



The Commonwealth of Massachusetts

OFFICE OF THE DISTRICT ATTORNEY FOR THE NORFOLK DISTRICT

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March 4, 2011

John Reinstein
Legal Director
American Civil Liberties Union of Massachusetts
211 Congress Street
Boston, MA 02110

Re: Public Records Request

Dear Attorney Reinstein:

I write in response to your January 13, 2011 letter to Norfolk District Attorney Michael W. Morrissey. I apologize for the delay in getting back to you. Your letter was inadvertently misplaced and I did not receive this assignment until March 3, 2011.

Under the public records statute, you seek information regarding this Office's use of G.L. c. 271, § 17B. Below I list each of your nine questions and our response to each. Please note that our answer is directed to G. L. c. 271, § 17B, and does not include any additional federal and state laws protecting electronic communications that may apply. As to your request that we waive all fees, as mandated by the 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. See G.L. c. 66, §10(a) ("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").

We aim to be helpful in answering all public records requests; we are not permitted by law, however, to release much of the information you seek. The Legislature has categorized the following as not being public record: 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 victim privacy. Some specific answers to your requests would mean releasing information that could directly endanger the safety of individuals and the general public in both ongoing and other investigations, and revealing investigative techniques and related matter. Public policy disfavors revealing 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). In addition, grand jury materials are secret and are protected from disclosure by both the Massachusetts constitution and the common law. We presume 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 Norfolk County of an administrative subpoena pursuant to the provisions of § 17B;

We have no records responsive to this request. A sample request form, which police must submit when requesting the district attorney issue an administrative subpoena, is included for your information.

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

A sample form is attached.

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

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

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 was available, release of it is not 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 our standard form directs that recipients of subpoenas not disclose its receipt as "any such disclosure may impede the investigation and interfere with the enforcement of the law."

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 subpoenas was issued by the District Attorney for Norfolk 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;

I have performed an informal survey and have not found any information confirming that motions to quash G. L. c. 271, § 17B subpoenas were 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.

I hope this information is helpful and satisfies your request.



Varsha Kukafka
Assistant District Attorney