

December 14, 2004

Mark Zuckerman, Esq.
New York City Law Department
100 Church Street
New York, New York 10007

Re: Allen v. City of New York
Index No. 03-CV-2829

Dear Mr. Zuckerman:

I am writing in response to the subpoena served upon New York City Independent Media Center ("NYC-IMC") in connection with the above-referenced matter demanding the production of specified documents. NYC-IMC is the publisher of a bi-weekly newspaper (a copy of which I am enclosing) as well as a website and it engages in news gathering functions in furtherance of those publishing enterprises. As such, NYC-IMC is entitled to a qualified privilege under the First Amendment. See von Bulow v. von Bulow, 811 F.3d 136 (2nd Cir. 1987). Accordingly, under Gonzales v. National Broadcasting Company, 194 F.3d 29, 38 (2nd Cir. 1999), the City of New York must make a clear and specific showing that the documents that you seek from NYC-IMC are "likely relevant" to a "significant issue in the case" and that the material is "not reasonably obtainable from other available sources." As discussed more fully below, everything on the NYC-IMC website to which NYC-IMC has access -- including archives of any open working-group email discussions -- is available to the public and searchable using any standard search engine. Thus to the degree that you seek to examine any such information, it is obtainable by your client through the alternative method of conducting an electronic search through the use of a standard search engine such as Google. To the extent that you may be seeking information that is on a closed or subscription-only list serve, NYC-IMC does not have access to such material. To the extent that you may be seeking information contained in the bi-weekly newspaper, The Independent, back-issues of those newspapers are also available at the New York University Library. These matters are amplified in the discussion below.

I.

The applicable legal standards governing the qualified First Amendment privilege, at issue here, are set forth in von Bulow v. von Bulow, *supra*, and more particularly in Gonzales v. NBC, *supra*. In von Bulow, the Second Circuit made clear that a qualified First Amendment privilege is available to those engaged in a newsgathering enterprise so long as such newsgathering was undertaken "with an intent to disseminate information to the public." Von

Bulow, 811 F.2d at 143. The Second Circuit further observed in that case that "the privilege can be invoked to shield disclosure of non-confidential sources and non-confidential information." Id. And the von Bulow Court further suggested that "[i]n examining the boundaries of the journalist's privilege, [courts] may consider applicable state law, in this case New York's so-called 'Shield Law.'" 811 F.2d at 144. An examination of state law reveals that a qualified privilege with respect to non-confidential materials extends not only to reporters but to organizations engaged in newsgathering and publishing. See, generally, New York Civil Rights Law §79-h.

In Gonzalez, the Second Circuit reinforced the proposition that the qualified privilege applies whether or not it relates to confidential information and the Court explained the basis for this constitutionally-driven principle:

"If the parties to any lawsuit were free to subpoena the press at will, it would likely become standard operating procedure for those litigating against an entity that had been the subject of press attention to sift through press files in search of information supporting their claims. The resulting wholesale exposure of press files to litigant scrutiny would burden the press with heavy costs of subpoena compliance and could otherwise impair its ability to perform its duties – particularly – if potential sources were deterred from speaking to the press, or insisted on remaining anonymous, because of the likelihood that they would be sucked into litigation. Incentives would also arise for press entities to clean out files containing potentially valuable information lest they incur substantial costs in the event of future subpoenas. And permitting litigants unrestricted, court-enforced access to journalistic resources would risk the symbolic harm of making journalist appear to be an investigative arm of the judicial system, the government or private parties."

Thus, Gonzales further reaffirmed the need of a party seeking to overcome a qualified First Amendment privilege to show the "likely relevance" of the material "to a significant issue in the case" and that the material is not "reasonably obtainable from other available sources."

II.

NYC-IMC is an entity engaged in newsgathering in furtherance of its publishing enterprises and is, therefore, entitled to a qualified First Amendment privilege under von Bulow and Gonzales. The New York City Independent Media Center (NYC-IMC) is a loose association of individuals who join together to produce news content for web, radio, photo, video, and print outlets, especially outlets affiliated with the Indy media Network (Indy media). Indy media connects over 130 such Independent Media Centers around the world for collaboration on coverage of events and the sharing of certain resources.

