

## Pyrrhic Victory in Convertino Case

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We have closely followed the twists and turns in Detroit Free Press reporter David Ashenfelter's efforts to avoid being forced to reveal his sources in the civil action against the Department of Justice brought by former federal prosecutor Richard Convertino. This spring, a federal judge in Michigan allowed Ashenfelter to invoke his rights under the 5th Amendment in order to avoid testifying under oath about his sources.

Last week, the collateral damage from Convertino's legal crusade continued to spread. This time, Convertino was seeking some 736 DOJ documents that he claimed would provide him information as to the identity of the DOJ employee who presumably leaked to Ashenfelter information about the investigation into Convertino.

In a loss for Convertino that, ironically, also constitutes a loss for media interests, D.C. federal district court judge Royce Lamberth ruled last week that all 736 documents were protected from disclosure by a variety of privileges, including the deliberative process privilege. In addition, in the same opinion, Judge Lamberth held that private emails sent by federal prosecutor Jonathan Tukul from his DOJ account were covered by the attorney-client privilege and need not be produced.

As to the first part of the opinion, the deliberative process privilege is, all too often, the exception to the Freedom of Information Act that swallows the rule. It covers "advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." The privilege is easily used as a shield by government agencies to protect from disclosure all variety of internal documents that might otherwise be subject to public disclosure. While Judge Lamberth's opinion did not appear to break any new ground here, it certainly confirmed the many ways that government employees can make disclosure of records more complicated.

The second part of the opinion was more interesting, as it discussed an area of some interest to open government advocates across the country -- the status of private emails sent from a government account. In this case, Convertino argued that Tukul should not be able to invoke the attorney-client privilege for these 36 emails -- which were sent to or from his personal attorney -- because, by being sent through the government's server, they were, *per se*, revealed to a third party. Convertino asserted that because DOJ email policy explicitly gave the Department the right to read any DOJ email, Tukul had no reasonable expectation of privacy in these emails.

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Judge Lamberth disagreed, holding that "[o]n the facts of this case, Mr. Tukul's expectation of privacy was reasonable. The DOJ maintains a policy that does not ban personal use of the company e-mail. Although the DOJ does have access to personal e-mails sent through this account, Mr. Tukul was unaware that they would be regularly accessing and saving e-mails sent from his account."

The ruling clearly rolls back the widely held view that what is done on government computers is presumptively the property of the government, and therefore the people. Journalists in states with public records acts may now find themselves fighting in court for what was once assumed to be clearly public -- emails sent from government accounts by government employees.