



informant is as follows: “If a person was in fact approached in furtherance of a conspiracy with which these defendants are being charged, that person is a percipient witness. These defendants have every right to question that individual . . . ” (Defendants’ Response Memorandum, p. 1 (emphasis added).) Defendants’ new rationale, based on the vague assumption, “if” the confidential informant was approached, is flimsy indeed.

The record shows that the contact between the confidential informant and any of the conspirators was simply his receipt of the now infamous broadcast email from defendant Bateman and others which urged recipients, in thinly veiled terms, to submit the NCESPA rates in their bids. (Ex. 1 to Ryals Affidavit, submitted with the plaintiffs’ motion for a protective order.) Defendants have not even tried to make a factual showing to the Court that questioning the confidential informant about his receipt of the email would provide any meaningful information.

Defendants further cite no authority whatsoever for their patently wrong, naked assertion that “they have every right to question” the confidential informant. (Defendants’ Response Memorandum, p. 1) Defendants ignore the overwhelming weight of authority holding that they must show that discovering the identity of the confidential informant “is essential to a balanced measure of the issues and the fair administration of justice” and that their need for the information outweighs the government’s interest in maintaining its confidentiality. 1638 E. 2nd Street, 993 F. 2d 773, 774 (10th Cir. 1993) (emphasis added). Defendants also fail to address the authority holding that factors to consider in weighing the competing interests include whether the parties’ evidence “contradict on material facts that the informant could clarify,” and whether, as here, the defendant “offers no defense on the merits.” State v. Valladares, 165 N.C. App. 598,

606, 599 S.E.2d 79, 85-86, appeal dismissed, rev. denied, 359 N.C. 196, 608 S.E.2d 66 (2004).

Given the posture of this case, where the dispositive facts are overwhelmingly undisputed, it is plain why defendants do not even attempt to show the relevance, much less importance, of the confidential informant's identity to any element of their defense.

Defendants finally attempt to put a fig leaf on their futile argument by asserting, again with no reference to any authority, "The State's position that it can classify such a witness as a confidential informant and not disclose his identity is simply fallacious and no further argument should be required." (Defendants' Response Memorandum, pp. 1-2) Merely calling the plaintiffs' position "fallacious," and presumptuously asserting that "no further argument should be required," falls woefully short of meeting defendants' heavy burden of showing why the public interest, as well as the confidential informant's interests in privacy and freedom from retaliation, should yield to defendants' unjustified wish to know the confidential informant's identity.

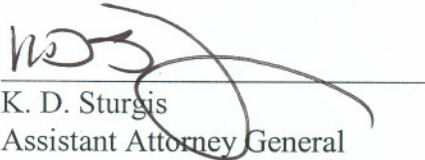
Defendants had the opportunity to ask any questions about what the confidential informant communicated to the State, when the communication took place, and whatever else they wished to know within the permissible scope of discovery, had they been genuinely interested in gathering evidence for use in their defense. Yet instead of exhausting legitimate lines of inquiry, defendants ended their inquiry where it began, by seeking the identity of the confidential informant and no more.

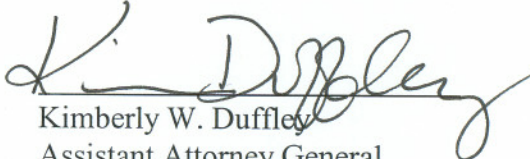
## CONCLUSION

Because defendants have shown no legitimate – much less compelling – need to discover the confidential informant's identity, the balance of interests in this case weighs heavily in favor of maintaining its confidentiality.

This the 3rd day of November, 2006.

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CERTIFICATE OF SERVICE

I hereby certify that on this date the **Reply Memorandum in Support of Plaintiffs' Motion for a Protective Order Concerning the Identity of the Confidential Informant**, and the exhibits appended thereto, were served by depositing same in the U.S. Mail, first class postage prepaid, addressed to:

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This the 3rd day of November, 2006.

  
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