STATE OF VERMONT
ORANGE COUNTY, SS.

James H. Spooner, *Plaintiff*	)	Orange County Superior Court
	)	Docket No. 129-7-04 OeCv
v.	)	
	)	
Town of Topsham, *Defendant*	)	

DECISION and ORDER
regarding
HENRY BUERMEYER'S MOTION TO QUASH SUBPOENA

Henry Buermeyer is a newspaper reporter who has been subpoenaed to testify at a deposition in this case, and who has moved to quash the subpoena. Plaintiff James Spooner's suit against the Town of Topsham is for age discrimination. Mr. Spooner claims that in 2001 when he applied for the open position of road foreman, he was the most qualified applicant but the Town hired another person because he was younger. The members of the Selectboard explained the reasons for their hiring decision at the meeting on September 10, 2001. Mr. Buermeyer was present and reported the event in a published newspaper story. Plaintiff seeks evidence from him about exactly what certain Selectboard members said at the meeting when they explained their decision. Mr. Buermeyer claims a journalist's privilege. He maintains that it will burden his ability to function as a reporter if he is compelled to testify.

A hearing on the motion was held December 16, 2005. Mr. Buermeyer is represented by Attorney Robert B. Hemley. Attorney Edwin L. Hobson represents Plaintiff James Spooner, and Attorney Andrea L. Gallitano represents the Town of Topsham. The attorneys filed memos of law both before and after the hearing. For the reasons set forth below, the Court grants the Motion to Quash.

Facts

The memos filed by the parties contain accounts of the facts with a difference in emphasis, but the essential facts as they pertain to the issue presented by this motion are not in conflict. For purposes of analysis, the Court adopts the facts as set forth by the Plaintiff, the primary proponent of obtaining Mr. Buermeyer's testimony.

On September 10, 2001, a Selectboard meeting was held at which the Board undertook the responsibility of hiring a new road foreman. Plaintiff James Spooner was one of the applicants. The Selectboard members interviewed the candidates and discussed them in executive

session, following which the Board announced in open session that it had chosen Bryan Hart. Two members of the Selectboard gave an explanation for their decision.[1]

Mr. Buermeyer attended the meeting as a reporter. After the meeting and prior to publishing his story on the meeting, Mr. Buermeyer called Mr. Spooner. During the course of the conversation, Mr. Buermeyer expressed the view that what the Town had done was illegal. He told Mr. Spooner that an age discrimination complaint could be filed with the Attorney General's office.

Mr. Buermeyer wrote a newspaper article about the meeting which was published on September 19 in the Bradford Journal Opinion. The article contained the following report of the reasons given for the decision:

Selection criteria

> When the selectboard returned to open session, Spooner made a motion to act on the decision that had been arrived at during the executive session. Thompson explained the process he and selectman William J. Appleton had agreed to, over Spooner's objections.
>
> "He's younger, so we can get a lot more service," Thompson said of why Hart had been chosen over the other three candidates. Thompson added that Hart was not related to anybody [on the selectboard], "and that's important for a position of that magnitude."
>
> Appleton agreed with Thompson, saying, "Bryan had some experience. I'm told he's very capable of learning. He's younger."

Two or three weeks after the article was published, Mr. Spooner visited Mr. Buermeyer at the reporter's home and showed him the papers he intended to file with the Attorney General's office. Mr. Buermeyer read the papers, and made two comments. One was that 'there were more things that could be put in,' and the other was that 'age discrimination is a terrible thing.'

Relevant evidence in the case will include testimony from witnesses who attended the meeting and heard what the Selectboard members said when they explained their decision. Mr. Buermeyer was one of several persons who attended the meeting, and thus one of several potential witnesses. Mr. Spooner subpoenaed Mr. Buermeyer for a deposition, as did the Town, and Mr. Spooner has listed Mr. Buermeyer as a trial witness. If Mr. Buermeyer is obliged to

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[1]The Selectboard members were Bruce Thompson, Anthony Spooner, and William J. Appleton. James H. Spooner, the Plaintiff in this case, is a brother of Anthony Spooner.

testify at the deposition, the Town also wishes to question him. Apparently other witnesses do not have a clear recollection of what Mr. Thompson said. They have some recollection that the Selectboard members may have commented on the applicants' ages, but they do not remember Mr. Thompson saying, "He's younger, so we can get a lot more service." Assuming that Mr. Buermeyer has a good memory and/or notes, he could provide relevant and material testimony about the Selectboard's explanation for its decision.

