

John Reinstein, Legal Director
(617) 482-3170 ext. 324
reinstein@aclum.org

January 13, 2011

David F. Capeless, District Attorney
7 North Street
P.O. Box 1969
Pittsfield, MA 01202

Dear District Attorney Capeless:

In 2008, the provisions of G.L. c. 271, § 17B were amended to expand substantially the power of Massachusetts prosecutors to obtain information about private communications. Enacted as part of legislation addressed to preventing sexual abuse of children, St. 2008, § 205, and described by the attorney general as a tool to track online predators, the amendment of § 17B nevertheless went much further. As amended, the law allows the attorney general or a district attorney to issue an administrative subpoena for the records of certain communications service providers concerning private communications if the prosecutor has “reasonable grounds to believe that [such records] are relevant and material to an ongoing criminal investigation.” The recipient of such a subpoena is required to deliver the records to the attorney general or the district attorney within 14 days. Although the statute expressly prohibits the disclosure of the content of electronic communication, the records which may be obtained under the statute are capable of revealing significant amounts of information about the activities and communications of Massachusetts residents.

In order to permit the public to understand how this authority has been used, the American Civil Liberties Union of Massachusetts (“ACLUM”) is making this request under the Massachusetts public records law, G.L. c. 66, § 10, for the following records:

1. Any written description of the procedure for approval of the issuance by the District Attorney for Berkshire County of an administrative subpoena pursuant to the provisions of § 17B;
2. A sample of the form of a § 17B administrative subpoena used by the office of the District Attorney for Berkshire County;
3. Records showing the number of § 17B administrative subpoenas issued by the District Attorney for Berkshire County in each year for the years 2008, 2009 and 2010;

4. Records showing the particular offenses or category of offenses which were the subject of “ongoing criminal investigations” justifying the issuance of a § 17B administrative subpoena in each year for the years 2008, 2009 and 2010 and the number of such subpoenas issued for each offense or category of offense;
5. Records showing whether in any case the recipient of a § 17B administrative subpoena was requested not to disclose to the subject of the records that a subpoena for his records had been received;
6. Records showing whether notice of any § 17B administrative subpoena was provided to the person or entity who is the subject of the records;
7. Records showing the names of the common carriers or services providers to whom a § 17B administrative subpoenas was issued by the District Attorney for Berkshire County and the number of such subpoenas issued to each in each year for the years 2008, 2009 and 2010;
8. Any motions to quash a § 17B subpoena which have been filed since October 2008; and
9. Records showing the name and court docket number of any case in which a motion to suppress evidence obtained as a result of a § 17B subpoena has been filed

The purpose of this request is to obtain information about how extensively and under what circumstances your office has used the authority conferred by the 2008 amendment. As information about the scope of use of § 17B is not currently available to the public, we have no means of knowing whether literal compliance with this request require review and disclosure of a substantial number of records. If that is the case, we would certainly be willing to discuss an appropriate modification of the request consistent with disclosure of the information we are seeking.

In your response, please indicate which, if any, of the requested records are available in electronic form and can be disclosed in that form. With respect to both electronic and paper records, we ask that you waive any costs pursuant to 950 C.M.R. § 32.06(5) as this request involves a matter of public concern and because it is made on behalf of a nonprofit organization. ACLUM is a nonprofit §501(c)(3) organization dedicated to the protection of civil rights and liberties for all persons in the Commonwealth of Massachusetts.

If you decide not to waive copying costs, we request that you permit us to examine, at our election, the responsive documents before deciding which portions to photocopy.

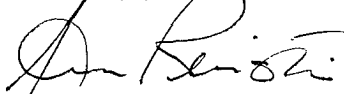
David F. Capeless, District Attorney
January 13, 2011
Page 3

Should you determine that some portion of the documents requested are exempt from disclosure, please release any reasonably segregable portions that are not exempt. In addition, please note the applicable statutory exemption and explain why it applies to the redacted portions. As you know, a custodian of public records shall comply with a request within ten days after receipt.

If you have questions about this request, please contact me at (617) 482-3170 x324 or by email at jreinstein@aclum.org.

Thank you for your assistance. We look forward to your response.

Sincerely yours,

A handwritten signature in black ink, appearing to read "John Reinstein", written over a diagonal line that extends from the bottom left towards the top right.

John Reinstein