

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

-----X
UNITED STATES,

Plaintiff,

v.

ERIE COUNTY, NEW YORK, et al.,

Defendants.
-----X

:
:
: 09-Civ.-0849

:
: **AFFIRMATION OF**
: **COREY STOUGHTON IN**
: **SUPPORT OF NON-PARTIES'**
: **MOTION TO QUASH**
:
:
: X

I, Corey Stoughton, an attorney admitted to this Court and to practice in the State of New York, state as follows:

1. I am Senior Staff Attorney at the New York Civil Liberties Union (NYCLU) and counsel for non-party subpoena recipients the League of Women Voters of Buffalo/Niagara, the Erie County Prisoners' Rights Coalition, and the Partnership for the Public Good (hereinafter "Recipients").

2. Attached hereto as Exhibits A-C are true and correct copies of the subpoenas served on the Recipients.

3. Days before the 2010 Thanksgiving holiday, I contacted Brian Liebenow from the Erie County Law Department to inform him that the NYCLU had been contacted by some of the Recipients and we were considering representing them in relation to the subpoenas the County had issued. On behalf of the Recipients I asked for additional time to make arrangements with the Recipients for representation and to review the subpoenas. Mr. Liebenow consented to an extension of time to respond to the subpoenas and we agreed that we would speak by telephone after the Thanksgiving holiday, early in the first week of December.

4. I called and left messages for Mr. Liebenow on December 1 and December 2, 2010.

5. On December 3, I reached Mr. Liebenow by telephone. I informed him that I now represented the Recipients and asked him to explain what kind of documents the County was looking for and why those documents were required in the underlying litigation. I explained the Recipients' concerns about the overbreadth and burdensomeness of the requests. Mr. Liebenow explained that the County's sole basis for the subpoenas was the fact that the United States had listed the Recipients in their initial disclosures as parties with potentially discoverable information. In light of this, I informed him that the Recipients did not think the subpoenas were justifiable in light of their chilling effect on First Amendment rights. Nonetheless, I stated that the Recipients would be willing to discuss a narrowing of the subpoena if the County could explain what documents it specifically thought were necessary for its defense.

6. On December 6, Mr. Liebenow and I exchanged correspondence memorializing this conversation, copies of which letters I have attached hereto as Exs. D-E.

7. The County did not respond again until January 26, 2011, when Mr. Liebenow sent a letter outlining the County's "good faith response" to the Recipients' objections. A copy of that letter is attached hereto as Ex. F.

8. The Recipients responded promptly to the County's letter on January 28, 2011. A copy of that letter is attached hereto as Ex. G.

9. Three months passed with no response from the County, during which time I believed that the County was considering the Recipients' pending objections to the subpoenas and weighing the Recipients' First Amendment arguments.

10. On April 20, 2011, a different lawyer from the County, Jeremy Colby, sent a letter to the Recipients stating that, in his view, the Recipients had waived their objections to the subpoenas by failing to formally respond to them. Despite this threat, the letter invited further good-faith discussion by laying out the County's position with regard to the Recipients' objections to the subpoena, agreeing to further narrow the scope of the subpoena, and requesting that the Recipients provide the County with legal authority to support their First Amendment claims. A copy of Mr. Colby's letter is attached hereto as Ex. H.

11. I responded to Mr. Colby's letter on April 25, providing the legal authority Mr. Colby requested and engaging the County's discussion of the Recipients' objections to the subpoenas. A copy of that letter is attached hereto as Ex. I.

12. On May 30, I spoke to Mr. Colby by telephone. During that conversation Mr. Colby agreed to narrow the scope of the subpoenas even further and, although he did not agree with the Recipients' First Amendment objections to the subpoenas, he agreed that the County should first seek the documents it had subpoenaed through party discovery.

13. In an email memorializing that conversation, however, Mr. Colby demanded that Recipients nonetheless provide "formal responses" to the subpoenas or the County would move to compel them. I responded to Mr. Colby that any "formal response" to the subpoenas would entail a motion to quash and, therefore, would defeat the purpose of waiting to see if party discovery would eliminate the need for the subpoenas. I also suggested that formal responses to the original subpoenas would be futile since the County had agreed to narrow them so substantially, and suggested that the County withdraw the subpoenas and issue ones more in keeping with the outcome of our negotiations, should the County believe it was still necessary to do so after exhausting efforts to obtain the information through party discovery. Thereafter, Mr.

Colby withdrew his offer to narrow the scope of the subpoenas and stated that the County “intends to move to compel.” Nonetheless, he requested that the Recipients “hold off” on any motion to quash pending an upcoming status conference and a visit from the Department of Justice. The chain of emails constituting this correspondence is attached hereto as Ex. J.

14. Having not heard from the County for more than two weeks and believing that good-faith negotiations had been exhausted in light of the County’s stated intention to move to compel, I emailed Mr. Colby on July 19, 2011 and asked that the County withdraw the subpoenas or the Recipients would proceed to file a motion to quash. The County refused to withdrawn the subpoenas. This email is the final email in the chain that constitutes Ex. J.

Dated: July 27, 2011
New York, New York



Corey Stoughton

Exhibit A

UNITED STATES DISTRICT COURT
for the

Western District of New York

UNITED STATES,

Plaintiff

v.

ERIE COUNTY, NEW YORK, et al.,

Defendant

Civil Action No. 09-CV-0849

(If the action is pending in another district, state where:)

SUBPOENA TO PRODUCE DOCUMENTS, INFORMATION, OR OBJECTS
OR TO PERMIT INSPECTION OF PREMISES IN A CIVIL ACTION

To: ERIE COUNTY PRISONERS' RIGHTS COALITION, c/o Karima Amin, P.O. Box 332 Buffalo, New York 14209

☒ **Production:** YOU ARE COMMANDED to produce at the time, date, and place set forth below the following documents, electronically stored information, or objects, and permit their inspection, copying, testing, or sampling of the material: See list of documents attached hereto as Exhibit A.

Place: Erie County Department of Law, 95 Franklin Street, Room 1634 Buffalo, New York	Date and Time: 11/30/2010 10:00 am
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☐ **Inspection of Premises:** YOU ARE COMMANDED to permit entry onto the designated premises, land, or other property possessed or controlled by you at the time, date, and location set forth below, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

Place:	Date and Time:
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The provisions of Fed. R. Civ. P. 45(c), relating to your protection as a person subject to a subpoena, and Rule 45 (d) and (e), relating to your duty to respond to this subpoena and the potential consequences of not doing so, are attached.

Date: 11/10/2010

CLERK OF COURT

OR

Signature of Clerk or Deputy Clerk

Attorney's signature

The name, address, e-mail, and telephone number of the attorney representing (name of party) the Defendants, who issues or requests this subpoena, are:

Martin A. Polowy, Esq., Acting Erie County Attorney, Brian R. Liebenow, Esq., Assistant County Attorney, of counsel, 95 Franklin Street, Room 1634, Buffalo, New York 14202, (716) 858-2200, Brian.Liebenow@erie.gov

Civil Action No. 09-CV-0849

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

This subpoena for *(name of individual and title, if any)* Erle County Prisoners' Rights Coalition, c/o Karima Amin
was received by me on *(date)* _____.

☒ I served the subpoena by delivering a copy to the named person as follows: _____

_____ on *(date)* _____; or

☐ I returned the subpoena unexecuted because: _____

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also
tendered to the witness fees for one day's attendance, and the mileage allowed by law, in the amount of
\$ _____.

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ 0.00.

I declare under penalty of perjury that this information is true.