The Right to Evidence and the Journalist's Privilege

In support of his motion, Mr. Buermeyer asserts a qualified journalist's privilege, and claims that the requirements to overcome the privilege, as he defines them, have not been met by the Plaintiff. While all participants recognize such a privilege to exist under some circumstances, there is disagreement about three important issues: when it applies, the showing that must be made to overcome it, and whether that showing has been made by the facts of this case.

On one hand, courts follow a longstanding principle that litigants are entitled to call for relevant and material evidence from every individual who is in a position to provide it. "[E]xceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth." *Douglas v. Windham Superior Court*, 157 Vt. 34, 39-40 (1991) (quoting *United States v. Nixon*, 418 U.S. 683, 710 (1974)). On the other hand, the law also reflects "a paramount public interest in the maintenance of a vigorous, aggressive and independent press capable of participating in robust, unfettered debate over controversial matters." *Baker v. F & F Investment*, 470 F.2d 778, 782 (2d Cir. 1972). For this reason, courts have recognized a qualified privilege for journalists under some circumstances to protect the "pivotal function of reporters to collect information for public dissemination." *Gonzales v. National Broadcasting Co.*, 194 F.3d 29, 35 (2d Cir. 1999) (quoting *McGraw-Hill, Inc. v. Arizona* (*In re Petroleum Products Antitrust Litigation*), 680 F.2d 5, 8 (2d Cir. 1982)).

Given these competing policies, courts have developed principles for when a privilege may be asserted, and balancing tests to determine when an asserted journalist's privilege must yield to the demand for "every man's evidence" in the discovery context. The balancing tests generally derive from Justice Powell's concurring opinion in *Branzburg v. Hayes*, 408 U.S. 665 (1972). The opinion of the Court, which was authored by Justice White and joined by four other justices, including Justice Powell, held that there was no violation of the First Amendment when state or federal governments required news reporters to appear and testify before grand juries, even if they were asked to reveal confidential sources. "[T]he longstanding principle that 'the public . . . has a right to every man's evidence,' except for those persons protected by a constitutional, common-law, or statutory privilege, . . . is particularly applicable to grand jury proceedings." *Id.* at 688 (citations omitted). The "public interest in law enforcement and in ensuring effective grand jury proceedings [overrides] the consequential, but uncertain, burden on news gathering that is said to result from insisting that reporters, like other citizens, respond to relevant questions put to them in the course of a valid grand jury investigation or criminal trial." *Id.* at 690-91. Justice White's

majority opinion left open the possibility that, under other circumstances, journalists could assert a privilege and seek protection, but found no basis in law for a privilege on the facts of the case.

Justice Powell's concurring opinion (i.e. the "swing" vote) suggested a balancing test, as follows:

> [If a] newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe that his testimony implicates confidential source relationship without a legitimate need of law enforcement, he will have access to the court on a motion to quash and an appropriate protective order may be entered. The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions.

Branzburg v. Hayes, 408 U.S. at 710 (Powell, J., concurring).

Many courts have agreed with Justice Powell that journalists enjoy some form of qualified privilege, and that a balancing test is appropriate to determine when a litigant's need for evidence outweighs the privilege. The Vermont Supreme Court set forth such a test in *State v. St. Peter*, 132 Vt. 266 (1974). A journalist refused to answer questions at a deposition in which a defendant in a criminal case was seeking discovery about circumstances surrounding the reporter's presence at a drug raid that resulted in his arrest. The Vermont Supreme Court weighed competing constitutional and non-constitutional considerations and set forth the following test to be applied by the trial judge regarding discovery in a criminal case:

> [W]hen a newsgatherer, legitimately entitled to First Amendment protection, objects to inquiries put to him in a deposition proceeding conducted in a criminal case, on the grounds of a First Amendment privilege, he is entitled to refuse to answer unless the interrogator can demonstrate to the judicial officer appealed to that there is no other adequately available source for the information and that it is relevant and material on the issue of guilt or innocence. If such a showing cannot be made to a measure consistent with the overriding of any First Amendment concern, the deponent cannot properly be compelled to answer the question.

