edwards Tr. 94. DeRogatis' *GQ* article states: "When I received the tape in early February, I sat with Edwards and watched it to be certain it was the same one she'd seen." Exhibit B; see also Exhibit C. There is no First Amendment right to possess or display child pornography. See *United States v. Williams*, --U.S. --, 2008 WL 2078503 (May 19, 2008).	Defendant offers no facts explaining why anyone's possession of a copy of People's Exhibit 1 would exonerate Defendant. Consequently, ***the question is patently irrelevant, no matter which answer is given***. It is a "stunt," and serves only to place a reporter in the dilemma of having to reveal source information to exonerate himself or needlessly invoke the Fifth Amendment out of an abundance of caution. Respondent submits that placing a journalist in this dilemma is the entire point of Defendant's motion. The question's obvious irrelevance epitomizes "bad faith" harassment under *Branzburg*. Finally, Defendant's untethered charges of "bias" in the context of newsgathering has nothing to do with his guilt and serves only to clothe the question with a semblance of relevance. Assuming any reporter testified that he believed the Defendant was a pedophile and belonged in prison based on Defendant's marriage to a 15 year old girl, his monetary settlements of sexual assault cases brought by young girls, and his appearance in multiple sex tapes, Defendant fails to offer facts demonstrating why such an opinion would bear on Defendant's innocence or the authenticity of People's Exhibit 1. *Cf.* 735 ILCS 5/8-904

Question	Relevance/Lack of Privilege	Reporter Opposition
	Possession and/or display of child pornography — even by a reporter — violates both State and Federal criminal law. E.g., 18 U.S.C. § 2252A; 720 ILCS 5/11.20.1. DeRogatis' possession and display of the videotape shows that the bias of the person who gave the tape to the police was strong enough to compel him to commit a crime. The question does not require DeRogatis to disclose the source of any information.	(requiring showing of relevance to divest Reporter's Privilege). Finally, it should be noted, Defendant has steadfastly maintained his innocence on child pornography charges, but now accuses Respondent of a crime for attempting to confirm this very fact. Even if there was evidence that Respondent committed a crime, it would be the role of a grand jury, not the Defendant or this Court, to investigate the matter. 725 ILCS 5/112-4.
Did you ever view the videotape in People's Exhibit 1 after you gave it the police?	Same as above.	Same as above.
Did you wait some time after February 4 or 5, 2002 to provide a copy of the videotape to Investigator Everett?	This would impeach Investigator Everett's testimony that he received the videotape on February 1, 2008. Suspicion and doubt surrounding the acquisition of the videotape by the police would arise. The question does not require DeRogatis to disclose the source of any information.	Defendant concedes this information is available from an alternative source--Investigator Everett. *Cf.* 735 ILCS 5/8-907. That he does not like the Investigator's answer does not give him the right to subpoena a reporter in hopes of getting a better answer. If Defendant seeks to impeach Everett's testimony, he can question other officers who were present when the tape was received or present evidence that the testimony was inconsistent with business records recording the receipt of the tape. Plaintiff's motion lacks any evidentiary submission regarding exhaustion of these potential sources. *In re Special Grand*

Question	Relevance/Lack of Privilege	Reporter Opposition
		Jury Investigation of Alleged Violation of the Juvenile Court Act, 104 Ill. 2d 419, 474 N.E.2d 450 (1984) (requiring that all law enforcement officials who may have relevant information regarding leak of juvenile court transcript be called to testify before Reporter's Privilege can be divested); *People v. Childers,* 94 Ill.App.3d 104, 418 N.E.2d 959 (3d Dist. 1981) (denying divesture of privilege application seeking to ask reporter about report that defendant was interrogated for 14 straight hours when defendant and his relatives had never alleged that this had occurred and Defendant had not inquired of officers who were present concerning the investigation); *Gulliver's Periodicals, Ltd. v. Chas Levy Cir. Co.,* 455 F. Supp. 1197, 1203 (N.D. Ill. 1978) (denying subpoena to compel a reporter to impeach a source). Defendant also fails to state with particularity the anticipated testimony. *Cf. People v. Andrews*, 146 Ill.2d 413, 588 N.E.2d at 1131-32 (1992) (offer of proof must "explicitly state what the excluded testimony would reveal and may not merely allude to what might be divulged by the testimony."). It is disingenuous to predicate relevance based on "suspicion and doubt" without offering a factual foundation for the expected testimony.

CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that he caused copies of **Non-Party James DeRogatis's Opposition To Motion For Leave To Issue Subpoenas To Reporter and for Offer of Proof** to be served upon counsel of record:

> Shauna Boliker, Esq.
> States Attorney of Cook County, Illinois
> 2600 South California Avenue
> Chicago, Illinois 60608
> Facsimile: (773) 869-2382
>
> Edward M. Genson, Esq.
> Mark W. Martin, Esq.
> Genson & Gillespie
> 53 West Jackson Blvd., Suite 1420
> Chicago, Illinois 60604
> Facsimile: (312) 939-3654

by facsimile transmission, and by depositing same in the United States Mail in pre-addressed envelopes, postage prepaid, at 55 West Monroe Street, Chicago, Illinois 60603, both before the hour of 5:00 p.m. on May 29, 2008.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA	
v.	Case No. 19 CR 567
ROBERT SYLVESTER KELLY, aka "R. Kelly," DERREL McDAVID, and MILTON BROWN, aka "June Brown"	Judge Harry D. Leinenweber

EMERGENCY MOTION TO QUASH SUBPOENA TO REPORTER AND/OR FOR PROTECTIVE ORDER

NOW COMES non-party journalist Jim DeRogatis, and The New Yorker Magazine, to respectfully move this Court pursuant to Fed. R. Crim. P. 17(c) and the First Amendment, U.S. Const. amend I, to quash the subpoena served upon him in the above captioned case by Defendant, Derrell McDavid, or for a protective order.[1] In support thereof, Movants state as follows:

1. Mr. DeRogatis is not a party or government witness. He is instead a reporter, music critic, author and Associate Professor at Columbia College Chicago. As a journalist, he has reported extensively on defendants from the beginnings of Defendant Robert Kelly's career and throughout the present trial for news organizations, including Chicago Sun-Times and The New Yorker magazine. In 2019, DeRogatis authored the book *Soulless: The Case Against R. Kelly,* published by Abrams Press.

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[1] *See Branzburg v. Hayes*, 408 U.S. 665, 709 (1972) (Powell, J., concurring) ("[I]f the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation … he will have access to the court on a motion to quash and an appropriate protective order may be entered.").

