IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE.	)	
	)	
V.	)	
	)	
DOMINIQUE BENSON,	)	DEF. I.D.: 1409003743
CHRISTOPHER RIVERS,	)	DEF. I.D.: 1409001584
	)	
Defendants.	)	

Date Submitted: April 12, 2016
Date Decided: April 27, 2016

OPINION.
Motion to Quash Subpoenas of Phil Freedman and Cris Barrish.
DENIED.

Colleen K. Norris, Esquire, Karin M. Volker, Esquire and Jenna R. Milecki, Deputy Attorneys General, Wilmington, Delaware. Attorneys for the State of Delaware.

Patrick J. Collins, Esquire and Benjamin S. Gifford, IV, Esquire, Wilmington, Delaware. Attorneys for Dominique Benson.

Brian J. Chapman, Esquire and John A. Barber, Esquire, Wilmington, Delaware. Attorneys for Christopher Rivers.

BUTLER, J.

FACTS

The press of trial did not permit the Court to enter a formal Opinion with respect to the News Journal's Motion to Quash a Subpoena, but it now takes this opportunity to set forth its reasons for denying the Motion in more detail. The primary reason for formalizing the Court's Opinion is that, some 13 years after its publication, *State v. Rogers*[1] remains the only formal decision interpreting Delaware's Reporters' Privilege Act, codified at 10 *Del. C.* § 4321 et seq.

The facts necessary for a determination of this issue are as follows. Christopher Rivers is accused of hiring others to carry out the murders of his business partner, Joseph Connell, and Joseph's wife, Olga Connell.

Rivers went to the police station on the day of the murders in September 2013 for a brief interview. But once he was identified as a suspect, Rivers invoked his right to counsel and declined further questioning. Thus, the police never had a subsequent opportunity to speak to Rivers.

While there was apparently some suspicion of Rivers' involvement early in the investigation, Rivers was not arrested for the murders until almost one year later. During that time, the News Journal wrote many, many stories detailing what its reporters were able to uncover about Rivers, Connell and their auto repair business. At least some of those stories cast doubt on whether Rivers was a truly a

[1] 820 A.2d 1171 (Del. 2003).

grieving business partner and made little secret of the suspicions that were growing about his involvement.

After the News Journal printed a number of such stories, a meeting was arranged between a News Journal reporter, Christopher Rivers, and Rivers' attorney. The interview—or at least most of it—was recorded on video and lasted approximately 25 minutes. The News Journal edited the longer video into a video clip of approximately 3 minutes, which it then posted on its website, Delaware Online. In the clip, Rivers declares his shock and dismay at the deaths of Joseph and Olga Connell and laments the demise of his "best friend."

The State, meanwhile, was building a case that depicted a relationship between Rivers and Joseph Connell that was completely at odds with the characterization of the relationship Rivers made in the News Journal interview. Indeed, the News Journal suggested some irony in Rivers' protestations of friendship with Connell as its reporting showed deepening suspicions that Rivers was somehow involved in the homicide.

The grand jury returned an indictment against Rivers and the State now has the cooperation and expected testimony of Joshua Bey, an admitted co-conspirator in the homicide. Bey is expected to testify that he had a financial arrangement with Rivers to procure the killing of Joseph and Olga Connell and he did in fact arrange with co-defendants Dominique Benson and Aaron Thompson to do so.

The State has subpoenaed the News Journal and its reporter, seeking a copy of the whole video recorded between the News Journal reporter and Mr. Rivers. Thus, some of what the State seeks is material that the News Journal published on its website, some of it is what the News Journal elected to edit out of the online version. And therein lies the rub: the News Journal has filed a Motion to Quash the subpoena to the extent it seeks information gathered by its reporter that it has chosen not to make public.

BACKGROUND

There is a long and healthy tension between the government and the press. And it was long-ago settled that the right of the press to be free from government intrusion is perhaps our most treasured right.[2]

Whether there is any such "thing" as a "reporter's privilege" within the ambit of the First Amendment is, somewhat surprisingly, a bit less than crystal clear.[3] In *Branzburg v. Hayes*, the United States Supreme Court held that reporters could be compelled to testify before a grand jury.[4] In rejecting the reporters' arguments that they possessed a privilege not to identify the sources or substance

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[2] *See New York Times Co. v. Sullivan*, 376 U.S. 254, 269-70 (1964).