State v. St. Peter, 132 Vt. at 271. The Vermont Supreme Court appears to recognize a basis for a journalist's privilege in the First Amendment where the reporter is deposed in discovery, as contrasted with a grand jury investigation.

The United States Court of Appeals for the Second Circuit, which includes the District of Vermont, has issued numerous decisions discussing the factors pertinent to recognition of a

journalist's privilege. In *Baker v. F & F Investment*, 470 F.2d 778, 783 (2d Cir. 1972), the court suggested that the interest in requiring disclosure is weaker in civil cases. The journalist did not have to reveal his confidential sources where disclosure was not essential to protect the public interest in the orderly administration of justice, and the identity of the informant did not go to the heart of the case. In *United States v. Burke*, 700 F.2d 70 (2d Cir. 1983), the Second Circuit described in detail its standard for civil cases, and then applied it within the context of a criminal case. That standard is as follows:

> When a litigant seeks to subpoena documents that have been prepared by a reporter in connection with a news story, this Circuit's standard of review, at least in civil cases, is well settled: The law in this Circuit is clear that to protect the important interests of reporters and the public in preserving the confidentiality of journalists' sources, disclosure may be ordered only upon a clear and specific showing that the information is: highly material and relevant, necessary or critical to the maintenance of the claim, and not obtainable from other available sources.

United States v. Burke, 700 F.2d at 76-77 (citations omitted).

In *von Bulow v. von Bulow*, 811 F.2d 136 (2d Cir. 1987), the court defined the class of individuals who may assert the privilege: A journalist claiming the privilege must demonstrate that, at the inception of the news gathering process, he or she acted with "the intent to use the material–sought, gathered or received–to disseminate information to the public." *Id.* at 144.

In *Gonzales v. National Broadcasting Co.*, 194 F.3d 29 (2d Cir. 1999), the court clarified that the news gatherer's privilege exists even if the journalist's information is not confidential. However, under those circumstances the nature of the press interest is narrower, and the standard for overcoming the privilege is therefore less demanding:

> Where a civil litigant seeks nonconfidential materials from a nonparty press entity, the litigant is entitled to the requested discovery notwithstanding a valid assertion of the journalists' privilege if he can show that the materials at issue are of likely relevance to a significant issue in the case, and are not reasonably obtainable from other available sources.

Gonzales v. National Broadcasting Co., 194 F.3d at 36. Recently, a District Court from within the Second Circuit has ruled that the second prong of the *Gonzales* test is not met merely because the reporter was a non-partisan witness whose testimony might be more credible before a jury. *Carter v. City of New York*, 2004 WL 193142 (S.D.N.Y. 2004). Where there are numerous other witnesses to a public event, it will be difficult for a litigant seeking a journalist's testimony to prove that the evidence is "not reasonably obtainable from other available sources."

More recently, the Vermont Supreme Court rejected an attempt to assert a journalist's privilege under the First Amendment in the context of a criminal investigation. When the State

subpoenas a reporter to a grand jury proceeding or to an inquest, and asks the reporter to disclose evidence that is relevant and material to a criminal investigation, the facts are indistinguishable from *Branzburg*, and the reporter has no First Amendment privilege to refuse. *In re Inquest Subpoena (WCAX)*, 2005 VT 103, 16 Vt.L.W. 261. Under those circumstances, *Branzburg* is controlling notwithstanding the fact that the State's Attorney proceeded by way of an inquest rather than by convening a grand jury. *Id.* ¶ 11. The *WCAX* case does not change the scope of a reporter's privilege under other circumstances. The Court explained that there was no inconsistency between *Branzburg* and *WCAX* on the one hand, and *St. Peter* on the other, because *St. Peter* was not concerned with a criminal investigation by the government, and the evidence sought did not concern the commission of a crime. Id. ¶ 14.