2. The New Yorker, founded in 1925, is a Pulitzer Prize winning weekly national magazine which has published some of the most groundbreaking journalism and commentary of the last hundred years. The New Yorker engaged DeRogatis to report on Defendants, including extensive coverage of *United States v. Kelly*, No. 19-CR-286, (E.D.N.Y. June 29, 2022). Thirteen articles DeRogatis authored for The New Yorker can be found at the following link: https://www.newyorker.com/contributors/jim-derogatis

3. On August 3, 2022, Defendant McDavid served DeRogatis with a subpoena (Ex. A) for trial testimony in this case. The subpoena did not include a check for witness fees but DeRogatis was nonetheless instructed to appear on September 6, 2022. Because the subpoena is unduly burdensome, unreasonable and oppressive under Rule 17(c) and the First Amendment, Movants accordingly request an order to quash the subpoena or a protective order.

4. "The courts must always be alert to the possibilities of limiting impingements upon press freedom to the minimum; and one way of doing so is to make compelled disclosure by a journalist a last resort after pursuit of other opportunities has failed." *Gulliver's Periodicals, Ltd. v. Chas. Levy Cir. Co.*, 455 F. Supp. 1197, 1203, n. 4 (N.D. Ill. 1978)). *See also Hare v. Zitek,* No. 02 C 3973, 2006 U.S. Dist. LEXIS 50269, at *11 (N.D. Ill. July 24, 2006) (requiring defendants to "establish, via proffer at trial, that they have a real need for the information and that the information is not available from another source."); *Patterson v. Burge*, 2005 U.S. Dist. LEXIS 1331 (N.D. Ill. 2005) ("surely some good justification should be advanced" to justify subpoena of journalists regarding newsgathering).

5. The foregoing principles apply to newsgathering irrespective of previously published works or the confidentiality of sources because "the policy which underlies the

existence of journalistic privilege would be equally undermined by compelling reporters to reveal factual information surrounding investigations." *Neal v. City of Harvey*, 173 F.R.D. 231, 234 (N.D. IL 1997); *United States v. Lopez*, 1987 U.S. Dist. LEXIS 11115, 14 Med. L. Rep. 2203, 2204 (N.D. Ill. 1987).[2]

6. Here, as demonstrated by the articles linked above, virtually all knowledge that DeRogatis has that may be relevant to the indictment in this case, if there is any such information, necessarily derives from his third party sources with direct knowledge of the facts and therefore would be inadmissible hearsay under FRE 802. See *Braun v. Lorillard, Inc.*, 84 F.3d 230, 237 (7th Cir. 1996) (affirmed trial court's exclusion of reporter witness under hearsay rules). Because Mr. DeRogatis' role has been as an investigative reporter, compelled testimony also is invasive as to his newsgathering methods and cumulative of the actual sources and their source materials. For example, Movants understand that the Court already denied Defendant McDavid's motion to put his newsgathering on trial with respect to alleged emails with potential official sources. (Dkt # 247). Movants further understand that, during the case in chief, Chicago Police Department Detective Dan Everett authenticated the only physical source material plausibly at issue: a VHS cassette personally handed to the Detective by a Chicago Sun-Times

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[2] *See also Branzburg*, 408 U.S. at 709 (despite absence of blanket federal privilege, reporters are entitled to assert a "claim to privilege" that is rooted in "constitutional rights with respect to the gathering of news or in safeguarding [reporters'] sources.); *id.* at 724 (courts must balance "vital constitutional and societal interests" of freedom of the press). While the Seventh Circuit has not recognized a blanket federal reporter's privilege, it acknowledges that Illinois has First Amendment interests in protecting reporters. *McKevitt v. Pallasch,* 339 F.3d 530, 533 (7th Cir.2003). See, e.g. *People ex rel Scott v. Silverstein*, 89 Ill. App. 3d 1039 (1st Dist. 1980) (recognizing "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.").

editor. Compare 735 ILCS 5/8-902(c) (defining "source" as, *inter alia,* the "*means* from or through which the news or information was obtained") (emph. added). Moreover, the contents of this source material was authenticated by witness "Jane" and other sworn witnesses. *See, e.g., Lopez*, 1987 U.S. Dist. LEXIS 11115 at 6 ("any further facts that might possibly be gleaned from [journalist's] out-takes were likely to be merely cumulative").

7. The only pertinent exception to FRE 802 therefore would be declarations *against* interest made by Defendant McDavid to DeRogatis during the course of DeRogatis's reporting, including for *The New Yorker*. Defendant McDavid, however, has represented that he will testify in his own defense and therefore may relate all of his on or off-the-record statements to DeRogatis, leaving DeRogatis in the potential position of impeaching his source or risking subsequent claims that he breached confidentiality, whether on direct examination or cross-examination by the USA or McDavid's co-defendants.[3] *Id.* ("Garcia, who is herself the subject of the interview, has failed to make even a preliminary showing as to the nature of the statements contained in the out-takes.").

8. The absence of a legitimate evidentiary need for testimony alone indicates harassment or intimidation. *Branzburg*, 408 U.S. at 709. Intimidation by subpoena, or by individuals unrelated, but sympathetic, to defendants, is of particular concern when coupled with

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[3] If required to testify, DeRogatis requests that the Court make a finding that the Subpoena constitutes a waiver by Defendant McDavid of any agreement to keep confidential statements made by McDavid to DeRogatis, even if admissible under FRE 804 (b)(3).

prior acts and statements of a threatening nature that augment the undue burden of being compelled to appear to answer irrelevant questions about inadmissible newsgathering activities. [4]

9. To rebut an improper purpose, McDavid should first proffer: (a) that DeRogatis possesses specific information relevant or necessary to the proceedings; (b) that a specific public interest would be adversely affected if the factual information sought were not disclosed; and (c) that all other available sources of information have been exhausted. *See Neal*, 173 F.R.D. at 232-234 (showing that the sought after information is highly relevant and material must be specific); Compare 735 ILCS 5/8-904, 907(2) (requiring specific factual findings before divestiture of the Illinois reporter privilege can be ordered).

10. Finally, because multiple witnesses testified from their direct knowledge on the facts material to the case, this Court should exercise discretion to quash the subpoena on the reporter. *Lopez*, 1987 U.S. Dist. LEXIS 11115 (defendant in criminal case had "not satisfied her burden of making a *specific* of how the outtakes she seeks [from WMAQ-TV] are 'highly material' to her case." (emphasis in original)).