Date: _____

Server's signature

Printed name and title

Server's address

Additional information regarding attempted service, etc:

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff

vs.

EXHIBIT A TO SUBPOENA
DUCES TECUM

Civil Docket No. 09-CV-0849

ERIE COUNTY, NEW YORK et al.

Defendants

EXHIBIT A TO SUBPOENA DUCE TECUM DIRECTED TO
ERIE COUNTY PRISONERS' RIGHTS COALITION c/o KARIMA AMIN

Instructions and Definitions

Pursuant to the subpoena duces tecum accompanying this exhibit you are commanded to produce at the time, date, and place set forth in the aforementioned subpoena duces tecum the documents, electronically stored information, or objects, identified below.

The term "document" as used herein means any written, printed, typed, or other graphic matter of any kind or nature, whether produced or reproduced, including drafts of copies bearing notations or marks not found on the original, and includes but is not limited to memoranda, reports, notes, letters, envelopes, telegrams, tabulations, studies, analysis, evaluations, work papers, journals, statistical records, lists, comparisons, questionnaires, surveys, charts, graphs, computer printouts, microfilms, and diaries. The term "document" is defined to be synonymous in meaning and equal in scope to the usage of this term in Federal Rule of Civil Procedure 34(a), including, without limitation, electronic or computerized data compilations. A draft or non-identical copy is a separate document within the meaning of this term.

Documents:

1. All correspondence, including, but not limited to written letters, and electronic mail between Erie County Prisoners' Rights Coalition, its members, directors, chairs, and/or agents, and the United States Department of Justice, its attorneys, employees and/or agents.
2. All documents provided to the United States Department of Justice, its attorneys, employees and/or agents by the Erie County Prisoners' Rights Coalition, its members, directors, chairs, and/or agents.
3. All documents provided to the Erie County Prisoners' Rights Coalition, its members, directors, chairs, and agents by third parties, including, but not limited to former and/or current Erie County and/or Erie County Sheriff's employees, and current and/or former inmates at the Erie County Holding Center ("ECHC") and/or Erie County Correctional Facility ("ECCF") regarding the conditions at the ECHC and/or the ECCF.

Dated: November 10, 2010
Buffalo, New York

MARTIN A. POLOWY,
Acting Erie County Attorney

By: 

Brian R. Liebenow, Esq.
Assistant County Attorney, of counsel
Attorneys for Defendants
95 Franklin Street, Room 1634
Buffalo, New York 14202
Phone: (716) 858-2200
Email: Brian.Liebenow@erie.gov

Exhibit B

AO 88B (Rev. 06/09) Subpoena to Produce Documents, Information, or Objects or to Permit Inspection of Premises in a Civil Action

UNITED STATES DISTRICT COURT

for the

Western District of New York

UNITED STATES,

Plaintiff

v.

ERIE COUNTY, NEW YORK, et al.,

Defendant

Civil Action No. 09-CV-0849

(If the action is pending in another district, state where:)

SUBPOENA TO PRODUCE DOCUMENTS, INFORMATION, OR OBJECTS
OR TO PERMIT INSPECTION OF PREMISES IN A CIVIL ACTION

To: Partnership For The Public Good, Inc., 237 Main St., Suite 1200 Buffalo, New York, 14203

☒ **Production:** YOU ARE COMMANDED to produce at the time, date, and place set forth below the following documents, electronically stored information, or objects, and permit their inspection, copying, testing, or sampling of the material: See list of documents attached hereto as Exhibit A.

Place: Erie County Department of Law,
95 Franklin Street, Room 1634
Buffalo, New York

Date and Time:

11/30/2010 10:00 am

☐ **Inspection of Premises:** YOU ARE COMMANDED to permit entry onto the designated premises, land, or other property possessed or controlled by you at the time, date, and location set forth below, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

Place:

Date and Time:

The provisions of Fed. R. Civ. P. 45(c), relating to your protection as a person subject to a subpoena, and Rule 45 (d) and (e), relating to your duty to respond to this subpoena and the potential consequences of not doing so, are attached.

Date: 11/10/2010

CLERK OF COURT

OR

Signature of Clerk or Deputy Clerk

Attorney's signature

The name, address, e-mail, and telephone number of the attorney representing (name of party) the Defendants, who issues or requests this subpoena, are:

Martin A. Polowy, Esq., Acting Erie County Attorney, Brian R. Liebenow, Esq., Assistant County Attorney, of counsel,
95 Franklin Street, Room 1634, Buffalo, New York 14202, (716) 858-2200, Brian.Liebenow@erie.gov

AO 88B (Rev. 06/09) Subpoena to Produce Documents, Information, or Objects or to Permit Inspection of Premises in a Civil Action (Page 2)

Civil Action No. 09-CV-0849

PROOF OF SERVICE*(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)*

This subpoena for *(name of individual and title, if any)* Partnership For The Public Good, Inc.
was received by me on *(date)* _____.

☒ I served the subpoena by delivering a copy to the named person as follows: _____

_____ on *(date)* _____; or

☐ I returned the subpoena unexecuted because: _____

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also
tendered to the witness fees for one day's attendance, and the mileage allowed by law, in the amount of
\$ _____.

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ 0.00.

I declare under penalty of perjury that this information is true.

Date: _____

Server's signature

Printed name and title

Server's address

Additional information regarding attempted service, etc:

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff

Civil Docket No. 09-CV-0849

vs.

ERIE COUNTY, NEW YORK et al.

Defendants

EXHIBIT A TO SUBPOENA DUCES TECUM DIRECTED TO
PARTNERSHIP FOR THE PUBLIC GOOD, INC.
237 MAIN ST., SUITE 1200
BUFFALO, NEW YORK, 14203

Instructions and Definitions

Pursuant to the subpoena duces tecum accompanying this exhibit you are commanded to produce at the time, date, and place set forth in the aforementioned subpoena duces tecum the documents, electronically stored information, or objects, identified below.

The term "document" as used herein means any written, printed, typed, or other graphic matter of any kind or nature, whether produced or reproduced, including drafts of copies bearing notations or marks not found on the original, and includes but is not limited to memoranda, reports, notes, letters, envelopes, telegrams, tabulations, studies, analysis, evaluations, work papers, journals, statistical records, lists, comparisons, questionnaires, surveys, charts, graphs, computer printouts, microfilms, and diaries. The term "document" is defined to be synonymous in meaning and equal in scope to the usage of this term in Federal Rule of Civil Procedure 34(a), including, without limitation, electronic or computerized data compilations. A draft or non-identical copy is a separate document within the meaning of this term.

Documents:

1. All correspondence, including, but not limited to written letters, and electronic mail between the Partnership for the Public Good, Inc., its members, directors, chairs, and/or agents, and the United States Department of Justice, its attorneys, employees and/or agents regarding the conditions at the Erie County Holding Center and/or the Erie County Correctional Facility.
2. All documents provided to the United States Department of Justice, its attorneys, employees and/or agents by the Partnership for the Public Good, Inc., its members, directors, chairs, and/or agents regarding the conditions at the Erie County Holding Center and/or the Erie County Correctional Facility.
3. All documents provided to the Partnership for the Public Good, Inc., its members, directors, chairs, and agents by third parties, including, but not limited to former and/or current Erie County and/or Erie County Sheriff's employees, and current and/or former inmates at the Erie County Holding Center ("ECHC") and/or Erie County Correctional Facility ("ECCF") regarding the conditions at the ECHC and/or the ECCF.