Legal Bases for a Journalist's Privilege

Mr. Buermeyer claims that his privilege is grounded in the First Amendment of the United States Constitution, the Vermont Constitution, and common law as recognized in *Burke*. Unlike some states, Vermont has no statute defining the existence or scope of a journalist's privilege.

First Amendment

The First Amendment provides:

> **AMENDMENT I. [Freedom of religion, speech, press, assemblage and petition]**
>
> Congress shall make no law . . . abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Constitution, Amend. I.

Federal courts that have recognized a qualified privilege "have expressed differing views on whether the journalists' privilege is constitutionally required, or rooted in federal common law." *Gonzales v. National Broadcasting Co.*, 194 F.3d at 35, n.6. The Second Circuit took the view in *Gonzales* that, until Congress legislates to modify the privilege or do away with it, the Second Circuit does not have to decide whether the privilege is founded in the Constitution. *Id.*

In *State v. St. Peter*, the Vermont Supreme Court appears to recognize the journalist's privilege as being "of constitutional dimension" grounded in the First Amendment:

> The right of discovery in Vermont is of great liberality, and the law is the better for it. But it is not of constitutional dimension and has no common law equivalent. When it is confronted by policy considerations *related to a constitutional privilege*, a carefully considered modification in the light of both concerns is in

order. . . Personal concerns, other than possible self-incrimination, must yield to the deposing procedures. But legitimate objections to disclosure *based on First Amendment grounds* require careful evaluation by the judicial officer before answers are compelled. . ."

132 at 270-271. (Emphasis added.) The Court proceeded to announce the test that must be met to overcome the privilege when a newsgatherer is "legitimately entitled to First Amendment protection:" (1) there is no other adequately available source for the information, and (2) it is relevant and material on the issue of guilt or innocence.

Article 13, Vermont Constitution

Chapter I, Article 13 of the Vermont Constitution is more specific than the First Amendment to the United States Constitution about the importance of the press in providing information to the public about the work of those exercising governmental power:

Article 13. [Freedom of speech and of the press]

That the people have a right to freedom of speech, and of writing and publishing their sentiments, concerning the transactions of government, and therefore the freedom of the press ought not to be restrained.

Vermont Constitution, Chapter I, Article 13.

This language suggests that the state constitutional provision for freedom of the press is at its strongest when it is applied to protect journalists reporting on the exercise of power by those who hold public office. This language must be understood in the historical context in which governments sought to impose prior restraint on the work of journalists. The present context is different, where the information is sought in discovery in a civil case after the reporter published a newspaper account of a public meeting "concerning the transactions of government."

Article 13 was not discussed in the opinion in *State v. St. Peter*. Moreover, there are cases where the Supreme Court has rejected arguments that Article 13 provides greater protection than the First Amendment. See, e.g., *Grievance of Morrissey*, 149 Vt. 1, 18 (1987) (although Article 13 is more specific than the First Amendment, it does not provide greater protection to a disgruntled state officer). The language and policy of Article 13 support recognition of a privilege for a journalist reporting on the actions of elected government officials, but has not been relied on by any court to provide a higher level of protection than is derived from the First Amendment.

Common Law

As previously noted, it is unclear whether the privilege recognized by the Second Circuit,

derived from the concurring opinion in *Branzburg*, is grounded in the First Amendment or federal common law or both. Federal common law appears as a possible basis for the privilege. To the extent that the privilege is based in federal common law, Vermont state court judges may agree with the reasoning of the Second Circuit, but are not bound by its decisions.

