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February 4, 2011

John Reinstein, Esq.
Legal Director
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Boston, MA 02110

Dear Attorney Reinstein:

Public Records Request

The purpose of this letter is to respond to your public records request, which was received in this office on January 18, 2011. By letter of January 26, 2011, I indicated that additional time was necessary to respond to your request.

You have requested records related to G.L. c. 271, §17B, specifically “information about how extensively and under what circumstances [this] office has used the authority conferred by the 2008 amendment” to §17B. The 2008 amendment was part of St.2008, §205, *An Act Further Protecting Children*. Some of the history behind G. L. c. 271, § 17B may assist in clarifying your understanding about the breadth of the section. Section 17B was first enacted in 1966, amended in 1997 (a minor word change), and amended for a second time in the 2008 act mentioned above. The changes to section 17B in the 2008 act enhanced Legislative policies already incorporated in this section when it came into law in 1966. Section 17B had an already established purpose and provided tools for criminal investigations where there existed reasonable grounds to believe that public communications were relevant and material. Although the Legislature could have written a brand-new section in G. L. c. 265 aimed at specifically addressing child abuse cases, it chose not to do so. It left intact the tools in existence since 1966, and incorporated tools or aspects of the extant tools that it believed necessary to combat child abuse.

The statute has been interpreted by the courts in cases such as *Commonwealth v. Vinnie*, 428 Mass. 161, *cert. denied*, 525 U.S. 1007 (1998) and *Commonwealth v. Federoff*, 43 Mass. App. Ct. 725 (1997). And, in looking at statutes we interpret them to give effect “to all [] provisions, so that no part will be inoperative or superfluous.” *Bankers Life & Cas. Co. v. Commissioner of Ins.*, 427 Mass. 136, 140 (1998), quoting 2A B. Singer, *Sutherland Statutory Construction* § 46.06 (5th ed.1992).

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Please note that, even as rewritten, this is not a "stand alone" statute. For example, federal law places restrictions on access to and use of administrative subpoenas under this state statute, as it does overall in the area of electronic communications. The Supremacy Clause of the United States Constitution requires full compliance with federal law. Other legal restrictions to the use of this statute may, therefore, apply that are not enumerated in our state statute.

Our state statute reads in full:

Section 17B. Except as otherwise prohibited under section 2703 of Title 18 of the United States Code, whenever the attorney general or a district attorney has reasonable grounds to believe that records in the possession of: (i) a common carrier subject to the jurisdiction of the department of telecommunications and cable, as provided in paragraph (d) of section 12 of chapter 159; or (ii) a provider of electronic communication service as defined in subparagraph (15) of section 2510 of Title 18 of the United States Code; or (iii) a provider of remote computing service as defined in section 2711 of Title 18 of the United States Code, are relevant and material to an ongoing criminal investigation, the attorney general or district attorney may issue an administrative subpoena demanding all such records in the possession of such common carrier or service, and such records shall be delivered to the attorney general or district attorney within 14 days of receipt of the subpoena. No such common carrier or service, or employee thereof, shall be civilly or criminally responsible for furnishing any records or information in compliance with such demand. Nothing in this section shall limit the right of the attorney general or a district attorney to otherwise obtain records from such a common carrier or service pursuant to a search warrant, a court order or a grand jury or trial subpoena.

No subpoena issued pursuant to this section shall demand records that disclose the content of electronic communications or subscriber account records disclosing internet locations which have been accessed including, but not limited to, websites, chat channels and newsgroups, but excluding servers used to initially access the internet. No recipient of a subpoena issued pursuant to this section shall provide any such content or records accessed, in response to such subpoena.

So far as this section is concerned you have asked nine specific questions. The District Attorney's answer is directed to G. L. c. 271, § 17B, and does not include any comment on the additional federal and state laws protecting electronic communications which may apply.

