

## Reporter Invokes Fifth Amendment Privilege to

### Digital Media and Data Privacy Law Blog

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A reporter for the Detroit Free Press took an unusual approach last week in an effort to protect the identity of a confidential source -- he invoked the Fifth Amendment privilege against self-incrimination.

This dispute arose in the context of a civil lawsuit brought by former federal prosecutor Richard Convertino in federal court in the District of Columbia. Convertino led the prosecution of the so-called "Detroit Sleeper Cell" defendants shortly after September 11, 2001; however, the Justice Department subsequently removed Convertino from his post and asked that the convictions he obtained in that matter be dismissed. In the complaint he filed in the pending civil action, Convertino -- who was himself acquitted of charges that he conspired to conceal exculpatory evidence and lied to a federal judge in connection with the prosecution -- contends that the Department of Justice disclosed information about him to the news media in violation of the federal Privacy Act.

In connection with the civil lawsuit, Convertino sought to depose Detroit Free Press reporter David Ashenfelter. In particular, he sought from Ashenfelter the identity of a confidential source who told the newspaper that Convertino was being investigated for misconduct in connection with a terrorism prosecution. Information from that source appeared in a January 2004 article that Ashenfelter authored. Ashenfelter and the Detroit Free Press fought the subpoena in federal court in Michigan, moving to quash the subpoena and opposing Convertino's motion to compel Ashenfelter to comply with the subpoena. In these papers Ashenfelter relied on traditional First Amendment arguments, which we have discussed in a prior post. The district court rejected these arguments, and ordered the deposition to move forward in a written decision, which was subsequently reaffirmed on the newspaper's request for reconsideration.

Having lost on his First Amendment arguments, Ashenfelter appeared for his deposition last week. However, during the deposition he still refused to answer questions concerning his confidential source, invoking the Fifth Amendment's privilege against self-incrimination. The basis of his invocation of the privilege was Convertino's allegation that Ashenfelter, in refusing to reveal his source, was aiding the crime Convertino contends the source committed when the original leak occurred in 2004. The Detroit Free Press issued a statement after the deposition adjourned, stating that "the First Amendment ought to be enough to protect journalists" and citing the matter as an example of why Congress should enact a federal shield law to protect reporters from being

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compelled to identify their sources in federal proceedings. Convertino's attorney stated that he may ask the court to hold Ashenfelter in contempt for refusing to answer questions about his source.