In *St. Peter*, the Supreme Court commented to the effect that, at least until then (1974), Vermont courts had not recognized any news gatherer's privilege to withhold testimony under common law. 132 Vt. at 269. That observation does not preclude the future recognition of a privilege under state common law, and Vermont courts have not rejected such a claim. In a State trial court decision, Judge Zimmerman recognized a qualified constitutional privilege in a criminal case involving nonconfidential information. *State v. Peters*, No. 97-01-01 Wncr. She acknowledged the test in *St. Peter*, but she applied instead the Second Circuit test from *Burke* and concluded that the State had not overcome the privilege. Because of the reliance on *Burke*, the opinion suggests a possible recognition of a journalist's privilege under state common law (in addition to a First Amendment basis) analogous to that under federal common law.

Analysis

This case is not determined by cases such as *Branzburg* and *WCAX* which have held that there is no journalist's privilege under the First Amendment when the information sought is for the investigation of criminal conduct. Rather, the context is discovery of facts pertinent to a civil claim asserted against a governmental body, where the discovery sought consists of statements made in public in the presence of several witnesses.

Eligibility for the Privilege

A preliminary issue is whether Mr. Buermeyer qualifies as a journalist at all, allowing him to assert such privilege as may be recognized in law. Plaintiff argues that Mr. Buermeyer stepped out of the journalist's role by using the material he gathered to advance Mr. Spooner's interests, making him ineligible to assert any privilege otherwise available to a journalist. Specifically, Plaintiff argues that when Mr. Buermeyer telephoned Mr. Spooner on September 12th (after the Selectboard meeting but before the newspaper story was published) and expressed his opinion that Mr. Spooner had a legal claim and told Mr. Spooner how to contact the Attorney General's office to make an age discrimination claim, and when he reviewed with Mr. Spooner the written claim before it was filed and commented that there was more that could be included and age discrimination was a terrible thing, he helped and encouraged Mr. Spooner and became his advocate. Plaintiff argues that Mr. Buermeyer cannot rely on a privilege reserved for those whose role is limited to reporting news to the public.

None of the acts by Mr. Buermeyer are inconsistent with a journalist's role sufficient to cause him to lose status as a reporter. A reporter interviewing witnesses at the scene of an accident might reasonably direct an injured party to the police station or fire department without

giving up the role of reporter. Likewise, when a reporter expresses an opinion during an interview, he does not disqualify himself as a reporter. While Mr. Buermeyer reviewed Mr. Spooner's claim to the Attorney General's office, he did not supply Mr. Spooner with specific facts or convert the use of his reporter's notes or personal memory for the benefit of aiding Mr. Spooner in pursuing his claim. Rather, he kept them for his own use as a reporter.

Plaintiff's Claim of Waiver of the Privilege

Neither did Mr. Buermeyer waive his status as a reporter by publishing his story about the Selectboard meeting. A waiver, generally, is "the relinquishment of a known right, either directly or by acting in a manner that is inconsistent with the right or one's intention to rely on it." *Bilney v. Evening Star Newspaper Co.*, 406 A.2d 652, 658 (Md. App. 1979). When addressing a claim that a reporter has waived his privilege, the court must consider whether he acted inconsistently with the purposes for the privilege. Waiver of a reporter's privilege operates differently from waiver of other privileges, because the rationale serves a different function. A journalist's "qualified privilege is designed to protect the overarching public policy of *access* to information, and not confidentiality for a particular party." *Damiano v. Sony Music Entertainment, Inc.*, 168 F.R.D. 485, 499 (D. N.J. 1996).

Thus, for example, a reporter does not waive the privilege by conducting interviews in the presence of a third party, because the dissemination of the news is not hindered by that practice. *Id.* Another case recognizing the same principle is *Pugh v. Avis Rent A Car System, Inc.*, 1997 WL 669876, *5 (S.D. N.Y. 1997). Moreover, "publication of part of the information gathered does not waive the privilege as to all of the information gathered on the same subject matter, because [such a waiver] 'would chill the free flow of information to the public.'" *In re Paul*, 513 S.E.2d 219, 224 (Ga. 1999).