Dated: November 10, 2010
Buffalo, New York

MARTIN A. POLOWY,
Acting Erie County Attorney

By: 

Brian R. Liebenow, Esq.
Assistant County Attorney, of counsel
Attorneys for Defendants
95 Franklin Street, Room 1634
Buffalo, New York 14202
Phone: (716) 858-2200
Email: Brian.Liebenow@erie.gov

Exhibit C

ERIE COUNTY ATTORNEY'S OFFICE

95 Franklin Street, Room 1634, Buffalo, New York 14202 (716) 858-2200

UNITED STATES DISTRICT COURT

for the

Western District of New York

UNITED STATES,

Plaintiff,

ERIE COUNTY, NEW YORK, et al.,

Defendant.

Civil Action No. 09-CV-0849

(If the action is pending in another district, state where:

SUBPOENA TO PRODUCE DOCUMENTS, INFORMATION, OR OBJECTS
OR TO PERMIT INSPECTION OF PREMISES IN A CIVIL ACTIONTo: LEAGUE OF WOMEN VOTERS OF BUFFALO/NIAGARA, INC., 1272 Delaware Avenue, Buffalo, New York
14209.

☒ **Production:** YOU ARE COMMANDED to produce at the time, date, and place set forth below the following documents, electronically stored information, or objects, and permit their inspection, copying, testing, or sampling of the material: See list of documents attached hereto as Exhibit A.

Place: Erie County Department of Law, 95 Franklin Street, Room 1634 Buffalo, New York	Date and Time: 11/30/2010 10:00 am
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☐ **Inspection of Premises:** YOU ARE COMMANDED to permit entry onto the designated premises, land, or other property possessed or controlled by you at the time, date, and location set forth below, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

Place:	Date and Time:
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The provisions of Fed. R. Civ. P. 45(c), relating to your protection as a person subject to a subpoena, and Rule 45 (d) and (e), relating to your duty to respond to this subpoena and the potential consequences of not doing so, are attached.

Date: 11/10/2010

CLERK OF COURT

OR

Signature of Clerk or Deputy Clerk

Attorney's signature

The name, address, e-mail, and telephone number of the attorney representing (name of party) the Defendants, who issues or requests this subpoena, are:

Martin A. Polowy, Esq., Acting Erie County Attorney, Brian R. Liebenow, Esq., Assistant County Attorney, of counsel,
95 Franklin Street, Room 1634, Buffalo, New York 14202, (716) 858-2200, Brian.Liebenow@erie.gov.

CIVIL ACTION NO. 03-CV-00000

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

This subpoena for (name of individual and title, if any) LEAGUE OF WOMEN VOTERS OF BUFFALO/NIAGARA
was received by me on (date) _____

☒ I served the subpoena by delivering a copy to the named person as follows:

_____ on (date) _____ ; or

☐ I returned the subpoena unexecuted because: _____

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also
tendered to the witness fees for one day's attendance, and the mileage allowed by law, in the amount of

\$ _____

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ 0.00

I declare under penalty of perjury that this information is true.

Date: _____

Server's signature

Printed name and title

Server's address

Additional information regarding attempted service, etc:

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff

Civil Docket No. 09-CV-0849

vs.

ERIE COUNTY, NEW YORK et al.

Defendants

**EXHIBIT A TO SUBPOENA DUCES TECUM DIRECTED TO
LEAGUE OF WOMEN VOTERS OF BUFFALO/NIAGARA, INC.
1272 DELAWARE AVENUE
BUFFALO, NEW YORK, 14209**

Instructions and Definitions

Pursuant to the subpoena duces tecum accompanying this exhibit you are commanded to produce at the time, date, and place set forth in the aforementioned subpoena duces tecum the documents, electronically stored information, or objects, identified below.

The term "document" as used herein means any written, printed, typed, or other graphic matter of any kind or nature, whether produced or reproduced, including drafts of copies bearing notations or marks not found on the original, and includes but is not limited to memoranda, reports, notes, letters, envelopes, telegrams, tabulations, studies, analysis, evaluations, work papers, journals, statistical records, lists, comparisons, questionnaires, surveys, charts, graphs, computer printouts, microfilms, and diaries. The term "document" is defined to be synonymous in meaning and equal in scope to the usage of this term in Federal Rule of Civil Procedure 34(a), including, without limitation, electronic or computerized data compilations. A draft or non-identical copy is a separate document within the meaning of this term.

Federal Rule of Civil Procedure 45 (c), (d), and (e) (Effective 12/1/07)

(c) Protecting a Person Subject to a Subpoena.

(1) *Avoiding Undue Burden or Expense; Sanctions.* A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The issuing court must enforce this duty and impose an appropriate sanction — which may include lost earnings and reasonable attorney's fees — on a party or attorney who fails to comply.

(2) *Command to Produce Materials or Permit Inspection.*

(A) *Appearance Not Required.* A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing or sampling any or all of the materials or to inspecting the premises — or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the issuing court for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) *Quashing or Modifying a Subpoena.*

(A) *When Required.* On timely motion, the issuing court must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person who is neither a party nor a party's officer to travel more than 100 miles from where that person resides, is employed, or regularly transacts business in person — except that, subject to Rule 45(c)(3)(B)(iii), the person may be commanded to attend a trial by traveling from any such place within the state where the trial is held;

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the issuing court may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information;

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party; or

(iii) a person who is neither a party nor a party's officer to incur substantial expenses to travel more than 100 miles to attend trial.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(c)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

(d) Duties in Responding to a Subpoena.

(1) *Producing Documents or Electronically Stored Information.* These procedures apply to producing documents or electronically stored information:

(A) *Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) *Form for Producing Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) *Claiming Privilege or Protection.*

(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

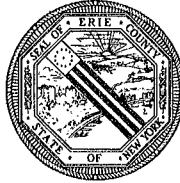
(i) expressly make the claim; and

(ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(e) *Contempt.* The issuing court may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena. A nonparty's failure to obey must be excused if the subpoena purports to require the nonparty to attend or produce at a place outside the limits of Rule 45(c)(3)(A)(ii).

Exhibit D



COUNTY OF ERIE

MARTIN A. POLOWY
ACTING COUNTY ATTORNEY

CHRIS COLLINS
COUNTY EXECUTIVE

THOMAS F. KIRKPATRICK
ACTING FIRST ASSISTANT COUNTY ATTORNEY

DEPARTMENT OF LAW

December 6, 2010

Via Facsimile (212-607-3318) and U.S. Mail

Corey Stoughton, Esq.
New York Civil Liberties Union
125 Broad Street, 19th Floor
New York, New York 10004

RE: US DOJ v. Erie County, Chris Collins, Timothy Howard, et. al.
Our File No.: 31-20070052
Case No.: 9-CV-849

Dear Ms. Stoughton:

I write to confirm our conversation from Friday, December 3, 2010 wherein you advised me that you are representing the League of Women Voters of Buffalo-Niagara ("LOWV"), the Erie County Prisoners' Rights Coalition ("ECPRC"), and the Partnership for the Public Good ("PFPG"), in connection with the non-party subpoenas duces tecum ("the Subpoenas") served in the above referenced matter.

As you know, on November 10, 2010, the above referenced organizations were each properly served by the County of Erie with a subpoena duces tecum related to the on-going litigation between the United States and the County of Erie ("the Litigation"). The Subpoenas were the result of the United States identifying the LOWV, ECPRC, and PFPG as having discoverable information that the United States may use to support its allegations against the County of Erie pursuant to Rule 26 of the Federal Rules of Civil Procedure ("FRCP"). The Subpoenas were returnable on November 30, 2010.

