January 31, 2011

John Reinstein, Legal Director
ACLU of Massachusetts
211 Congress Street
Boston, MA 02110

Re: Public Records Request
     Administrative Subpoena Investigations

Dear Mr. Reinstein:

The District Attorney's Office has received your letter (dated January 13, 2011) in which you requested various materials connected with investigations involving administrative subpoenas issued under G.L. c. 271, § 17B. I will address each of your nine requests below.

Request #1. The District Attorney's Office is unable to satisfy your request for a "written description of the procedure for approval of the issuance" of such a subpoena. The requested information is exempt from disclosure because it relates to "internal personnel rules and practices." G.L. c. 4, § 7(26)(b). See, e.g., Hardy v. Bureau of Alcohol, Tobacco & Firearms, 631 F.2d 653, 656 (9th Cir. 1980) (cognate federal exemption for personnel practices includes "[m]aterials instructing law enforcement agents on how to investigate"); City of Concord v. Ambrose, 333 F. Supp. 958, 960 (N.D. Cal. 1971) (exemption including "'personnel rules' can be so construed to cover instructions to law enforcement personnel on the tactics by which they should effect arrests"). The public record law cannot be manipulated to "assist those engaged in criminal activity by acquainting them with the intimate details of the strategies employed in its detection." Caplan v. Bureau of Alcohol, Tobacco & Firearms, 587 F.2d 544, 547 (2d Cir. 1978).

Request #2. The District Attorney's Office has satisfied your request for a "sample of the form of a § 17B administrative subpoena." I have enclosed a 1-page blank sample form.
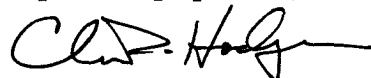
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<u>Request #3 through #9.</u> The District Attorney's Office is unable to satisfy your requests for the following: records of such subpoenas issued from 2008 through 2010, records showing offense categories for the same years, records showing whether any recipient has been requested to keep the subpoena confidential, records showing whether persons or entities subject to the subpoena received notice, records showing the names of common carriers or service providers receiving the subpoenas, records showing motions to quash such subpoenas, and records showing docket numbers of cases involving such suppression motions. The District Attorney's Office is unable to satisfy request #3 through #9 for two reasons.

First, you are essentially requesting lists that do not exist and have not been "made or received" by the District Attorney's Office. G.L. c. 4, § 7(26). While it obviously maintains files that may contain administrative subpoenas, the District Attorney's Office does not maintain any lists of this information. The public record law does not require a government agency to create a record that does not exist. "Neither c. 66, sec. 10(a), nor its definitional counterpart c. 4, § 7 cls. 26, contains any express requirement that agencies assemble or compile in one document all information in their possession which qualifies as a public record." 32 Op. Att'y Gen. 157, 165 (1977).

Second, the subpoenas are connected to criminal investigations and necessarily constitute "investigatory materials" that are exempt from disclosure under the public record law. G.L. c. 4, § 7(26)(f). This exemption applies even to cases that are closed. <u>See Bougas</u> <u>v.</u> <u>Chief</u> <u>of</u> <u>Police</u> <u>of</u> <u>Lexington</u>, 371 Mass. 59, 63 (1976). "[I]f an agency's investigatory files were obtainable without limitation after the investigation was concluded, future law enforcement efforts by the agency could be seriously hindered. Even materials relating to an inactive investigation may require confidentiality in order to convince citizens that they may safely confide in law enforcement officials." <u>Id</u>.

Thank you for your inquiry.

Very truly yours,

Christopher P. Hodgens
Assistant District Attorney