In the instant case, Mr. Buermeyer did not waive his reporter's privilege by publishing his article about the Selectboard meeting. Such publication is entirely consistent with the purposes for the privilege. Likewise, his later discussions with Mr. Spooner were also consistent with his maintenance of the reporter's role. It does not matter that Mrs. Spooner was present for some of the discussion between the reporter and her husband.

Defining the Privilege and its Limits

There are three issues presented by Mr. Buermeyer's motion. First, is he entitled to a journalist's privilege under the circumstances of this case and if so, on what legal basis? If a privilege is recognized under these circumstances, what elements must be shown to overcome it? Third, has Plaintiff shown by facts the elements necessary to overcome the privilege?

Legal grounds

State v. St. Peter implicitly acknowledges a journalist's privilege based on the First Amendment to withhold answering questions in discovery, except to the extent that policy

considerations call for a balancing of the privilege against those considerations. This represents the starting point for analysis in this case. The test from *St. Peter* is not itself applicable, since the test specifically calls for a criterion based on "guilt or innocence." If accommodation is made for the fact that the case is civil, and "a significant issue" is substituted for "guilt or innocence," the test becomes nearly identical to the one in *Gonzales:*

St. Peter test, substituting "a significant issue" for "guilt or innocence:"

(1) there is no other adequately available source for the information, and
(2) it is relevant and material on the issue of "a significant issue."

Gonzales test: the materials. . .
(1) are of likely relevance to a significant issue in the case, and
(2) are not reasonably obtainable from other available sources.

Article 13 of the Vermont Constitution provides additional support for a privilege to protect journalists when they are engaged in reporting on the affairs of government. The policy of the accountability of government officials as the "trustees and servants" of the people runs deep in the Vermont Constitution (Chapter I, Article 6), and the press is recognized in Article 13 as an important means of assuring that accountability. Recognition of a journalist's privilege to report on the actions of government is a means of implementing that policy. This important constitutional principle would be undermined if journalists hesitated before attending public meetings and reporting on public affairs at any level of government out of a concern that they would open themselves to being served with subpoenae to testify in depositions in civil actions. This is not to suggest that Article 13 provides a greater level of protection for journalists than the First Amendment, but only that both support recognition of a journalist's privilege in this case. The "constitutional dimension" referred to in *St. Peter* was the First Amendment, but the "constitutional dimension" of Article 13 is especially strong where, as here, the affairs of government are the subject of the reporting.

Both the Second Circuit and at least one state court judge have also recognized a journalist's privilege based on common law, as noted above. It would put journalists in Vermont in a difficult position to have a privilege based on federal common law that differed from the privilege available under state constitutional or common law. Such a situation would certainly have a chilling effect on the robustness of reporting on public affairs. The history of the development of the privilege supports recognition of a journalist's privilege in this case on all three bases: First Amendment, Article 13, and state common law.

Elements for Overcoming the Privilege

In *St. Peter*, the factors that were found sufficiently compelling to overcome the privilege derived from the fact that a criminal defendant's right of discovery was at stake: a criminal defendant otherwise entitled to discovery could overcome the privilege if there was no other source for the information, and if the information is relevant and material on the issue of guilt or

innocence. Here we are not concerned with a criminal defendant's right of discovery. What is at stake is the protection of broad concerns, such as the "pivotal function of reporters to collect information for public dissemination," and the "paramount public interest in the maintenance of a vigorous, aggressive and independent press . . . ." *Gonzales*, 194 F.3d at 35 (quoting *Petroleum Products*, 680 F.2d at 8, and *Baker*, 470 F.2d at 782). The Second Circuit explained in *Gonzales* that the broader concerns are relevant whether or not the information sought is confidential:

> If the parties to any lawsuit were free to subpoena the press at will, it would likely become standard operating procedure for those litigating against an entity that had been the subject of press attention to sift through press files in search of information supporting their claims. The resulting wholesale exposure of press files to litigant scrutiny would burden the press with heavy costs of subpoena compliance, and could otherwise impair its ability to perform its duties – particularly if potential sources were deterred from speaking to the press, or insisted on remaining anonymous, because of the likelihood that they would be sucked into litigation. Incentives would also arise for press entities to clean out files containing potentially valuable information lest they incur substantial costs in the event of future subpoenas. And permitting litigants unrestricted, court-enforced access to journalistic resources would risk the symbolic harm of making journalists appear to be an investigative arm of the judicial system, the government, or private parties.

