Electronic Frontier Foundation
Protecting Rights and Promoting Freedom on the Electronic Frontier

May 29, 2009

VIA EMAIL, FAX AND POSTAL MAIL

Steven D. DeBrota
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Re: Response of Ms. Kristina Clair to Grand Jury Subpoena of January 23, 2009

Assistant U.S. Attorney DeBrota,

As you know, the Electronic Frontier Foundation (EFF) represents Ms. Kristina Clair in regard to the Subpoena to Testify Before the Grand Jury in the United States District Court for the Southern District of Indiana, numbered 09-01-DLP-15-10, dated January 23, 2009 and withdrawn by your office on February 25 after my written objections of February 13. I write today to clarify my client's First Amendment right to disclose the existence of that subpoena and to speak about it publicly.

In my letter of February 13, I advised AUSA Doris Pryor that Ms. Clair did not possess the records sought in the subpoena, that the subpoena was improperly served, and that the subpoena was invalid as it requested records protected under 18 U.S.C. § 2703(c)(1), which requires you to obtain a search warrant or a court order under § 2703(d) to compel their disclosure.

In that letter, I also questioned the validity of the purported requirement on the face of the subpoena that Ms. Clair not disclose the subpoena's existence "unless authorized by the Assistant U.S. Attorney," in light of the fact that the secrecy requirements applying to grand jury proceedings do not apply to my client, *see* F.R.Crim.P. 6(e)(2), and further considering that the subpoena was not accompanied by a court order under 18 U.S.C. § 2705(b) precluding Ms. Clair from notifying any other person of the existence of the subpoena.[1] Such orders, as you know, are issued when a court finds there is reason to believe that disclosure would result in danger to the life or physical safety of an individual, flight from prosecution, destruction of or tampering with evidence, or

[1] Notably, this provision has previously been criticized as potentially violating the First Amendment's prohibition against prior restraint of speech and the common law right of public access to judicial records. *See generally, e.g., In re Sealing and Non-Disclosure of Pen/Trap/2703(d) Orders*, 562 F.Supp.2d 876 (S.D.Tex. 2008).

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intimidation of potential witnesses, or would otherwise seriously jeopardize an investigation or unduly delay a trial. *See id.*

On February 24, I received a voicemail from Ms. Pryor in response to my letter. In that message, Ms. Pryor said that I was correct that the subpoena did not compel Ms. Clair's silence, but that she would be seeking a court order, as she would confirm in a letter later that day. No such letter was forthcoming; instead, I received on February 25 a faxed letter from Ms. Pryor simply stating that the subpoena had been withdrawn.

Shortly after receiving that fax, on February 25, I and my colleague Lee Tien were able to reach you by phone to discuss the newly withdrawn subpoena. You indicated that your office had reconsidered its position and, for unspecified reasons, was choosing **not** to seek a court order compelling Ms. Clair's silence. You further stated that your "legal posture" was that given the withdrawal of the subpoena, it was a "nullity" and that Ms. Clair "can say what she wants"—that there was "no legal disability" against Ms. Clair publicly discussing the subpoena. We expressed our pleasure at this and informed you of Ms. Clair's desire for EFF to publish the subpoena in conjunction with a legal critique of it, both to publicize an instance of government overreaching and to assist future recipients of similarly flawed subpoenas.

Despite the choice not to seek a court order, you made clear your belief that disclosure of the subpoena would have an adverse impact on the grand jury's investigation, that it "may endanger someone's health" and would have a "human cost," and that Ms. Clair should use "conscience as her guide." When we pressed for you to confirm that Ms. Clair would face no legal consequences for her disclosure, *e.g.*, prosecution by your office for obstruction of justice, you would not give it, instead noting the possibility of legal consequences if, for example, "her cousin is involved" in the conduct being investigated. To clarify the issue and memorialize our conversation, I emailed you and Ms. Pryor that same day confirming our understanding that there was no legal bar to Ms. Clair disclosing the subpoena. I received no response.

Your contradictory positions—your stated belief that disclosure of the subpoena will harm the investigation, contrasted with your failure to seek a court order based on that belief—are unacceptable. Ms. Clair has not been informed of the nature of your investigation, the identity of its targets, or the nature of the crimes being investigated. Ms. Clair has no intent, corrupt or otherwise, to influence, obstruct, or impede the due administration of justice in this matter. She does, however, wish to exercise her First Amendment right to speak about the subpoena without restriction, and to authorize EFF to publish and critique the subpoena. Yet that speech has been chilled by the vague threat of obstruction of justice inherent in your imprecise and unsupported statements that her disclosure would somehow harm your investigation.

Put simply, you cannot have it both ways. If you believe that Ms. Clair's disclosure of the subpoena will harm your investigation, apply for a court order under 18 U.S.C. § 2705(b) to prohibit that disclosure. If you do not inform me within seven days that you have applied for such an order, Ms. Clair will assume that her disclosure of the subpoena will

not influence, obstruct, or impede the due administration of justice or otherwise lead to any adverse result in your investigation, and that you have no objection to such disclosure.

If you do apply for a court order to gag Ms. Clair, I ask that you inform us of the court and the judge considering that application, so that we may petition that court as necessary to vindicate Ms. Clair's First Amendment rights.

This letter is made without prejudice to any rights Ms. Clair may have, which are expressly reserved.

Thank you,

Kevin S. Bankston
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