[3] "The existence and scope of the qualified reporter's privilege in the common law is, at best, unsettled." *Rogers*, 820 A.2d at 1179.

[4] 408 U.S. 665, 690 ("We are asked to create another [testimonial privilege] by interpreting the First Amendment to grant newsmen a testimonial privilege that other citizens do not enjoy. This we decline to do.").

of information they confidentially obtained in preparing news reports the majority explained:

> [W]e perceive no basis for holding that the public interest in law enforcement and in ensuring effective grand jury proceedings is insufficient to override the consequential, but uncertain, burden on news gathering that is said to result from insisting that reporters, like other citizens, respond to relevant questions to put them in the course of a valid grand jury investigation or criminal trial.[5]

The Court was reluctant to recognize a constitutional privilege where it was "unclear how often and to what extent informers are actually deterred from furnishing information when newsmen are forced to testify before a grand jury."[6]

In a brief 3-paragraph concurrence, Justice Powell underscored the majority's position "that no harassment of newsmen will be tolerated."[7] He considered circumstances where a reporter might be called upon to give information that was remote and tenuous to the subject of the investigation or to disclose confidential source information and assured "the courts will be available to newsmen under circumstances where legitimate First Amendment interests require protection."[8] In Justice Powell's view, claims to privilege should be judged on a case-by-case basis to strike a balance between the "vital constitutional and

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[5] *Id.* at 690-91.
[6] *Id.* at 693.
[7] 408 U.S. at 709-10 (Powell, J., concurring).
[8] *Id.* at 710.

societal interests" necessarily involved in compelling reporters to give testimony in criminal investigations and trials.[9]

Notwithstanding the Supreme Court's majority opinion (in which Justice Powell joined) rejecting the notion that the First Amendment provided an all-encompassing reporter's privilege, courts have interpreted Justice Powell's concurring opinion to create a qualified reporter's privilege under some circumstances and for varying reasons. In the wake of *Branzburg*, some federal courts have developed somewhat unwieldy criteria for adjudicating a reporter's claim of privilege. As basically as it can be stated, the party seeking enforcement of a subpoena in those courts must show: 1) materiality; 2) necessity; and 3) a lack of alternative sources for the information,[10] and a failure to satisfy any one of the criteria may bar enforcement of the subpoena.

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[9] *Id.*

[10] *See, e.g.*, *In re Application to Quash Subpoena to Nat'l Broad. Co., Inc.*, 79 F.3d 346, 351 (2d Cir. 1996) (party seeking privileged reporter testimony must make "a clear and specific showing that the news: (i) is highly material and relevant; (ii) is critical or necessary to the maintenance of a party's claim, defense or proof of an issue material thereto; and (iii) is not obtainable from any alternative source."); *U.S. v. Nat'l Talent Assocs., Inc.*, 1997 WL 829176, at *2 (D.N.J. Sept.4, 1997) (party seeking to overcome reporter's privilege must establish that the information is relevant and material, and the court must determine on a case-by-case basis whether (1) the party made efforts to obtain information from other source; (2) there is no alternative source for the information; and (3) the information sought is crucial to the claim); *U.S. v. Marcos*, 1990 WL 74521, at *2 (S.D.N.Y. June 1, 1990) (Disclosure of reporter's unpublished information may be ordered only upon a clear and specific showing that information is highly material and relevant, necessary or critical to the maintenance of the claim, and not obtainable from other available sources.").

The News Journal relied on a number of federal cases that address the reporters' privilege using the federal standard.[11] Those cases, while informative, are ultimately not controlling in this case because the General Assembly of Delaware passed its own "Reporter's Privilege Act,"[12] and provided a "detailed road map" for its application.[13] Notably, the Act does not employ a "meets all criteria" standard for determining whether the subpoenaing party has overcome the privilege. Rather, it requires the Court to determine whether "the public's interest in having the reporter's testimony outweighs the public interest in keeping the information confidential."[14] Thus, Delaware's "balancing test" is qualitatively different from the "threshold" or "criteria" tests applied in federal courts. This,