Gonzales, 194 F.3d at 35 (footnote omitted).

Based on these concerns, the *Gonzales* court recognized a qualified privilege of journalists with nonconfidential information, but made it easier for a litigant to overcome the privilege to have access to "every man's evidence" by relaxing the criteria from those applicable where confidential material is sought. The policy considerations expressed in *Gonzales* are applicable to the circumstances of this case: the press should have every encouragement to report on the actions and affairs of government, without being easily drawn into participation with private litigation. This involves the same kind of balancing analysis that the Vermont Supreme Court engaged in when considering the policy considerations at stake in *St. Peter*.

Under *Gonzales*, a litigant is entitled to requested discovery notwithstanding the journalist's privilege if he or she can show that the materials at issue:

> (1) are of likely relevance to a significant issue in the case, and
> (2) are not reasonably obtainable from other available sources.

See *Gonzales*, 194 F.3d at 36.

This is somewhat less demanding than the test from the *Burke* decision advocated by Mr. Buermeyer, i.e. whether the person seeking disclosure makes a clear and specific showing that the

information is:

(1) highly material and relevant,
(2) necessary or critical to the maintenance of the claim, and
(3) not obtainable from other available sources.

See *Burke*,700 F.2d at 76-77. It is, however, virtually identical to the test in *St. Peter* if "significant issue" is substituted for "guilt or innocence," as demonstrated above.

As in *Gonzales*, the information sought in this case is from a public meeting at which several other witnesses were present, so there is no public policy consideration in protecting journalists' interests in confidential sources. Thus, the *Gonzales* test for non-confidential information and the *St. Peter* test as modified for civil cases are based on the same principle: journalists should be protected from outside interests that distract from pursuit of a vigorous press to provide the public with good information, but not to a degree that unreasonably deprives litigants of their right to discovery of critical information that is otherwise unavailable. This is the test that makes the most sense based on both analysis and coordinating the privilege as it applies in state and federal courts in Vermont. Thus, it is the test to be applied in this case.

Applying the Test

Under the test, a litigant is entitled to requested discovery notwithstanding the journalist's privilege if he or she can show that the materials at issue:

(1) are of likely relevance to a significant issue in the case, and
(2) are not reasonably obtainable from other available sources.

Mr. Buermeyer's testimony concerning what members of the Selectboard said in explaining their hiring decision at the public meeting on September 10, 2001 would likely be relevant to a significant issue in Mr. Spooner's case: the basis for the decision to hire Bryan Hart over James Spooner. A significant issue is whether Mr. Spooner's age was a factor. Clearly it would be relevant to hear testimony about what the Selectboard members said at the public meeting immediately following the making of the decision in executive session.

The closer question is whether Mr. Buermeyer's testimony about what was said at the meeting is "reasonably obtainable from other available sources." Other witnesses were present. As in the *Carter* case from the Southern District of New York, the reporter was merely one of several witnesses to a public event. Mr. Buermeyer might remember the event differently from others, and he might also make a better witness, given the fact that he is a newspaper reporter. Nevertheless he is still only one of several witnesses.

The fact that others do not remember as well as a reporter, or have the type of notes that a reporter might take, does not make the information "not reasonably available." If that were the case, civil litigants involved in cases of public interest could compel reporters into their service,

chilling the willingness of journalists to attend certain public meetings in order to avoid entanglement in private actions. This would be entirely counterproductive to the policies of the First Amendment and Article 13 of encouraging reporting on the affairs of government.

ORDER

For the reasons set forth above, Henry Buermeyer's Motion to Quash Subpoena is *granted*.

Dated at Chelsea, Vermont, this 14th day of March, 2006.

Mary Miles Teachout

Hon. Mary Miles Teachout
Presiding Judge