WHEREFORE, for the foregoing reasons, Journalist Jim DeRogatis and The New Yorker Magazine respectfully request that the Court exercise its discretion to quash the subpoena. Alternatively, Movants request the Court to enter a protective order requiring a) a specific showing by Defendant that the prospective testimony satisfies the foregoing criteria under the First Amendment; b) finding that the subpoena waives all claims of source confidentiality that

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[4] Published reports include that a window of the DeRogatis family home was shot out after Chicago Sun-Times reported on Defendant Kelly and threats concerning DeRogatis and his then-six year old daughter.

Defendant McDavid may hereafter assert or c) providing for authentication of previously published materials through stipulation or affidavit.

Respectfully submitted,

Jim DeRogatis and The New Yorker

By: /s/ Seth A. Stern
One of their Attorneys

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UNITED STATES DISTRICT COURT

for the

Northern District of Illinois

United States of America
v.
Robert Kelly, et al.
Defendant

Case No. 19 CR 567

SUBPOENA TO TESTIFY AT A HEARING OR TRIAL IN A CRIMINAL CASE

To: James P. DeRogatis
1425 W. Diversey Pkwy #2
Chicago, Illinois 60614

YOU ARE COMMANDED to appear in the United States district court at the time, date, and place shown below to testify in this criminal case. When you arrive, you must remain at the court until the judge or a court officer allows you to leave.

Place of Appearance: Dirksen United States Courthouse, 219 S. Dearborn Street, Chicago, IL 60604	Courtroom No.: 2525
	Date and Time: 08/15/2022 9:00 am

You must also bring with you the following documents, electronically stored information, or objects *(blank if not applicable)*:

(SEAL)

Date: 08/03/2022

CLERK OF COURT

Signature of Clerk or Deputy Clerk

The name, address, e-mail, and telephone number of the attorney representing *(name of party)* Derrel McDavid, who requests this subpoena, are:

Vadim A. Glozman
Law Offices of Vadim A. Glozman
53 W. Jackson Blvd., Suite 1128
Chicago, IL 60604
vg@glozmanlaw.com
312-726-9015

EXHIBIT A

Case No. 19 CR 567

PROOF OF SERVICE

This subpoena for *(name of individual and title, if any)* ______________________

was received by me on *(date)* ____________ .

☐ I served the subpoena by delivering a copy to the named person as follows: ______________

______________________________ on *(date)* ______________ ; or

☐ I returned the subpoena unexecuted because: ______________________

____ .

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also tendered to the witness fees for one day's attendance, and the mileage allowed by law, in the amount of $ ____________ .

My fees are $ ______ for travel and $ ______ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: ______________ ______________________________
Server's signature

____
Printed name and title

____
Server's address

Additional information regarding attempted service, etc:

Print | Save As... | Add Attachment | Reset

AO 89 (Rev. 08/09) Subpoena to Testify at a Hearing or Trial in a Criminal Case

UNITED STATES DISTRICT COURT

for the

Northern District of Illinois

United States of America v. Robert Kelly, et al. *Defendant*	)	Case No. 19 CR 567

SUBPOENA TO TESTIFY AT A HEARING OR TRIAL IN A CRIMINAL CASE

To: Jim DeRogatis
1425 W. Diversey Pkwy #2
Chicago, Illinois 60614

YOU ARE COMMANDED to appear in the United States district court at the time, date, and place shown below to testify in this criminal case. When you arrive, you must remain at the court until the judge or a court officer allows you to leave.

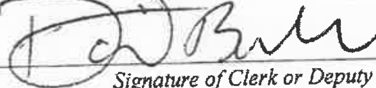
Place of Appearance:	Dirksen United States Courthouse 219 S. Dearborn Street Chicago, IL 60604	Courtroom No.: 2525 Date and Time: 08/15/2022 9:00 am

You must also bring with you the following documents, electronically stored information, or objects *(blank if not applicable)*:

(SEAL)

Date: 08/03/2022

CLERK OF COURT



Signature of Clerk or Deputy Clerk

The name, address, e-mail, and telephone number of the attorney representing *(name of party)* Derrel McDavid, who requests this subpoena, are:

Vadim A. Glozman
Law Offices of Vadim A. Glozman
53 W. Jackson Blvd., Suite 1128
Chicago, IL 60604
vg@glozmanlaw.com
312-726-9015

Case No. 19 CR 567

PROOF OF SERVICE

This subpoena for *(name of individual and title, if any)* ____________________
was received by me on *(date)* ____________ .

☐ I served the subpoena by delivering a copy to the named person as follows: ____________________
____________________ on *(date)* ____________ ; or

☐ I returned the subpoena unexecuted because: ____________________
____________________ .

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also tendered to the witness fees for one day's attendance, and the mileage allowed by law, in the amount of $ ____________ .

My fees are $ ________ for travel and $ ________ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: ____________ ____________________
Server's signature

____
Printed name and title

____
Server's address

Additional information regarding attempted service, etc:

Print | Save As... | Add Attachment | Reset

West's Nevada Revised Statutes Annotated
Title 4. Witnesses and Evidence (Chapters 47-56) (Refs & Annos)
Chapter 49. Privileges (Refs & Annos)
Other Occupational Privileges

N.R.S. 49.275

49.275. News media

Currentness

No reporter, former reporter or editorial employee of any newspaper, periodical or press association or employee of any radio or television station may be required to disclose any published or unpublished information obtained or prepared by such person in such person's professional capacity in gathering, receiving or processing information for communication to the public, or the source of any information procured or obtained by such person, in any legal proceedings, trial or investigation:

1. Before any court, grand jury, coroner's inquest, jury or any officer thereof.

2. Before the Legislature or any committee thereof.

3. Before any department, agency or commission of the State.

4. Before any local governing body or committee thereof, or any officer of a local government.

Credits
Added by Laws 1971, p. 786. Amended by Laws 1975, p. 502.

Editors' Notes

SUBCOMMITTEE'S COMMENT

Transfers new privilege created by chapter 476, Statutes of Nevada 1969, to its proper place in new codification.

Notes of Decisions (34)

N. R. S. 49.275, NV ST 49.275
Current through Ch. 2 (End) of the 33rd Special Session (2021), including all technical corrections received from the Legislative Counsel Bureau.