On November 24, 2010, you contacted me via telephone and informed me that you would be representing one or more of the three organizations listed above and you requested an extension of the November 30, 2010 production deadline. I consented to a brief adjournment of the production

Corey Stoughton, Esq.
December 6, 2010
Page 2 of 2

deadline, and we agreed to speak the following week once you had further reviewed the Subpoenas and confirmed which of the three organizations you would be representing.

On December 3, 2010 we spoke via telephone at which time you confirmed your representation of LOWV, ECPRC, and PFPG. During our conversation you also inexplicably informed me that your clients will not be responding to the Subpoenas. Although I offered to discuss any objections you had in a good faith attempt to resolve this dispute, you declined.

While I trust that you are familiar with the FRCP, I direct your attention to Rules 34 and 45 which require a non-party to produce documents and tangible things as directed by a subpoena. I respectfully encourage you and your clients to reconsider your position in an effort to conserve judicial resources and the costs associated with motion practice. Again, to the extent you have any, I am available to discuss your objections in a good faith attempt to resolve this dispute.

In the event that your position changes upon reconsideration, or you wish to discuss this matter further, please contact me by 12:00 P.M. on Tuesday, December 7, 2010. Please be advised that in the event that I am forced to proceed with motion practice, I will be seeking costs, including attorneys fees.

Thank you for your prompt attention to this matter.

Very truly yours,

MARTIN A. POLOWY
Acting Erie County Attorney

By: 

BRIAN R. LIEBENOW
Assistant County Attorney

BRL/dkw

Exhibit E



NYCLU

NEW YORK CIVIL LIBERTIES UNION

125 Broad Street
New York, NY 10004
(212) 607-3366
(212) 607-3329
www.nyclu.org

Corey Stoughton
Senior Staff Attorney
cstoughton@nyclu.org

BY FACSIMILE & FIRST CLASS MAIL

Brian R. Liebenow
Assistant County Attorney
County of Erie
95 Franklin St., Room 1634
Buffalo, NY 14202
Fax: (706) 858 2281

December 6, 2010

Re: Non-Party Subpoenas in *United States v. Erie County* (09-CV-849, WDNY)

Dear Mr. Liebenow:

I received your letter today regarding the County's intent to move to compel a response to the subpoenas issued to the League of Women Voters of Buffalo-Niagara, the Prisoners' Rights Coalition, and the Partnership for the Public Good. Your letter suggests that I declined to discuss the non-parties' objections to the subpoenas. I want to state clearly that that is not the case. We discussed those objections on the phone last week and I remain open to further discussion. To that end, let me articulate again, this time in writing, the nature of the non-parties' objections.

As we discussed last week, the non-party recipients of these subpoenas cannot comprehend their legitimate purpose. The law is clear that when a government party seeks to use the subpoena power in a manner that has the potential to chill recipients' exercise of their First Amendment rights of association and to petition government, the burden on the party issuing the subpoena to justify its need for the information is heightened.

When we spoke, you were not able to articulate how the information demanded in the County's subpoenas would be relevant to its defenses in the above-referenced case, nor why your office cannot obtain any information pertinent to the United States Department of Justice's investigation of the County's correctional facilities from the parties to the litigation directly. We understand that the United States identified the non-party advocacy organizations in their initial disclosures as potentially having discoverable information that the United States might use in this litigation but it is our further understanding that the United States has provided all of that information to you in discovery. Having said that, I remain open to discussing with you what proposed information or categories of information in the possession of the non-parties you

believe the County requires for its defense of this case that is not obtainable from the United States.

In any case, however, the United States' mention of the non-parties in its disclosures cannot justify the remarkable breadth of the information demanded in the County's subpoena. The identical subpoenas seek all communications and documents exchanged between any part of the DOJ and the organizations or anyone associated with them, with no subject matter or time limitation. They also seek every document received by the organizations or anyone associated with them pertaining to the conditions at the County facilities at issue in the litigation, again without time limitation. These requests are patently overbroad in relation to the subject matter of the litigation, would place an enormous burden on the non-parties, and raise obvious privacy and First Amendment concerns for the organizations, their members, and their board members.

I hope this letter serves to clarify the issues regarding the subpoenas. It remains the non-parties' hope that the County will reconsider both its use of the subpoena power to impose such an enormous and unnecessary burden on the objects of the subpoenas as well as its present intent to invoke the judicial process to do so. I remain available to discuss the non-parties' objections further so that we may avoid unnecessary litigation.

Sincerely,

A handwritten signature in black ink, appearing to read 'Corey Stoughton', with a long horizontal flourish extending to the right.

Corey Stoughton

Exhibit F



COUNTY OF ERIE

MARTIN A. POLOWY
ACTING COUNTY ATTORNEY

CHRIS COLLINS
COUNTY EXECUTIVE

THOMAS F. KIRKPATRICK
ACTING FIRST ASSISTANT COUNTY ATTORNEY

DEPARTMENT OF LAW

January 26, 2011

Via Facsimile at (212) 607-3318 and U.S. Mail
Corey Stoughton, Esq.
New York Civil Liberties Union
125 Broad Street, 19th Floor
New York, New York 10004

RE: US DOJ v. Erie County, Chris Collins, Timothy Howard, et. al.
Our File No.: 31-20070052
Case No.: 9-CV-849

Dear Ms. Stoughton:

This letter will serve as The County's good faith response to the concerns raised in your letter dated December 6, 2011 regarding the non-party subpoenas duces tecum ("the Subpoenas") served upon your clients, the League of Women Voters of Buffalo-Niagara ("LOWV"), the Erie County Prisoners' Rights Coalition ("ECPRC"), and the Partnership for the Public Good ("PFPG"), in connection with in the above referenced matter.

Your clients contend that the scope of the Subpoenas is "patently overbroad in relation to the subject matter of the litigation" and "would place an enormous burden on the non-parties." It is our understanding that your clients' primary objection to the subpoenas is that they seek information "with no subject matter or time limitation."

The County disagrees with your clients' assertions, but in a good faith effort to conserve judicial resources, the County agrees to limit the information sought as follows:

1. All correspondence, including, but not limited to written letters, and electronic mail regarding the Erie County Holding Center and/or Erie County Correctional Facility, or any other Erie County Departments, agencies, offices, or similar County subdivisions in connection with those facilities between the LOWV, ECPRC, and PFPG, their members, directors, chairs, and/or agents, and the United States Department of Justice, its attorneys, employees and/or agents sent or received between January 1, 2005 and the present date.

2. All documents provided to the United States Department of Justice, its attorneys, employees and/or agents by the LOWV, ECPRC, and PFPG, their members, directors, chairs, and/or agents, from January 1, 2005 and the present and related to the conditions at the Erie County Holding Center and/or Erie County Correctional Facility.
3. All documents provided to the LOWV, ECPRC, and PFPG, their members, directors, chairs, and/or agents by third parties, including, but not limited to former and/or current Erie County and/or Erie County Sheriff's employees, and current and/or former inmates at the Erie County Holding Center and/or Erie County Correctional Facility, received between January 1, 2005 and the present, regarding the conditions at the aforementioned facilities.

In addition to the above limitations, in order to reduce any perceived burden on your clients, we are willing to make arrangement to have our vendor come to your clients' offices to copy any documents responsive to our subpoena.

In light of the above proposed limitations, we respectfully encourage your clients to reconsider their position in an effort to conserve judicial resources and the costs associated with motion practice. We remain available to discuss your clients' objections in a good faith attempt to resolve this dispute.