Each Independent Media Center remains autonomous. Moreover, medium-specific collectives, such as the video team or the print team within each local IMC, are also autonomous from their own local chapters. While there are mutually agreed-upon principles that bind the network, there is no uniform organizational structure that applies to every chapter in the network. The NYC-IMC cannot speak for or act on behalf of the Indy media

network and vice-versa, the network cannot act for or speak on behalf of the NYC- IMC. The organizational description below, therefore, applies *only* to the NYC-IMC.

The New York City Independent Media Center is currently composed of a website, a bi-weekly newspaper, a weekly public access television show, and a team of photographers and audio reporters who publish their work on the nyc.indymedia.org website. Editorial decisions are made by medium-specific teams, and they all consist of different -- although sometimes overlapping -- groups of people.

The website has two main parts to it. First is the open-publishing newswire, which functions like a bulletin board in that individuals can publish their content on it without prior editorial approval. Anonymous publishing is allowed. From there, content may be "promoted" to the center column feature section. This is done by a collective that coordinates its work via email list-serves. Video and audio segments are produced by independent reporters and then submitted to the collective project for webcast or broadcast. The producer retains ownership of the content, but agrees to Indymedia's principle of allowing other non-profit and not-for-profit agencies to use their material.

The NYC-IMC publishes a bi-weekly newspaper, *The Independent*. It is produced by a revolving-door team of NYC-based reporters who write local, national, and international stories based on internet research, on-the-ground reporting, and personal interviews. Articles or photos that are printed in the newspaper may be taken from the website, reprinted from other websites, or produced by NYC-IMC journalists. This material is also then posted to the website in both html and pdf format where it is available to the public for free and to other non-profit news agencies for reprint. Material on the website including archives of open working-group email discussions, is available to the public and searchable using any standard search engine. Links to subscription-only list-serves are available only to subscribers and NYC-IMC has no access to those list-serves as it is not a subscriber.

III.

Since, as discussed above, NYC-IMC is a newsgatherer and publisher of news, the City has an obligation to attempt to secure the documents set forth in the subpoena through other available means. Accordingly, NYC-IMC's opposition to the demand for documents is both specific and general. On the specific level the material requested in paragraphs one and two are objectionable upon the ground that they may be obtained from the individuals involved in the Animal and Earth Liberation March itself. Such an objection applies with special force to the requests numbered 3-11. Each of these requests seeks messages to and from an identified party. Accordingly, the City must attempt to secure each of these documents from the parties to that correspondence before seeking such information from NYC-IMC. Finally, the material requested in the paragraphs number 12-15 all relate to documents on Indy media websites. But, as noted above, all of this material is equally accessible to the City by simply using a standard search engine.

This final observation leads, in turn, to NYC-IMC's general objection to each of these requests. As noted above, material on the website including archives of open

working-group email discussions is generally available to the public and searchable using any standard search engine. Email discussions that are on a site that is accessible only by subscription are not accessible to NYC-IMC. It follows, therefore, that all of the electronic documents to which NYC-IM may have access and which may be covered by the subpoena are also accessible to New York City or any other member of the public.

The NYC-IMC's newspaper may be slightly less accessible. Back issues of the publication are available at the Tamiment Library (Robert Wagner Labor Archives) of New York University. But, to the degree that you wish to examine any or all back issues, NYC-IMC will, without waiving any privilege to which it is entitled, make those back issues available for your examination at their offices.

IV.

For the foregoing reasons, I have concluded that NYC-IMC is entitled to a qualified First Amendment privilege under von Bulow and Gonzales; that NYC-IMC has no access to electronic information to which the City of New York would not have access through the use of a standard search engine; and that, accordingly, motion practice with respect to this matter would unyielding to the City both as a legal and practical matter and would, therefore, be a waste of judicial resources. If your conclusion is otherwise, I would be interested in knowing the specific basis for such a determination. Finally, if you wish to arrange for an examination of the back-issues of the newspaper, please feel free to contact me.

Sincerely,

Arthur Eisenberg
Counsel for NYC-IMC

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