End of Document

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IN THE SUPREME COURT OF THE STATE OF NEVADA

LAS VEGAS REVIEW-JOURNAL, INC.; KEITH MOYER; GLENN COOK; ANASTASIA HENDRIX; RHONDA PRAST; BRIANA ERICKSON; AND ARTHUR KANE, Appellants, vs. THE STATE OF NEVADA; ROBERT TELLES; AND LAS VEGAS METROPOLITAN POLICE DEPARTMENT, Respondents.	No. 85634 NOV 1 4 2022 ELIZABETH A. BROWN CLERK OF SUPREME COURT BY DEPUTY CLERK

ORDER TO SHOW CAUSE WHY APPEAL SHOULD NOT BE SUMMARILY REVERSED AND REMANDED AND ORDER IMPOSING TEMPORARY INJUNCTION

This is an appeal from a district court order denying a preliminary injunction in an action seeking the return of, or protection of, materials allegedly protected under NRS 49.275 and the First Amendment. Appellants have filed an emergency motion for an injunction pending appeal, and respondent Las Vegas Metropolitan Police Department has filed an opposition.[1]

Below, the district court concluded that respondents' joint appeal from a previous order granting a preliminary injunction divested it of jurisdiction to resolve appellants' second motion for a preliminary injunction, which appears to have sought broader or additional protections, and thus denied the second motion on the ground that the court lacked

[1]Respondent's motion for leave to file a response that exceeds the page limit is granted, NRAP 27(d)(2). The response was filed on November 14, 2022.

22-35782

jurisdiction to adjudicate it. However, while a notice of appeal generally divests a district court of jurisdiction to act, *Foster v. Dingwall*, 126 Nev. 49, 52, 228 P.3d 453, 454-55 (2010), this court has held that the district court retains jurisdiction over matters that are entirely collateral to and independent from that part of the case taken up by appeal, *Bongiovi v. Bongiovi*, 94 Nev. 321, 579 P.2d 1246 (1978), and it is well accepted that when an appeal is filed from a preliminary injunction, the district court is divested of jurisdiction over the preliminary injunction but retains jurisdiction over the remainder of the case. 11A Charles A. Wright & Arthur R. Miller, Fed. Prac. & Proc. Civ. § 2962 (3d ed.) ("An appeal from the grant or denial of a preliminary injunction does not divest the trial court of jurisdiction or prevent it from taking other steps in the litigation while the appeal is pending."); *Zundel v. Holder*, 687 F.3d 271, 282 (6th Cir. 2012) ("[A]n appeal from an order granting or denying a preliminary injunction does not divest the district court of jurisdiction to proceed with the action on the merits. The district court retains some jurisdiction to continue deciding other issues during the pendency of an interlocutory appeal." (internal quote marks and citations omitted)); *State ex rel. Corbin v. Tolleson*, 732 P.2d 1114 (Ariz. Ct. App. 1986) ("When a party appeals a preliminary injunction, the trial court loses jurisdiction over the injunction but retains jurisdiction over the remainder of the case.").

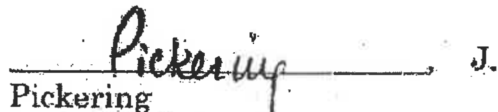
Accordingly, it appears that the district court incorrectly concluded that it was divested of jurisdiction. Further, even if the court believed that some part of the second motion was at issue in the appeal, NRCP 62.1 and NRAP 12A allow the court to either deny the motion on the merits or indicate that it would grant the motion if the appellate court remanded for that purpose or that the motion raises substantial issues, so that the moving party could then seek a remand for purposes of resolving the motion.

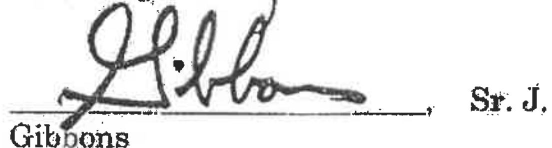
Therefore, respondents shall have 7 days from the date of this order to show cause why the district court's order should not be summarily reversed and the case remanded for further proceedings. Appellant shall have 3 days from when respondents' response is served to file and serve any reply. No extensions of time will be granted absent extraordinary and compelling circumstances demonstrated by written motion.

Further, we temporarily grant appellant's motion for an injunction, pending our receipt and consideration of the response to this show cause order and any reply. Respondents are hereby enjoined from inspecting or searching, or directing, encouraging, or soliciting anyone else to search, any electronic or digital information that a reasonable person would understand might contain newsgathering materials, in cars Jeff German may have driven or other electronic information storage devices or documents or other papers these parties may locate and/or obtain in the future in connection with the prosecution of Robert Telles and/or the investigation into Jeff German's death, pending further order of this court.

It is so ORDERED.[2]

_______________, J.
Cadish


_______________, J.
Pickering


_______________, Sr. J.
Gibbons

[2]The Honorable Mark Gibbons, Senior Justice, participated in this matter under a general order of assignment.

cc: Hon. Susan Johnson, District Judge
Lansford W. Levitt, Settlement Judge
Ballard Spahr LLP/Denver
Ballard Spahr LLP/Las Vegas
Chesnoff & Schonfeld
Marquis Aurbach Chtd.
Richard Harris Law Firm
Liesl K. Freedman
Matthew J. Christian
Clark County District Attorney
Eighth District Court Clerk

EIGHTH JUDICIAL DISTRICT COURT
CLERK OF THE COURT
REGIONAL JUSTICE CENTER
200 LEWIS AVENUE, 3rd Fl.
LAS VEGAS, NEVADA 89155-1160
(702) 671-4554

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Elizabeth A. Brown
Clerk of Supreme Court

Steven D. Grierson
Clerk of the Court

Anntoinette Naumec-Miller
Court Division Administrator

February 2, 2023

Elizabeth A. Brown
Clerk of the Court
201 South Carson Street, Suite 201
Carson City, Nevada 89701-4702

RE: In the Matter of STATE vs. TELLES
S.C. CASE: 85553 c/w 85634
D.C. CASE: A-22-859361-C

Dear Ms. Brown:

Pursuant to your Order Removing Appeals from Settlement Program, Consolidating Appeals and Reinstating Briefing, and Granting Limited Remand, dated January 6, 2023, enclosed is a certified copy of the Order Denying Plaintiff's Second Ex Parte Application for an Emergency Temporary Restraining Order and Request for Preliminary Injunction Hearing on Order Shortening Time filed February 2, 2023 in the above referenced case. If you have any questions regarding this matter, please do not hesitate to contact me at (702) 671-0512.