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[11] These cases, taken together, lead the Court to its conclusion that while federal courts talk the talk of employing a "balancing" test when considering claims of privilege, they appear to rest their rulings on a failure to meet any one of the criteria with little consideration to weighing the other relevant considerations. *See, e.g., U.S. v. National Talent Associates, Inc.*, 1997 WL 829176, at *4-5 (D.N.J. Sept. 4, 1997 (quashing government subpoena for NBC's "Dateline" outtakes where government failed to establish necessity and could seek the information through alternative sources); *Damiano v. Sony Music Entertainment, Inc.*, 168 F.R.D. 485, 487, 497-98 (D.N.J. 1996) (motion to compel production of unpublished portions of a reporter's interview denied where unpublished portions were material and relevant but did not "go to the heart of the claim" and therefore unnecessary and plaintiff failed to establish an absence of alternative sources); *U.S. v. Marcos*, 1990 WL 74521, at *3-4 (quashing subpoena for CBS "60 Minutes" interview including defendant's exculpatory statements where disclaimers were not necessary or critical to government's case despite being circumstantially probative as to defendant's consciousness of guilt); *Palandjian v. Pahlavi*, 103 F.R.D. 410 (D.D.C. 1984) (quashing subpoena where the information defendant sought was available from alternative sources); *Brown & Williamson Tobacco Corp. v. Wigand*, 643 N.Y.S.2d 92 (App. Div. 1996) (quashing subpoena where outtakes were not critical to the action because litigant had "ample proof" of alleged breach of confidentiality agreement in the parts of the interview that were publicly broadcast).

[12] 10 *Del. C.* § 4321.

[13] *Rogers*, 820 A.2d at 1179.

[14] 10 *Del. C.* § 4323(a).

unfortunately, renders the federal decisions in this area, on which the News Journal relies, of limited value.

In addition to our statutory mandate, we have a single case decided under the statute. That case is quite helpful in resolving this dispute, and therefore, is worthy of some extended discussion.

State v. Rogers involved a liquor store holdup during which shots were fired and the store owner was critically injured.[15] A News Journal reporter went to the scene shortly thereafter and interviewed bystanders, including defendant Rogers.[16] In the subsequent news story, Rogers was quoted saying that he frequented the liquor store to keep the store owner company.[17]

Rogers was interviewed by police a few days later and he told police he was cleaning out a basement across town at the time of the shooting.[18] Once the owner recovered from her injuries, she identified Rogers as the perpetrator and the police, disbelieving his alibi, arrested Rogers.[19] The News Journal then published a second story, further detailing Rogers' conversation with the reporter, this time referencing Rogers' statement that he was "away" at the time of the shooting.[20]

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[15] 820 A.2d at 1174.
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.*

Then, six days before trial, the prosecutor spoke directly with the reporter.[21] The reporter told the prosecutor that Rogers had told the reporter that he was "at the hospital" at the time of the shooting.[22] This conversation revealed more than had been reported in the News Journal report. Subsequently, the prosecution issued a subpoena to the News Journal seeking not only the date, time, and location of the initial interview but also Rogers' statement that he was at the hospital at the time of the shooting.[23]

To be clear, the material sought in *Rogers* included both the objective facts of the first interview and information in the reporter's possession that had not previously been reported to the public. The unreported information was sought not because it proved Rogers' complicity in the crime but rather refuted the allegedly false alibi he had given the police that he was cleaning out a basement across town. Analyzing the subpoena using the balancing test required by the Act, the Court held that the nature of the information sought and the circumstances under which it was obtained "compel[led] the conclusion that the qualified reporter's privilege must give way to the public's right to a full and fair trial in [a] criminal case where

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[21] *Id.*
[22] *Id.*
[23] *Id.*

all information is presented to the fact finder for use in its search for the truth."[24] Accordingly, the Court denied the reporter's motion to quash.

Indeed, to the extent they are factually distinguishable, the *Rogers* Court authorized disclosure of a reporter's field notes, not a portion of videotape as the State subpoenaed here, the credibility of which cannot seriously be doubted. Thus, the *Rogers* decision reached somewhat further into the reporter's protected area than the evidence sought here.

ANALYSIS

A. The Reporter's Privilege Act applies.

Both sides concede the Act applies. The Act does not differentiate between criminal or civil cases and does not differentiate between protection of confidential sources and known sources with unpublished material. All claims of privilege advanced by news reporters in Delaware are governed by the Act. It is therefore incumbent that the Court analyze the subpoena according to the requirements set forth in the Act.