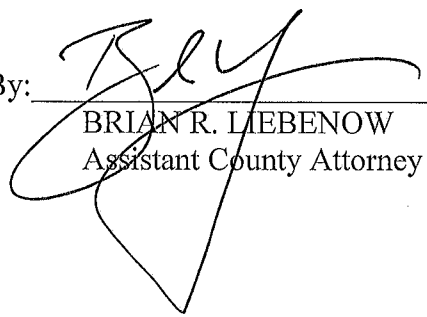
In the event that your clients' position changes upon reconsideration, please contact our office by 4:00 P.M. on Friday, January 28, 2011. Please be advised that in the event that we are forced to proceed with motion practice, we will be seeking costs, including attorneys fees.

Thank you for your prompt attention to this matter.

Very truly yours,

MARTIN A. POLOWY
Acting Erie County Attorney

By: _____


BRIAN R. LIEBENOW
Assistant County Attorney

BRL/dbm

Exhibit G



NYCLU

NEW YORK CIVIL LIBERTIES UNION

125 Broad Street
New York, NY 10004
(212) 607-3366
(212) 607-3329
www.nyclu.org

Corey Stoughton
Senior Staff Attorney
cstoughton@nyclu.org

BY FACSIMILE & FIRST CLASS MAIL

Brian R. Liebenow
Assistant County Attorney
County of Erie
95 Franklin St., Room 1634
Buffalo, NY 14202
Fax: (706) 858 2281

January 28, 2010

Re: Non-Party Subpoenas in *United States v. Erie County* (09-CV-849, WDNY)

Dear Mr. Liebenow:

I write once again regarding the non-party subpoenas issued to the League of Women Voters of Buffalo-Niagara, the Prisoners' Rights Coalition, and the Partnership for the Public Good. The proposal in your letter of January 26 to narrow the subpoenas from an unlimited time period to documents from the past six years, and from all subject matters to topics concerning the Erie County Holding Center and/or Erie County Correctional Facility, fails to address several of the concerns raised in our letter of December 6 regarding both the breadth of the subpoena, the undue burden of response, and the infringement of the subpoena recipients' First Amendment rights.

In particular, your letter does not speak at all to the question of the County's need for this information in light of the clear potential of these subpoenas to chill their recipients' exercise of First Amendment rights of association and to petition government. At no point in your correspondence or in our conversations has the County articulated its basis for requesting this information from non-parties, either in terms of the relationship of documents sought to the United States' case against the County or in terms of the County's ability or inability to obtain any relevant information directly from the United States. Based on our understanding of the nature of the United States' claims against the County in this suit – and in light of the ongoing overbreadth and burdensomeness issues discussed below – it is difficult to interpret the subpoenas as other than a fishing expedition designed to punish these organizations and those associated with them for advocacy that the County perceives to be antithetical to its interests.

The subpoenas also remain overbroad and excessively burdensome on their face in several respects. In particular, as I mentioned in my December 6 letter, they are addressed not only to the organizations themselves but to any "members, directors, chairs, and/or agents" of the

organizations, without limitation. Further, request number three, as you propose to amend it, seeks every document provided to the organizations (and their members, directors, chairs and/or agents) and any other party regarding ECCF and/or ECCH. As you know, all three organizations (as well as several of their members, directors, chairs and/or agents) are active and life-long prisoner-rights advocates whose primary focus is working on issues related to the two facilities; the request, therefore, seeks information about every intake, complaint, and external discussion these non-party organizations and individuals have had for the past six years regarding their primary mission.

Moreover, as the amended request specifically singles out documents received from inmates, and as some of the targets of the County's subpoenas are attorneys and/or mental health professionals, this request also raises serious concerns regarding confidential client information, the attorney-client privilege and other professional privileges.

Although we appreciate the effort you have taken to address some of the concerns raised in our last letter, the subpoenas drafted by the County remain objectionable for the reasons stated herein, particularly in light of the well-developed case law cautioning against such subpoenas on First Amendment grounds. To the extent that the County is willing or able to address these remaining concerns, I am available to discuss the subpoena either in writing or over the telephone. (I will, however, be away next week and ask that you take that into account in setting any deadlines for a further response or taking any other action.) If the County wishes instead to bring this issue to the Court, the subpoena recipients are prepared to cross-move to quash the subpoenas and to seek other relief from the Court as appropriate.

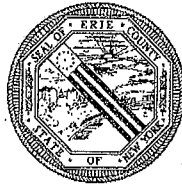
Sincerely,

A handwritten signature in black ink, appearing to read "Corey Stoughton", with a stylized flourish at the end.

Corey Stoughton

cc: Alyssa Lareau (via email)
Staff Attorney
United States Department of Justice
Civil Rights Division
Special Litigation Section
950 Pennsylvania Ave. NW
Washington, DC 20530

Exhibit H



COUNTY OF ERIE

JEREMY A. COLBY
COUNTY ATTORNEY

CHRIS COLLINS
COUNTY EXECUTIVE

DEPARTMENT OF LAW

MARTIN A. POLOWY
FIRST ASSISTANT COUNTY ATTORNEY

THOMAS F. KIRKPATRICK, JR.
SECOND ASSISTANT COUNTY ATTORNEY

April 20, 2011

VIA E-MAIL ONLY at cstoughton@nyclu.org

Corey Stoughton, Esq.
New York Civil Liberties Union
125 Broad Street
New York, New York 10004

RE: US DOJ v. Erie County, Chris Collins, Timothy Howard, et al
Our File No.: 31-20070052
Case No.: 9-CV-849

Dear Ms. Stoughton:

I write in response to your letter of January 28, 2011.¹ Before responding to your letter, a brief summary of the events at issue. On November 10, 2010, a subpoena was served on the League of Women Voters of Buffalo Niagara ("the League"), the Erie County Prisoners' Rights Coalition ("the Coalition"), and the Partnership for the Public Good ("the Partnership"). The League responded by letter dated November 15, 2010 objecting to the manner of service and its difficulty in producing documents before the upcoming holiday season because it is a volunteer organization.² Neither the Coalition nor the Partnership objected before November 24, 2010. Although you spoke with Brian Liebenow on November 24, it is my understanding that no objections were raised and that you merely sought an extension of the production deadline -- which was granted. You also noted that you would confirm whether you would be representing the subpoena recipients.

¹ The letter, however, was dated 2010 (albeit faxed on January 28, 2011).

² The holiday objection is now moot. The only possible objection that the League raised in a timely manner is the manner of service, but the subpoena was personally served (attached is the proof of service). Moreover, even if the League was served by mail as asserted in their letter, such service is permissible under Rule 45. Beare v. Millington, 2010 WL 234771, at *4 (E.D.N.Y. 2010) ("This Court agrees with the reasoning of the courts in the Second Circuit holding that Rule 45 requires only delivery which reasonably ensures actual receipt by a witness.") (citations omitted); JPMorgan Chase Bank, N.A. v. IDW Group, LLC, 2009 WL 1313259, at *2 (S.D.N.Y. 2009) ("[T]he language of Rule 45 does not explicitly demand personal service of a subpoena; indeed [s]uch language neither requires in-hand service nor prohibits alternative means of service.") (citations and internal quotation marks omitted).

You again spoke with Mr. Liebenow by phone on December 3, 2010, with subsequent correspondence dated December 6, 2010 and January 28, 2010 [sic]. I will address the objections set forth in your letters in a final attempt to resolve this matter without motion practice.