Sincerely,
STEVEN D. GRIERSON, CLERK OF THE COURT

/s/ Heather Ungermann
Heather Ungermann, Deputy Clerk

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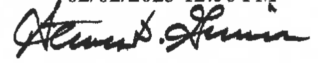

CLERK OF THE COURT

1 ORDR
2
3 **EIGHTH JUDICIAL DISTRICT COURT**
4 **CLARK COUNTY, NEVADA**
5
Las Vegas Review-Journal, Inc., Plaintiff, vs. The State of Nevada, Robert Telles, and Las Vegas Metropolitan Police Department, Defendants.	Case No.: A-22-859361-C DEPT. No.: XII

11–13 **ORDER DENYING PLAINTIFF'S SECOND EX PARTE APPLICATION FOR AN EMERGENCY TEMPORARY RESTRAINING ORDER AND REQUEST FOR PRELIMINARY INJUNCTION HEARING ON ORDER SHORTENING TIME**

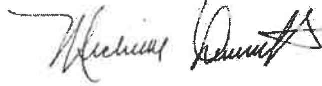
14 This matter came on before the court on January 25, 2023 pursuant to a
15 limited remand from the Nevada Supreme Court ("NSC"). The Plaintiff's filed a
16 Second Ex Parte Application For An Emergency Temporary Restraining Order
17 And Request For Preliminary Injunction Hearing On Order Shortening Time
18 ("Second Motion for Preliminary Injunction"). The NSC remanded the matter to
19 the District Court on January 6, 2023 to consider the Plaintiff's Application.
20
21 This Court now enters the following findings and orders:
22 **THE COURT FINDS** the car referenced in the Second Motion for
23 Preliminary Injunction for additional devices, papers, documents, and cars
24 ("Additional Newsgathering Materials") was a leased vehicle and it has been
25 returned to the owner. The Metropolitan Police Department is not in possession of
26 the vehicle.
27
28

MICHELLE LEAVITT
DISTRICT JUDGE
DEPARTMENT TWELVE
LAS VEGAS, NEVADA 89155

THERFORE, IT IS HEREBY ORDERED that the Plaintiff's Second Motion for Preliminary Injunction shall be, and it is, hereby **DENIED**.

Dated this 2nd day of February, 2023.

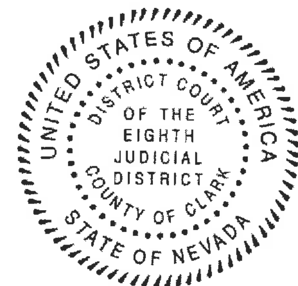
Dated this 2nd day of February, 2023



MICHELLE LEAVITT
DISTRICT COURT JUDGE
DEPARTMENT XII
EIGHTH JUDICIAL DISTRICT COURT

F79 8CC B97A 45E6
Michelle Leavitt
District Court Judge

February 2, 2023



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MICHELLE LEAVITT
DISTRICT JUDGE
DEPARTMENT TWELVE
LAS VEGAS, NEVADA 89155

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CERTIFICATE OF SERVICE

I hereby certify on the date filed, this document was electronically served to the email addresses and/or by Fax transmission or by standard mail to:

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Pamela Osterman
Pamela Osterman
Judicial Executive Assistant
Department XII
Eighth Judicial District Court

MICHELLE LEAVITT
DISTRICT JUDGE

DEPARTMENT TWELVE
LAS VEGAS, NEVADA 89155

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CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

Las Vegas Review-Journal, Inc., Plaintiff(s) vs. The State of Nevada, Defendant(s)	CASE NO: A-22-859361-C DEPT. NO. Department 12

AUTOMATED CERTIFICATE OF SERVICE

This automated certificate of service was generated by the Eighth Judicial District Court. The foregoing Order was served via the court's electronic eFile system to all recipients registered for e-Service on the above entitled case as listed below:

Service Date: 2/2/2023

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If indicated below, a copy of the above mentioned filings were also served by mail via United States Postal Service, postage prepaid, to the parties listed below at their last known addresses on 2/3/2023

Public Defender

Clark County Public Defender
309 S. 3rd Street , Suite #2
Las Vegas, NV, 89101

COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, ss.

SUPERIOR COURT
C.A. No. 2179CV00049

08/29/2022

JOHN DOE,

Plaintiff,

v.

ROMAN CATHOLIC BISHOP OF SPRINGFIELD, A CORPORATION SOLE; ARCHBISHOP MITCHELL T. ROZANSKI; PATRICIA MCMANAMY; MONSIGNOR CHRISTOPHER CONNELLY; JEFFREY TRANT; KEVIN MURPHY; MARK DUPONT; JOHN J. EGAN, ESQ.; AND JOHN HALE,

Defendants.

SPECIALLY ASSIGNED TO HON. KAREN L. GOODWIN

LARRY PARNASS'S MOTION FOR RECONSIDERATION
(Oral Argument Requested)

Larry Parnass respectfully submits this motion for reconsideration of the Court's July 29, 2022 Decision and Order on the defendants' Motion to Compel and his Motion for a Protective Order. In support of this motion, Parnass states as follows.

1. A motion to reconsider is properly brought where there is "a particular and demonstrable error in the original ruling or decision." *Audubon Hill S. Condominium Assn. v. Community Assn. Underwriters of America, Inc.*, 82 Mass. App. Ct. 461, 470 (2012). Here, the Court's July 29, 2022 ruling suffers from three such errors.

2. First, the July 29 Order was based on the incorrect belief that Parnass's sources of information about what John Doe allegedly told Kevin Murphy and the review board about

Bishop Weldon were non-confidential. (July 29 Order at 5). In fact, one of Parnass's sources for that information was confidential. Parnass so states in his Supplemental Affidavit, filed herewith. Parnass further explains that it would violate his promise to that source to comply with the subpoena as narrowed by the Court. (Supp. Parnass Aff., ¶ 3-4).

3. Second, the Court's order erred in assuming that Parnass could produce records and information about what people told him about Doe's statements to Murphy and the Review Board while still protecting the identity of any confidential source. As Parnass explains in his Supplemental Affidavit, he has notes of communications with the confidential source which cannot be produced, even in redacted form, without effectively identifying the source to the defendants. (Second Parnass Aff. at ¶¶ 3-4). The same is true about the order that Parnass testify on this subject. (*Id.*). Moreover, if Parnass is required to testify and produce documents concerning his communications with non-confidential sources, the identities of those sources will tend to confirm the identity of the confidential source through process of elimination. Accordingly, the instruction in the Court's Order that Parnass produce the specified information "while protecting the identity of the source(s)" cannot, in fact, be accomplished. (July 29, 2022 Order at 5).