B. The News Journal enjoys a qualified privilege in this case.

Pursuant to the Act, a reporter enjoys a qualified privilege in adjudicative proceedings "if the reporter states under oath that the disclosure of the information would violate an express or implied understanding with the source under which the

[24] *Id.* at 1183.

information was originally obtained or would substantially hinder the reporter in the maintenance of existing source relationships or the development of new source relationships."[25]

The Court is in receipt of sworn affidavits from the News Director of the News Journal, and a former News Journal reporter. Each swears that disclosing the unpublished portions of Rivers' interview would have a chilling effect on the reporter's ability to develop new source relationships.

The Court is hesitant to accept blanket assertions by the reporter as sufficient to invoke the privilege under the Act. Nevertheless, the statutory language requires only that the reporter "state under oath" without more. Thus, assuming that the *ipse dixit* of the reporter meets the pleading burden under the Act, the Court will address each of the enumerated factors in turn.

C. The State has carried its burden to overcome the privilege.

In determining whether the State has carried its burden to overcome the reporter's privilege, the Court must determine whether "the public interest in having the reporter's testimony outweighs the public interest in keeping the information confidential."[26] The Act provides:

> [T]he judge shall take into account 1) the importance of the issue on which the information is relevant, 2) the efforts that have been made by the subpoenaing party to acquire the evidence on the issue from

[25] 10 *Del. C.* § 4322.
[26] 10 *Del. C.* § 4323(a).

> alternative sources, 3) the sufficiency of the evidence available from alternative sources, 4) the circumstances under which the reporter obtained the information, and 5) the likely effect that the disclosure of the information will have on the future flow of the information to the public.[27]

The Court must balance the competing public interests with all of the statutory factors in mind; no single factor is dispositive.

1. The Importance of the Issue on which the Information is Relevant

This is a statement made by a suspect that the State alleges was the genesis of a murder-for-hire plot—a crime that by its very nature involves secrecy. It almost goes without saying that any statement made by such a suspect—inculpatory or exculpatory—would be highly relevant to the case. An airtight alibi explained to the reporter at a time before his arrest would be relevant enough to potentially secure his release from legal jeopardy. A demonstrably false statement put out for the purpose of convincing the public he is innocent may have the exact opposite effect. Either way, statements by a defendant, particularly in a murder-for-hire plot, are always going to be highly relevant and acutely important to determining the truth.

And while we must acknowledge that the Act applies to all claims of privilege whether in the context of civil or criminal proceedings, the mere fact that it applies does not mean that all proceedings are equally important or that the same

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[27] *Id.*

weight should be applied to each consideration, regardless of the nature of the proceedings. This is a first degree murder prosecution, carrying with it the most significant consequences provided in our law. Both the public and the defendant have a profound interest in the search for the truth in such a case.

2. The State's Efforts to Acquire the Information From Alternative Sources

Here, the State did indeed acquire a statement from Rivers on the date the homicide was discovered. It is quite likely that Rivers' statement to homicide detectives on the day of the murders differs in significant respects from the statement Rivers gave to the News Journal. The portion of the video published by the News Journal certainly appears to suggest so.

As noted, Rivers invoked his right to remain silent and was not otherwise "available." In addition, we can suppose that even without Rivers' cooperation, it might have been possible to subpoena his attorney, and the attorney might have been asked to convey his recollection of the information Rivers gave to the News Journal in the recorded interview. Recognizing as we must the inherit problems in asking an attorney to disclose information conveyed in a statement that was admittedly not governed by the attorney-client privilege, the Court cannot be blind to the fact that any statement made by the attorney would necessarily be his best recollection while a copy of the videotape itself would leave virtually no doubt that the statement was exactly what Rivers said. Notwithstanding the theoretical

availability of Rivers' lawyer to deliver the information, the Court here holds that as a practical matter there was no "alternative source" from which to acquire the information – the recorded statement of Rivers.

3. The Circumstances under Which the Reporter Obtained the Information

As to this factor, as in *Rogers*, the State's argument is quite persuasive. While exactly who called whom is lost to history, it is self-evident that the News Journal was enthusiastic to get a video-recorded statement from the lead suspect in a murder-for-hire case. Likewise, it is self-evident that Rivers had concluded that this was the medium through which he could tell his side of "the story" in a controlled environment, with counsel present, to a reporter who Rivers could presume would be more interested in getting a story—any story—than making Rivers answer to more piercing, uncomfortable questions. It was thus a mutually beneficial arrangement by both Rivers and the News Journal reporter.