First, your clients waived any objections that they may have had by failing to serve written objections within the fourteen day period set forth in Rule 45(c)(2)(B), which states that any such "objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served."³ The Second Circuit Court of Appeals has noted that "Rule 45 contemplates assertion of all objections to document production within 14 days. . ."⁴ Consequently, a "non-party waives any objections if she does not timely object to the subpoena."⁵

Second, you noted that your clients "cannot comprehend [the] legitimate purpose" of the subpoenas served on them. Your clients were identified by the United States in its Rule 26(a)(1) initial disclosures dated October 22, 2010 as persons in possession of relevant information. That is the legitimate purpose of the subpoenas. Although the United States may have some of the documents that are responsive to these subpoenas, the County is entitled to receive responses to its subpoenas.

Third, with respect to your clients' First Amendment rights, you have not provided anything other than your conclusory assertion of infringement and "potential . . . to chill." Please explain what activity would be chilled and why. As you know, First Amendment rights are not absolute. For example, in Schiller v. City of New York, a court rejected NYCLU's assertion that its First Amendment rights did not require it to comply with a subpoena where the NYCLU was involved in assisting or promoting litigants in a lawsuit concerning alleged police misconduct and the conditions of a detention center.⁶ Likewise here, your clients provided information to the United States to assist it in filing a lawsuit against the County. Under the fairness doctrine discussed in Schiller, your clients cannot selectively disclose information to one party and then refuse to respond to the County's subpoena.

Fourth, please identify the authority that supports your belief that the County must articulate its reason or basis for requesting this information. I am not aware of any requirement that litigants have to explain litigation decisions to non-party subpoena recipients. The County is

³ Emphasis added.

⁴ In re DG Acquisition Corp., 151 F.3d 75, 81 (2d Cir. 1998) (emphasis added).

⁵ Stringer v. Ryan, 2009 WL 3644360, at *1 (S.D. Fla. 2009) (citing In re DG Acquisition Corp., 151 F.3d 75, 81 (2d Cir. 1998)); see also Samad Bros., Inc. v. Bokara Rug Co., Inc., 2010 WL 5094344, at *2 (S.D.N.Y. 2010) ("failure to serve written objections to a subpoena within the time specified by Rule 45(c)(2)(B) typically constitutes a waiver of such objections" unless the party can show "unusual circumstances" and "good cause"); In re Corso, 328 B.R. 375, 384 (E.D.N.Y. Bankr. 2005) (citing In re DG Acquisition Corp. for the proposition that the "fourteen day time limitation to serve written objections to a subpoena is crucial as failure to do so typically constitutes a waiver of such objections").

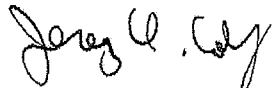
⁶ 245 F.R.D. 112 (S.D.N.Y. 2007).

not engaging in a fishing expedition nor is it retaliating against your clients for their advocacy. The County is simply seeking to obtain the documents your clients provided to the United States and which serve as part of the basis for the United States' claims in the action – as evidenced by the United States' disclosure that your clients possess relevant information.

Fifth, with respect to the breadth of the subpoenas, the County will defer request number three for now. This should obviate many of your concerns, including your concern about privilege. Although you suggest that it is overbroad and burdensome for your clients to provide responsive documents in the possession of "members, directors, chairs, and/or agents," your clients are required to provide documents within the custody or control of your clients, which includes documents held by agents and affiliated persons.⁷

Thank you for your time and immediate attention to this matter.

Very truly yours,



JEREMY A. COLBY
Erie County Attorney

JAC/dkw

⁷ See, e.g., U.S. v. Stein, 488 F. Supp. 2d 350, 360-62 (S.D.N.Y. 2009) (citing cases applying the phrase "possession, custody, or control" contained in Rule 45 and similar rules); Bailey Industries, Inc. v. CLJP, Inc., 270 F.R.D. 662, 671-672 (N.D. Fla. 2010) (noting that courts may require "certification that the nonparty has 'conducted a search for the information reasonably available to them through their agents, attorneys, or others subject to their control and has[] determined that the information requested either does not exist or that it has been produced.'" (emphasis added).

UNITED STATES DISTRICT COURT WESTERN DISTRICT OF NEW YORK

UNITED STATES

Plaintiff,

-vs.-

AFFIDAVIT OF SERVICE
ON AN INDIVIDUAL
OR CORPORATION

County of ERIE, NY

et al. Defendant.

Civil Action # 09-CV-0349

State of New York

County of ERIE

ss.:

DOUGLAS A. Di Filippo

being duly sworn, deposes and says that he is over 18 years of age and not a party to this action; that on the 10 day of November 2010 at approximately 2:46 PM AM at 1272 Delaware Ave Buffalo NY 14209 New York deponent served the annexed ~~Substantive Decree~~ on LEAGUE OF WOMEN VOTERS of the defendant named herein, in the following manner: ~~Buffalo/Maryland Ave~~

☐ Individual

By delivering to and leaving with said _____ personally a true copy thereof, and that he knew the person so served to be _____ the person mentioned and described in said _____

☒ Corporation

By delivering to and leaving with MARION MOORE and he knew the person so served to be with the administration of League of Women Voters of Buffalo/Maryland Ave of defendant corporation

☐ Responsible Person

By delivering to and leaving with _____ a true copy thereof, a person of suitable age and discretion. Said premises being the defendants (dwelling place) (usual place of abode) (place of business) within the State of New York.

☐ Substituted Service

By affixing a true copy thereof to the door of said premises the same being the defendants (dwelling place) (usual place of abode) (place of business) within the State of New York.

☐ Mail

Deponent also served a copy of the _____ by depositing a true copy of the same in a post-paid, properly addressed envelope in an official depository under the exclusive care and custody of the United States post office in the State of New York.

☐ Previous Attempt(s)

Deponent had previously attempted to serve the above-named defendant(s) pursuant to CPLR Sec. 308 at _____ on the _____ day of _____ 19 _____ PM _____ AM at _____ on the _____ day of _____ 19 _____ PM _____ AM at _____ on the _____ day of _____ 19 _____ PM _____ AM

☒ Description

The person served would be described as approximately 36-40 years of age 250 lbs. 6 ft. 0 in. X male _____ female BROWN hair BLACK skin _____ eyes _____ other _____

☐ Military

To my best knowledge, information and belief the said defendant at the time of service was not engaged in military service of the United States.

Subscribed to before me this 10th day of November 2010Carol R. Johnston

Notary Public or Commissioner of Deeds

CAROL R. JOHNSTON

Notary Public, State of New York

Qualified in Erie County

MV Commission # _____

DOUGLAS A. Di Filippo

Exhibit I



NYCLU

NEW YORK CIVIL LIBERTIES UNION

125 Broad Street
New York, NY 10004
212.607.3300
212.607.3318
www.nyclu.org

Corey Stoughton
Senior Staff Attorney
Direct Line: 212.607.3366
cstoughton@nyclu.org

April 25, 2011

Jeremy A. Colby
Erie County Attorney
County of Erie
95 Franklin St., Room 1634
Buffalo, NY 14202

Re: Non-Party Subpoenas in *United States v. Erie County* (09-CV-849, WDNy)

Dear Mr. Colby:

I write in response to your April 20 letter regarding the non-party subpoenas relating to the United States' suit against Erie County, issued last November to the League of Women Voters of Buffalo-Niagara, the Prisoners' Rights Coalition, and the Partnership for the Public Good.

To reiterate points made in two previous letters to your colleague, Mr. Liebenow, these subpoena recipients do not understand the County's purpose in issuing these subpoenas. They demand documents exchanged either with the United States or with the County itself. As such, they seek exclusively documents that are in the possession, custody or control of the parties to the underlying litigation, documents that presumably can be obtained through party discovery or directly from your own client. Your only response to this point is to say that "Although the United States may have some of the documents that are responsive to these subpoenas, the County is entitled to receive responses to its subpoenas." This does not follow, since on their very face the subpoenas seek *only* documents that the United States *and your client* already possess. If you believe there are relevant, responsive documents in the possession of the subpoena recipients that you cannot access from your client or through party discovery, please identify those documents and we can discuss the possibility of producing them. The County's failure to do so to date, despite now three letters articulating this same point, reinforces the perception that the subpoenas are merely a fishing expedition.