4. Third, the Court's decision erred by ordering compliance without first determining whether the defendants' need for this discovery (considering their alternative sources) outweighs the harm the subpoena will cause to the free flow of information. *Promulgation of Rules Regarding Protection of Confidential News Sources and Other Unpublished Information*, 395 Mass. 164, 171 (1985). Parnass established in his Motion for a Protective Order that enforcement of this subpoena has a propensity to chill the willingness of sources to speak to reporters on sensitive topics like clergy sexual abuse. As such, the burden is

on the defendants to overcome that threat by showing a material need for the information and exhaustion of other means. *Cumby v. Am. Med. Response, Inc.*, No. 3:18-CV-30050-MGM, 2019 WL 1118103, at *6 (D. Mass. Mar. 11, 2019) (Robertson, U.S.M.J.) (allowing motion to quash subpoena to MassLive for compelled production of investigative materials, finding that media's "interest in protecting its newsgathering and reporting functions from civil litigants' information requests outweighs [subpoenaing party's] interest in obtaining discovery of the records from MassLive.")

5. On the subject of balancing, the Court has found that a small part of defendants' subpoena is "potentially relevant" to the case, and that the subpoena is otherwise a "classic fishing expedition." (Order at 5). However, this relevance determination is only the beginning of the inquiry. Even a subpoena that seeks "potentially relevant" information must be quashed if the threat that it poses to the free flow of information outweighs the needs of the subpoenaing party. *Id.*

6. Here, the Court should find that defendants have failed to demonstrate a need that overcomes the harm their subpoena will cause to the First Amendment rights of Parnass and the news media if enforced. In addition to the points raised in the two Parnass affidavits, the Court should consider the fact that (as the Court observed in its Order) defendants have not "exhausted potential sources" of information other than Parnass before resorting to subpoenaing the press. (July 29 Order at 4); *Promulgation of Rules,* 395 Mass. at 171 (in determining whether there is a need to order compliance with a subpoena to the news media, the courts must consider "the availability of alternative remedies to compelled disclosure," and whether the subpoenaing party has availed itself of any such other means that may exist); *Sinnott*, 402 Mass. at 587 (rejecting enforcement of subpoena where it could not "be said that, on balance, the existence of other

potential sources was insignificant."). There were many witnesses to what John Doe said to the review board, and the record does not show that defendants deposed each of them. As such, and for the reasons stated above and in Parnass's earlier motion, the Court should reconsider its July 29 Order and find that defendants have not satisfied their burden on this motion.

Finally, given the public interest in the subject and the need to ensure all relevant information is before the Court, Parnass respectfully requests that the Court hold a hearing on this motion.

CONCLUSION

For the foregoing reasons, Larry Parnass respectfully requests that his Motion for Reconsideration be granted, and that defendants' subpoena to him be quashed in its entirety.

Respectfully Submitted,

LARRY PARNASS,

By his Attorney,

/s/ Jeffrey J. Pyle
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Telephone: (617) 456-8000
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jpyle@princelobel.com

Date: August 11, 2022

RULE 9C CERTIFICATION

I, Jeffrey J. Pyle, certify that on August 10, 2022, I discussed the subject matter of this motion with opposing counsel in a good faith effort to narrow the areas of disagreement to the fullest possible extent, but such effort was not successful.

/s/ Jeffrey J. Pyle
Jeffrey J. Pyle

CERTIFICATE OF SERVICE

I, Jeffrey J. Pyle, state that the foregoing document was served on counsel for each other party identified below by electronic mail pursuant to Superior Court Rule 9A on August 9, 2022.

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Counsel for The Defendant John J. Egan

/s/ Jeffrey J. Pyle
Jeffrey J. Pyle

COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, ss. SUPERIOR COURT
DOCKET NO. 2179CV00049

HAMPDEN COUNTY
SUPERIOR COURT
FILED

OCT - 3 2022

JOHN DOE

vs.

ROMAN CATHOLIC BISHOP OF SPRINGFIELD, A CORPORATION SOLE, & others[1]

MEMORANDUM AND ORDER ON MOTION FOR RECONSIDERATION

Berkshire Eagle Managing Editor Larry Parnass (Parnass) has moved for reconsideration of the Court's July 29, 2022, order allowing in part and denying in party the defendants' motion to compel Parnass to provide documents and testimony.[2] The court's order limited the area of inquiry and provided what it thought was a mechanism for Parnass to protect the identity of confidential sources. Parnass' motion asserts (1) he cannot produce documents or provide testimony about information provided by confidential sources without revealing their identities; and (2) the court did not properly weigh the defendants' need for the information against the harm disclosure would pose to the free flow of information. On the latter point, Parnass specifically faulted the court for not requiring the defendants to establish that they had exhausted all other sources of information.

Addressing the second point first, Parnass argues that the defendants have not shown the sought the requested information from the many witnesses John Doe's statements to Kevin Murphy and the Review Board. While the court agrees that the defendants have not made such a showing, Massachusetts law does not require that they do so. See *Dow Jones & Co. v. Superior Court*, 364 Mass. 317, 320 (1973). See also *Cumby v. American Medical Response*, No,

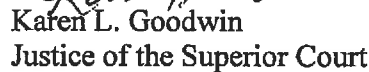
[1]Archbishop Mitchell T. Rozanski, Patricia McManamy, Monsignor Christopher Connelly, Jeffrey Trant, Kevin Murphy, Mark Dupont, John Egan, and John Hale.
[2] Parnass also moved for reconsideration of the court's parallel order on his motion for a protective order.

18cv30050-MGM, 2019 WL 1118103 (D. Mass. 2019) (noting that the Supreme Court has rejected an automatic requirement that non-confidential sources be exhausted). The court conducted the necessary balancing test in its initial order.

Parnass' argument on the first point, however, has caused the court to rethink its order as to information from confidential sources. In light of Parnass' affidavit stating that he cannot protect the identities of confidential sources simply by redacting their names, the court revises its order to apply only to nonconfidential sources. In the event the defendants wish to press their motion as to confidential sources, they will be required to demonstrate their efforts to obtain the information directly from those attending the meetings with Kevin Murphy and/or the Review Board.

Further, looking ahead toward the trial, the court is open to requiring that Parnass disclose whether any of the individuals identified as trial witnesses were confidential sources and, if so, to produce the information those sources provided to him.