Disclosure of the information here will not betray a confidential source.[28] As the Court said in *Rogers*, "To the extent she would be asked to reveal unpublished material, the information she will be asked to disclose is hidden only be a more expedient choice of words in the story."[29] Here, Rivers clearly intended his entire recorded statement to be available for public display. The News Journal cut portions of the video recording presumably for reasons of journalistic style.

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[28] *See Rogers,* 820 A.2d at 1182.
[29] *Id.*

The News Journal has not argued that any portion of the unpublished content was redacted for any other reason.

The circumstances under which the reporter obtained the information demonstrate clearly and quite graphically that neither Rivers nor the reporter expected the interview to be treated in any way confidentially.

4. *The Likely Effect That Disclosure of the Information Will Have on the Future Flow of Information to the Public.*

The Court must approach this factor with sensitivity to the fact that, in the affidavits accompanying the News Journal's Motion to Quash, its affiants swear to their concern that enforcement of this subpoena will have a "chilling effect" on the willingness of witnesses to come forward to the News Journal to tell their story in the future.

Nonetheless, the Court cannot simply accept without question the notion that the subpoena must be quashed on the mere assertion by a reporter that enforcement will "chill" future cooperation with the news media. To do so would be to give reporters a blanket privilege over any subpoena, quashing subpoenas on the simple "say so" of a "chilling effect" and vitiating the balancing required under the Act.

At the outset, it is difficult for the Court, which is not a news gathering organization, to test this assertion. If Rivers, for example, had given this statement on a promise of anonymity, or on a promise that he alone could exercise editorial

control over what portions of the statement he gave would be made public, the News Journal's assertions of a potential "chilling effect" would be more persuasive. Here, there is no evidence—indeed, the News Journal does not argue—that there was some agreement between the reporter and Rivers as to what would be published online. As noted in *Rogers*, "When a news source freely volunteers his identity, consents to attribution, and places no restrictions on the use of the information he has provided, it can reasonably be inferred that he has abandoned any expectation of confidentiality."[30]

In the seminal *Branzburg* case discussed above, the Court heard arguments about a "chilling effect" and noted that "[e]stimates of the inhibiting effect of such subpoenas on the willingness of informants to make disclosures to newsmen are widely divergent and to a great extent speculative."[31] *Branzburg* was not one but actually four cases consolidated for decision, all of which involved reporters' refusal to testify before a grand jury because they had specifically promised their sources confidentiality. Nonetheless, all were forced to testify before the grand jury. While it is easy enough for the reporter to file an affidavit with the Court alleging a "chilling effect" would result from compliance with the subpoena at issue here, there is no evidence of a promise of confidentiality, no effort to conceal his identity, and no further evidence presented by the News Journal as to exactly

[30] *Id.* at 1182-83.
[31] *Branzburg*, 408 U.S. at 693-94.

how disclosure of the videotape in question would cause this chilling effect about which it expresses concern.

CONCLUSION

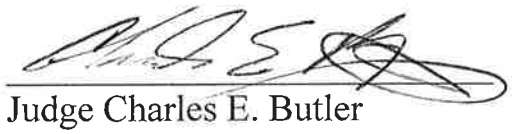
Mindful of the "big picture" balancing called for under the Act, the Court understands that the competing interests provided by statute are: 1) the public interest in disclosure; and 2) the public interest in non-disclosure. The public interest in disclosure in this case is articulated in *Branzburg*: "'the public . . . has a right to every man's evidence,' except for those persons protected by a constitutional, common-law, or statutory privilege."[32] As the Court observed, the public has a profound interest in having all information available in the search for the truth in this case.

The public interest in non-disclosure can be described as its interests in permitting the free flow of information from news sources; in confidence that the reporting is factually accurate; and in knowing that the press operates with little if any government interference or control. We see little, if any, damage to these concerns by compliance with the subpoena at issue here.

The Court retains its deep respect for the First Amendment and well appreciates the fact that in Delaware the News Journal is in many respects the only source available for statewide news. With due regard to the important—indeed

[32] *Id.* at 688 (internal citations omitted).

essential—function that the News Journal and its reporters play in the life of our State, having balanced the competing interests as we are called upon to do under the Reporter's Privilege Act, the Court must nevertheless enforce the instant subpoena.



Judge Charles E. Butler