Moreover, given our understanding of the issues at stake in the underlying litigation, we do not understand what documents the subpoena recipients could possess relevant to the County's defense of this lawsuit. As we understand it, the issue is whether the County violated the constitutional rights of detainees at two county jails. Although the subpoena recipients advocate on behalf of those detainees, we cannot understand how the documents requested in the County's subpoenas could contribute to the County's defense of conditions at these jails. Presumably, the County is in complete control of the information necessary to justify its policies, procedures, and actions in its own facilities. Simply to say that the United States identified these prisoner-rights advocates as "potentially" having relevant information in a prisoner-rights suit is no response.

As you rightly identify, one of the reasons the subpoena recipients are resistant to responding to these subpoenas is that the County's probing of these advocacy groups' contacts with various government officials implicates their First Amendment rights. It should be noted that these groups are being targeted because they advocate on behalf of prisoners in the county facilities at issue in the underlying litigation, an advocacy position that the County, based on its litigation posture in the underlying case, perceives as contrary to its interests. We agree with you that First Amendment rights do not necessarily trump a party's need for legitimate third party discovery, but given both the point made in the previous paragraphs (i.e., that the County has not demonstrated any need for this non-party discovery) as well as the indefensible breadth of these particular subpoenas, the potential for these subpoenas to chill the First Amendment rights of these and other similar advocacy organizations is a legitimate basis for resisting the subpoena.

You have asked for authority to support this proposition, as well as the proposition that, in light of these First Amendment concerns, the County bears the burden of articulating its legitimate need for these subpoenas. We direct you, by way of example, to *Wyoming v. United States Department of Agriculture*, 208 F.R.D. 449 (D.D.C. 2002), in which the district court denied a state's motion to compel production of documents against non-party advocacy groups in the context of its suit against the United States challenging various Forest Service regulations. As is the case here, the state's subpoena sought various documents exchanged between the advocacy groups and the United States, and the Court found that the subpoena was not justified given the state's relative lack of need for the information, the burden on the non-parties, the state's ability to get the information elsewhere, and the First Amendment concerns raised by the subpoena. We note that, in the *Wyoming* case, the underlying issue was whether the federal government violated the law by inappropriately consulting with advocacy groups like the subpoena recipients, a nexus between the underlying litigation and the subpoena that the County cannot claim in this case.

There also remain the issues of overbreadth and burdensomeness. We understand your letter to state that the County, "for now," has withdrawn Request No. 3. This does not address the range of objections raised in our previous two letters. As they stand, Requests 1 and 2 of subpoenas are overbroad and unduly burdensome for the reasons stated in our December 6 letter. Even if the County stands by the modifications to the subpoenas proposed by Mr. Liebenow's January 26 letter, they also remain overbroad and burdensome. (At this point, it is not clear to us whether the County does or does not stand by those modifications). To ask three small non-profits to search more than six years' worth of email correspondence and paper records, as well as the records of any of their "members, directors, chairs and/or agents" is unreasonable, especially in light of the County's failure to explain its need for these documents.

As for your claim that any objections by these subpoena recipients has been waived, we do not accept that claim and the cases you cite do not stand for that proposition in this circumstance, where the recipients dispute the legitimacy of the subpoena and we have been engaged in good faith negotiations over those subpoenas since they were issued. We have been working diligently to avoid resorting to the Court by moving to quash the subpoenas, work interrupted only by the County's months-long delays in responding to our correspondence on this matter.

For the foregoing reasons, the subpoenas are not defensible. However, as I have already stated, we remain open to discussing the possibility of producing specific documents (or categories of documents) that the County can demonstrate are needed for this litigation, provided that the search for those documents is not excessively burdensome and they cannot be obtained through other, less burdensome means. If the County is prepared to engage in that kind of dialogue, it may be more productive to have a telephone conversation to discuss the details.

Sincerely,

A handwritten signature in black ink, appearing to read "Corey Stoughton", with a stylized flourish at the end.

Corey Stoughton

cc: Alyssa Lareau (via email)
Staff Attorney
United States Department of Justice
Civil Rights Division
Special Litigation Section
950 Pennsylvania Ave. NW
Washington, DC 20530

Exhibit J

From: Colby, Jeremy [Jeremy.Colby@erie.gov]
Sent: Tuesday, July 19, 2011 4:49 PM
To: Corey Stoughton
Cc: alyssa.lareau@usdoj.gov; Liebenow, Brian; zazy.lopez@usdoj.gov
Subject: RE: US v. Erie County, 09-849 -- subpoena

Dear Corey,

If you feel the need to file your motion to quash, that is your call. I do not anticipate taking any action on the subpoenas in the next 3 weeks (and will not do so before contacting you to inform you of the result of my discussions with the DOJ). I am still in the process of seeking to resolve various issues with the DOJ. If you want to wait to see if my discussions with the DOJ resolves our dispute, then I have no problem with your waiting to hear further from me. As I have stated previously, I will not seek to hold against you any delay after our December-January correspondence as a ground for waiver. Thank you.

Best,

Jeremy

--

Jeremy Colby | Erie County Attorney
Erie County | Department of Law
95 Franklin St., Room 1634 | Buffalo, NY 14202
P:(716) 858-2201 | F:(716) 858-2299
Jeremy.Colby@erie.gov

Erie County's vision: Erie County will be a world-class community where People want to live, Businesses want to locate and Tourists want to visit.

This e-mail and any files transmitted with it are confidential and intended solely for the use of the individual or entity they are addressed to. The information contained in this e-mail and any files transmitted with it is information protected by the attorney-client and/or attorney/work product privilege. It is intended only for the use of the individual(s) named above and the privileges are not waived by virtue of this having been sent by electronic transmission. If the person actually receiving this e-mail or any other reader of this e-mail is not the named recipient or the employee or agent responsible to deliver it to the named recipient, any use, dissemination, distribution, forwarding or copying of any part of the message or its attachments is strictly prohibited. If you have received this message in error, please notify the sender immediately by return e-mail and delete it from your system. Unauthorized use of this material is strictly prohibited and may be unlawful.

From: Corey Stoughton [mailto:cstoughton@nyclu.org]
Sent: Tuesday, July 19, 2011 4:15 PM
To: Colby, Jeremy
Cc: alyssa.lareau@usdoj.gov; Liebenow, Brian; zazy.lopez@usdoj.gov
Subject: RE: US v. Erie County, 09-849 -- subpoena

Jeremy,

We have held off filing a motion per your request but it has been well past the week or so you requested and we have not heard anything from you. We ask again that you withdraw the subpoenas. Otherwise, in light of your correspondence below stating the County's intention to defend the original subpoenas and move to compel, we consider our obligation to negotiate in good faith exhausted and plan to file a motion to quash if we do not hear from you by the end of the week.