In summary, the court revises its July 29, 2022, order to reflect it is compelling only information provided by nonconfidential sources as to what they told Parnass about Doe's statements to Murphy and/or the Review Board.



Karen L. Goodwin
Justice of the Superior Court

Dated: October 3, 2022

West's Kansas Statutes Annotated
Chapter 60. Procedure, Civil
Article 4. Rules of Evidence (Refs & Annos)
J. Miscellaneous Provisions

K.S.A. 60-480

60-480. Journalist privilege; definitions

Currentness

As used in K.S.A. 60-480 through 60-485, and amendments thereto:

(a) "Journalist" means: (1) A publisher, editor, reporter or other person employed by a newspaper, magazine, news wire service, television station or radio station who gathers, receives or processes information for communication to the public; or (2) an online journal in the regular business of newsgathering and disseminating news or information to the public.

(b) "Information" means any information gathered, received or processed by a journalist, whether or not such information is actually published, and whether or not related information has been disseminated, and includes, but is not limited to, all notes, outtakes, photographs, tapes and other recordings or other data of whatever sort that is gathered by a journalist in the process of gathering, receiving or processing information for communication to the public.

(c) "Acting as a journalist" means a journalist who is engaged in activities that are part of such journalist's gathering, receiving or processing information for communication to the public.

Credits
Laws 2010, ch. 114, § 1, eff. July 1, 2010.

K. S. A. 60-480, KS ST 60-480
Statutes are current through laws enacted during the 2022 Regular Session of the Kansas Legislature effective on July 1, 2022. Some statute sections may be more current, see credits for details.

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West's Kansas Statutes Annotated
Chapter 60. Procedure, Civil
Article 4. Rules of Evidence (Refs & Annos)
J. Miscellaneous Provisions

K.S.A. 60-481

60-481. Journalist privilege

Currentness

Except as provided in K.S.A. 60-482, and amendments thereto, a journalist cannot be adjudged in contempt by a judicial, legislative, administrative body or any other body having the power to issue subpoenas, for refusing to disclose, in any state or local proceeding, any information or the source of any such information procured while acting as a journalist.

Credits

Laws 2010, ch. 114, § 2, eff. July 1, 2010.

K. S. A. 60-481, KS ST 60-481

Statutes are current through laws enacted during the 2022 Regular Session of the Kansas Legislature effective on July 1, 2022. Some statute sections may be more current, see credits for details.

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West's Kansas Statutes Annotated
Chapter 60. Procedure, Civil
Article 4. Rules of Evidence (Refs & Annos)
J. Miscellaneous Provisions

K.S.A. 60-482

60-482. Same; compelled disclosure

Currentness

(a) A journalist may not be compelled to disclose any previously undisclosed information or the source of any such information procured while acting as a journalist until the party seeking to compel the disclosure establishes by a preponderance of the evidence in district court that the disclosure sought:

(1) Is material and relevant to the proceeding for which the disclosure is sought;

(2) could not, after a showing of reasonable effort, be obtained by readily available alternative means; and

(3) is of a compelling interest.

(b) For purposes of this section, a "compelling interest" is evidence likely to be admissible and has probative value that is likely to outweigh any harm done to the free dissemination of information to the public through the activities of journalists, which includes, but is not limited to:

(1) The prevention of a certain miscarriage of justice; or

(2) an imminent act that would result in death or great bodily harm.

Interests that are not compelling include, but are not limited to, those of parties whose litigation lacks sufficient grounds, is abusive or is brought in bad faith.

Credits
Laws 2010, ch. 114, § 3, eff. July 1, 2010.

K. S. A. 60-482, KS ST 60-482
Statutes are current through laws enacted during the 2022 Regular Session of the Kansas Legislature effective on July 1, 2022. Some statute sections may be more current, see credits for details.

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West's Kansas Statutes Annotated
Chapter 60. Procedure, Civil
Article 4. Rules of Evidence (Refs & Annos)
J. Miscellaneous Provisions

K.S.A. 60-483

60-483. Same; hearing; disclosure

Currentness

The party claiming the privilege and the party seeking to compel disclosure shall be entitled to a hearing. After such hearing, the court may conduct an in camera inspection to determine if such disclosure is admissible. If the court then specifically finds that such disclosure is admissible and that its probative value outweighs any harm to the free dissemination of information to the public through the activities of journalists, then the court shall direct production of such disclosure and such disclosure only.

Credits
Laws 2010, ch. 114, § 4, eff. July 1, 2010.

K. S. A. 60-483, KS ST 60-483
Statutes are current through laws enacted during the 2022 Regular Session of the Kansas Legislature effective on July 1, 2022. Some statute sections may be more current, see credits for details.

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Chapter 60. Procedure, Civil
Article 4. Rules of Evidence (Refs & Annos)
J. Miscellaneous Provisions

K.S.A. 60-484

60-484. Same; costs and attorney fees

Currentness

If the court finds that the party seeking to compel disclosure had no reasonable basis to request such disclosure, the court may assess costs and attorney fees against the party seeking to compel disclosure. If the court finds that the party claiming the privilege had no reasonable basis to claim such privilege, the court may assess costs and attorney fees against the party claiming the privilege. If an application for attorney fees is made, the judge shall set forth the reasons for awarding or denying such costs or fees.

Credits
Laws 2010, ch. 114, § 5, eff. July 1, 2010.

K. S. A. 60-484, KS ST 60-484
Statutes are current through laws enacted during the 2022 Regular Session of the Kansas Legislature effective on July 1, 2022. Some statute sections may be more current, see credits for details.

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West's Kansas Statutes Annotated
Chapter 60. Procedure, Civil
Article 4. Rules of Evidence (Refs & Annos)
J. Miscellaneous Provisions

K.S.A. 60-485

60-485. Same; rights and privileges in addition to others

Currentness

The rights and privileges provided by this act are in addition to any other rights guaranteed by the constitutions of the United States or the state of Kansas. The provisions of K.S.A. 60-480 through 60-485, and amendments thereto, shall not be construed to create or imply any limitation on or to otherwise affect a privilege guaranteed by the constitutions of the United States or the state of Kansas.

Credits

Laws 2010, ch. 114, § 6, eff. July 1, 2010.

K. S. A. 60-485, KS ST 60-485

Statutes are current through laws enacted during the 2022 Regular Session of the Kansas Legislature effective on July 1, 2022. Some statute sections may be more current, see credits for details.

