

COMMONWEALTH OF MASSACHUSETTS

Office of

District Attorney Joseph D. Early, Jr.



Worcester Trial Court
225 Main St. G301 Worcester, MA 01608
www.worcesterda.com

Worcester County
(Middle District)
(508)-755-8601

April 25, 2013

Ms. Kade Crockford
ACLU of Massachusetts
211 Congress Street, 3rd Floor
Boston, MA 02110

Re: Public Records Request
Administrative Subpoena Investigations

Dear Ms. Crockford:

The District Attorney's Office has received your letter (dated April 22, 2013) 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.

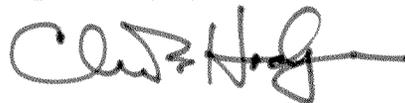
Request #3 through #9. The District Attorney's Office is unable to satisfy your requests for the following: records of such subpoenas issued from 2011 through 2013, records showing offense categories for the same years, records showing whether any recipient has been requested to keep the subpoena confidential, 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. See Bougas v. Chief of Police of Lexington, 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." Id.

Thank you for your inquiry.

Very truly yours,



Christopher P. Hodgins
Assistant District Attorney

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MASSACHUSETTS GENERAL LAWS
CHAPTER 271 - SECTION 17B
ADMINISTRATIVE SUBPOENA

Dear Keeper of Records:

Pursuant to an official criminal investigation being conducted by the _____ Department, it is demanded that your company furnish as soon as possible, subscriber information and location, to include the subscriber's name, date of birth, social security number, residential, mailing, e-mailing, billing addresses and any other identifying contact information for the subscriber of telephone number _____ as it was assigned from _____. This should include Regular Service, Bay State Service, Circle Calling, Speed Dialing, Call Forwarding, Call Waiting, Foreign Exchanges, Overseas Calling and any other extended dialing service. You are **not** to disclose the existence of this request, as any such disclosure could impede the investigation being conducted and thereby interfere with the enforcement of the law. This information is being demanded in accordance with the Acts and Resolves passed by the General Court of Massachusetts in 1966 as designated in Chapter 271, section 17B.

When forwarding the requested subpoena information, would you kindly **include** a copy of our original subpoena submitted.

Very truly yours,

JOSEPH D. EARLY, JR.
District Attorney
For the Middle District

Det. _____
Police Dept.
File

JDEjr/eas