Best,
Corey

From: Colby, Jeremy [mailto:Jeremy.Colby@erie.gov]
Sent: Thursday, June 30, 2011 9:41 AM
To: Corey Stoughton
Cc: alyssa.lareau@usdoj.gov; Liebenow, Brian; zazy.lopez@usdoj.gov
Subject: RE: US v. Erie County, 09-849 -- subpoena

Dear Corey,

You can proceed in the manner you deem appropriate. You asked me to notify you if the COE intended to move to compel because you anticipated filing a motion to quash. My e-mail informed you that the County intends to compel. My email also indicated that we could avoid motion practice if the US produced (and I get adequate assurances from US and your clients that no other responsive docs exist). I was simply holding out the prospect of a last-chance to avoid motions by asking you and the US to work together to resolve this issue. If you do it before I file my motion, great, if not, then you cannot say that I have not given you multiple opportunities to avoid motion practice.

Frankly, when your e-mail erroneously suggested that I agreed that the subpoena was unjustifiable, I lost interest in discussing it further with you.

My position on waiver is set forth in my letter of April 20, 2011. My position on waiver has nothing to do with your correspondence post-dating the November 24, 2010 deadline for serving objections. I will not hold against you the time that we have been corresponding.

Any motions would be directed to Judge McCarthy. We have a status conference today and the DOJ is coming for a visit next week. Hold off on your motion until next week and I will see if I can resolve in the interim.

Best,

Jeremy

--

Jeremy A. Colby | Erie County Attorney
Erie County | Department of Law
95 Franklin St., Room 1634 | Buffalo, NY 14202
P: (716) 858-2201 | F: (716) 858-2299
Jeremy.Colby@erie.gov

Erie County's vision: Erie County will be a world-class community where People want to live, Businesses want to locate and Tourists want to visit.

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From: Corey Stoughton [mailto:cstoughton@nyclu.org]
Sent: Wednesday, June 29, 2011 4:36 PM
To: Colby, Jeremy
Cc: alyssa.lareau@usdoj.gov; Liebenow, Brian; zazy.lopez@usdoj.gov

Subject: RE: US v. Erie County, 09-849 -- subpoena

Jeremy,

Your email leaves me confused about whether you are taking the position that we should proceed with motions practice or wait to see if, as you suggest, such motions will be obviated by party discovery.

Our intent in not filing a motion to quash to date has been to avoid motions practice if possible but I cannot continue to advise the recipients to do that if you are taking the position that failure to respond formally to the subpoenas constitutes a waiver of the recipients' objections. We have not waived those objections. Courts frequently consider motions to quash served after the return date of a subpoena when the parties have been negotiating in good faith, as we have been over the past several months. Your present position on waiver, however, as well as your suggestion that we go ahead and file a motion, suggests that these negotiations are at an end.

It seems like an enormous waste of the Court's and all of our time to pursue a motion that, as you noted, may be completely unnecessary depending on how party discovery proceeds, but in light of your email, unless we come to an agreement on withdrawing the subpoenas, we will be filing a motion promptly in order to avoid prejudice resulting from the recipients' waiting any longer to respond to them. If I have misunderstood your position, please let me know; if not, we will consider that our responsibility to confer in good faith to resolve this matter has been satisfied.

As memory serves, Judge Skretny requires the scheduling of a motion hearing prior to filing of a motion. We would be happy to discuss with you (and with DOJ, if they are interested in participating) a mutually agreeable date and briefing schedule. Please let me know how you would like to proceed.

Best,
Corey

From: Colby, Jeremy [mailto:Jeremy.Colby@erie.gov]
Sent: Tuesday, June 14, 2011 8:20 AM
To: Corey Stoughton
Cc: alyssa.lareau@usdoj.gov; Liebenow, Brian; zazy.lopez@usdoj.gov
Subject: RE: US v. Erie County, 09-849 -- subpoena

Corey,

I never agreed that the subpoena was "unjustifiable." I merely attempted to negotiate the scope in an attempt to achieve compliance that I could live with. Feel free to file your motion to quash, otherwise, we intend to file a motion to compel. This issue has remained outstanding for too long and our position remains that your clients waived objections. Your clients' refusal to produce any documents leaves me no choice in the matter.

If the DOJ reconsiders their refusal to produce documents (other than one chart) that they received from your clients, then that should obviate the need for this motion practice.

Best,

Jeremy

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Jeremy A. Colby | Erie County Attorney
Erie County | Department of Law

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From: Corey Stoughton [mailto:cstoughton@nyclu.org]
Sent: Wednesday, June 01, 2011 11:39 AM
To: Colby, Jeremy
Cc: alyssa.lareau@usdoj.gov; Liebenow, Brian; zazy.lopez@usdoj.gov
Subject: RE: US v. Erie County, 09-849 -- subpoena

Jeremy,

Thanks for writing. I acknowledge that we agreed to disagree about the inherent appropriateness of the subpoena in light of the recipients' First Amendment concerns, the reasonableness of requiring a search of all members' and board members' individual correspondence, and the County's obligation to exhaust discovery from the parties before turning to non-parties for discovery. On the other hand, based on our conversation yesterday and your and Mr. Liebenow's prior correspondence, it appears that we all agree that the original subpoena is unjustifiable as written and served, in particular with regard to parts 1 and 2 of the subpoena, the failure to tailor the request to the subject matter of the underlying litigation, and the lack of any time limitation, among other things.

Given that the County has backed far away from the breadth and scope of the original subpoena, that the County does not at the present moment intend to enforce the subpoena, and that the recipients' objections to it are documented in numerous letters and conversations between counsel, I do not see any purpose served by preparing a formal response to it. More importantly, the recipients' "response" to the original subpoena would not be to serve a response & objections along the lines of what you have demanded, but to move to quash. We have not moved, to date, out of respect for our ongoing dialogue and in the hope of resolving this cooperatively and without the need to burden the court, a hope we continue to have.

It seems to me that the better course is for the County to withdraw the original subpoena without prejudice to its ability to serve a more appropriate subpoena at a later date, should it deem that necessary. It is beyond dispute at this stage that the original subpoena is indefensible as written and it is difficult to imagine the County moving to compel based on it, as opposed to the much-narrowed vision of it that has emerged from our discussions. It would assist our negotiations and any motions practice, should it come to that, to work from a subpoena the County intends to defend rather than the one that was served.

If I have misunderstood the County's position and the County in fact intends to defend the original subpoena as written, then perhaps a motion to quash is the appropriate course of action. The recipients obviously do not wish to have these subpoenas hanging over their head while the County sorts out what it can or cannot obtain in party discovery. Please let me know if the County is willing to withdraw the original subpoenas.

Best,
Corey

From: Colby, Jeremy [mailto:Jeremy.Colby@erie.gov]
Sent: Tuesday, May 31, 2011 3:04 PM
To: Corey Stoughton
Cc: alyssa.lareau@usdoj.gov; Liebenow, Brian; zazy.lopez@usdoj.gov
Subject: US v. Erie County, 09-849 -- subpoena

Dear Ms. Stoughton:

We spoke today concerning the County's subpoena to your three clients. We agree to disagree for now and the County reserves its rights to move to compel. Although I agree with you that communications between your clients and the US DOJ should be produced by the DOJ, they have thus far refused to produce these materials based on an assertion of work-product (Request #1, 2d Set). The County will be pursuing the DOJ's inadequate discovery responses in the near future. If the DOJ fails to provide this information, it will likely force the County to move forward with a motion to compel. Although I understand the logistical difficulties that face your clients, it does not absolve them of their obligation to respond.

I request that your clients provide a formal response to the subpoena, i.e., describing what would be required for them to respond and/or stating that after diligent search, they have been unable to locate any responsive materials (and defining the limitation of their search). Such a response will inform the County's decision to seek to compel. Although I am willing to work with you, the County must insist on receiving a substantive response to its subpoenas (other than correspondence from counsel). Thank you.

Best regards,

Jeremy

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