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

SUSAN PFANNENSTIEL; AMBER HARRINGTON; NATASHA MCCURDY; KIMBERLY MEADER; and JARAH COOPER; Plaintiffs, vs. STATE OF KANSAS; HERMAN JONES, in his individual capacity; JASON DE VORE, in his individual capacity; Defendants.	Case No. 21-cv-04006-HLT-JPO

NOTICE OF INTENT TO ISSUE BUSINESS RECORD SUBPOENA

Pursuant to K.S.A. 60-245a(e), you are hereby notified that the attached Subpoena of Business Records will be issued to the following entity five days hereafter, with the response to said subpoena being due fourteen days (14) thereafter:

KMBC-TV
6455 Winchester Ave.
Kansas City, MO 64133

HITE, FANNING & HONEYMAN L.L.P.

/s/ Gaye B. Tibbets

Gaye B. Tibbets, #13240
100 N. Broadway, Ste. 950
Wichita, KS 67202-2209
Telephone: (316) 265-7741
Facsimile: (316) 267-7803
Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of October, 2022, I electronically filed the foregoing Notice with the clerk of the court by using the CM/ECF system which will send a notice of electronic filing to all counsel of record.

/s/ Gaye B. Tibbets
Gaye B. Tibbets

UNITED STATES DISTRICT COURT

for the

District of Kansas

Susan Pfannenstiel, et al. *Plaintiff* v. State of Kansas, et al. *Defendant*	)	Civil Action No. 21-CV-04006-HLT-ADM

SUBPOENA TO PRODUCE DOCUMENTS, INFORMATION, OR OBJECTS OR TO PERMIT INSPECTION OF PREMISES IN A CIVIL ACTION

To: KMBC-TV
6455 Winchester Ave., Kansas City, MO 64133

(Name of person to whom this subpoena is directed)

☑ *Production:* **YOU ARE COMMANDED** to produce at the time, date, and place set forth below the following documents, electronically stored information, or objects, and to permit inspection, copying, testing, or sampling of the material: Any and all interview recordings whether audio, video, written or otherwise of Susan Pfannenstiel, Natasha McCurdy, Amber Harrington, Kimberly Blevins (formally Meader), and Jarah Cooper. This includes outtakes or other unaired footage. Also provide all dates of said recordings/interviews.

Place: Hite, Fanning & Honeyman LLP 100 N. Broadway, Suite 950, Wichita, KS 67202 Or via email at garrett@hitefanning.com	Date and Time: November 14, 2022

☐ *Inspection of Premises:* **YOU ARE COMMANDED** to permit entry onto the designated premises, land, or other property possessed or controlled by you at the time, date, and location set forth below, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

Place:	Date and Time:

The following provisions of Fed. R. Civ. P. 45 are attached – Rule 45(c), relating to the place of compliance; Rule 45(d), relating to your protection as a person subject to a subpoena; and Rule 45(e) and (g), relating to your duty to respond to this subpoena and the potential consequences of not doing so.

Date: ______________

CLERK OF COURT

____
Signature of Clerk or Deputy Clerk

OR

/s/ Gaye B. Tibbets, #13240
Attorney's signature

The name, address, e-mail address, and telephone number of the attorney representing *(name of party)* State of Kansas, et al., who issues or requests this subpoena, are:
Gaye B. Tibbets, Hite, Fanning & Honeyman LLP, 100 N. Broadway, Ste. 950, Wichita, KS 67202

Notice to the person who issues or requests this subpoena

If this subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of premises before trial, a notice and a copy of the subpoena must be served on each party in this case before it is served on the person to whom it is directed. Fed. R. Civ. P. 45(a)(4).

Civil Action No. 21-CV-04006-HLT-ADM

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

I received this subpoena for *(name of individual and title, if any)* ______________________

on *(date)* __________ .

☑ I served the subpoena by delivering a copy to the named person as follows: via certified mail to the registered agent for KMBC-TV, 6455 Winchester Ave., Kansas City, MO 64133

on *(date)* 10/26/2022 ; or

☐ I returned the subpoena unexecuted because: ______________________

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also tendered to the witness the fees for one day's attendance, and the mileage allowed by law, in the amount of

$ __________ .

My fees are $ __________ for travel and $ __________ for services, for a total of $ 0.00 .

I declare under penalty of perjury that this information is true.

Date: 10/26/2022

/s/ Gaye B. Tibbets, #13240

Server's signature

Gaye B. Tibbets, Attorney

Printed name and title

Hite, Fanning & Honeyman LLP
100 N. Broadway, Suite 950
Wichita, KS 67202

Server's address

Additional information regarding attempted service, etc.:

Federal Rule of Civil Procedure 45 (c), (d), (e), and (g) (Effective 12/1/13)

(c) Place of Compliance.

(1) ***For a Trial, Hearing, or Deposition.*** A subpoena may command a person to attend a trial, hearing, or deposition only as follows:
(A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or
(B) within the state where the person resides, is employed, or regularly transacts business in person, if the person
(i) is a party or a party's officer; or
(ii) is commanded to attend a trial and would not incur substantial expense.

(2) ***For Other Discovery.*** A subpoena may command:
(A) production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and
(B) inspection of premises at the premises to be inspected.

(d) Protecting a Person Subject to a Subpoena; Enforcement.

(1) ***Avoiding Undue Burden or Expense; Sanctions.*** A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.

(2) ***Command to Produce Materials or Permit Inspection.***
(A) *Appearance Not Required.* A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.
(B) *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing, or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:
(i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.
(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) ***Quashing or Modifying a Subpoena.***
(A) *When Required.* On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:
(i) fails to allow a reasonable time to comply;
(ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);
(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or
(iv) subjects a person to undue burden.
(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:
(i) disclosing a trade secret or other confidential research, development, or commercial information; or
(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.
(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:
(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and
(ii) ensures that the subpoenaed person will be reasonably compensated.

(e) Duties in Responding to a Subpoena.

(1) ***Producing Documents or Electronically Stored Information.*** These procedures apply to producing documents or electronically stored information:
(A) *Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.
(B) *Form for Producing Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.
(C) *Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.
(D) *Inaccessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) ***Claiming Privilege or Protection.***
(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:
(i) expressly make the claim; and
(ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.
(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(g) Contempt.
The court for the district where compliance is required—and also, after a motion is transferred, the issuing court—may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.

For access to subpoena materials, see Fed. R. Civ. P. 45(a) Committee Note (2013).