Before answering your nine requests, I would like to respond to your request that this office waive all fees. Please be advised that, if applicable, you will be required to pay all of the costs associated with your request. The governing statute explicitly states: "Every person for whom a search of public records is made shall, at the direction of the person having custody of such records, pay the actual expense of such search." G. L. c. 66, § 10(a). As mandated by the

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Legislature, the District Attorney may only incur costs and expend funds for limited purposes, primarily investigating and prosecuting criminal cases. G. L. c. 12, §§ 22-25A, 27.

The Hampden County District Attorney aims to be as helpful and expansive as possible in answering all public records requests. But we are not permitted by law to release much of the information you seek. The Legislature has categorized the following as not public records: Information concerning a victim's identity and related statements in a sexual assault prosecution, G. L. c. 265, § 24C and G. L. c. 41, § 97D, and Criminal Offender Record Information (CORI), G. L. c. 6, §§ 167, 172. We are also charged with maintaining victims' privacy. Some specific answers to your requests would mean releasing information directly endangering the safety of individuals and the general public in both ongoing and other investigations, and revelation of investigative techniques, and related matters. Policy disfavors revelation to criminals those techniques used or not used in particular circumstances to investigate criminal activity. G. L. c. 4, § 7 ¶ (26) (a) (c) & (f). *Bougas v. Police Chief of Lexington*, 371 Mass. 59 (1976).

Any grand jury materials are secret, and are protected from disclosure by both the Massachusetts constitution and the common law. We presume that you are not seeking any items to which the deliberative process privilege and work product privilege apply. *See District Attorney for the Norfolk District*, 419 Mass. 507 (1995), and *Commonwealth v. Liang*, 434 Mass. 131 (2001).

Turning to your specific requests:

1. Any written description of the procedure for approval of the issuance by the District Attorney for Hampden County of an administrative subpoena pursuant to the provisions of § 17B;

The Office of the District Attorney for Hampden County has no records responsive to this request.

2. A sample of the form of a § 17B administrative subpoena used by the office of the District Attorney for Hampden County;

Three (3) sample forms are attached. The forms are redacted for the reasons stated above.

3. Records showing the number of § 17B administrative subpoenas issued by the District Attorney for Hampden County in each year for the years 2008, 2009, and 2010;

Please be advised that, even if this information were available, it is not a public record. See above.

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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;

Please note that a "particular offense or category of offenses" standing alone can never justify the issuance of an administrative subpoena. Section 17B imposes substantive legal requirements which must be met.

Please also be advised that even if this information were available, it is not a public record. See above.

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;

Please note that the standard forms used by this office direct that recipients of subpoenas not disclose the request "so as not to jeopardize the ongoing investigation."

6. Records showing whether notice of any § 17B administrative subpoena was provided to the person or entity who is the subject of the records;

Please see #5 above. It should be noted that when a criminal case develops, any such information would be turned over in discovery under the rules of criminal procedure.

7. Records showing the names of the common carriers or service providers to whom a § 17B administrative subpoena was issued by the District Attorney for Hampden County and the number of such subpoenas issued to each in each year for the years 2008, 2009 and 2010;

Please be advised that even if this information was available, it is not public record. See above.

8. Any motions to quash a § 17B subpoena which have been filed since October 2008; and

I have conducted an informal survey on your behalf, and have not found any information confirming that motions to quash G. L. c. 271, § 17B subpoenas have been filed.

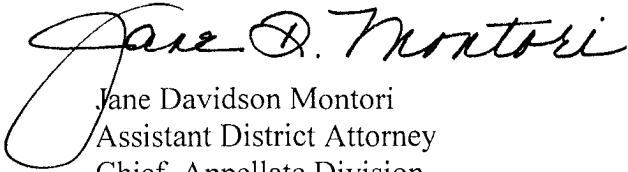
9. Records showing the name and court docket number of any case in which a motion to suppress evidence obtained as a result of a § 17B subpoena has been filed.

Please see #8 above.

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I hope this information is helpful to you. If you have any questions or require further information, please do not hesitate to contact me at the above address.

Very truly yours,


Jane Davidson Montori
Assistant District Attorney
Chief, Appellate Division

Enclosures