

anonymity which, I suggested, would, by analogy, require her to make a showing to support the compelled identification of anonymous speakers. She said that, although she could not tell me what the investigation was about, it was not political and the DA's office did not want to identify the anonymous posters to pursue them for their speech. She indicated that other blogs had been subpoenaed and that everybody else had cooperated to date. I told her that many posts simply seemed to express opinions, and asked how those opinions could possibly be relevant to a legitimate criminal investigation. She declined to say, in part because she needed to talk to Mr. Goward, but also because she said she did not need to give me any explanation.

4. I also asked why a legend had been placed on the subpoena, implicitly threatening criminal prosecution for disclosing the existence of the subpoena, and protested that this prevented my clients from following the proper procedure to give notice to the anonymous speakers so that they could defend their own rights. Although not agreeing with the use of the word "threat," she agreed that the legend was a warning that disclosure might interfere with law enforcement and hence violate the law.

5. I had brief conversations with Mr. Goward, after which he sent me a letter dated February 28, 2008, requesting written confirmation that I was representing the recipients of the subpoena, and arguing that the right to speak anonymously is "confined to matters involving core First Amendment expression" and that the right is not absolute if the speakers "abuse the opportunities presented by [the Internet] by making tortious or other[wise] actionable communications." I responded by letter dated March 2, 2008, confirming my representation, suggesting that Mr. Goward review all of the authorities I had provided to Ms. Iaconis, and urging that we continue to talk about the basis for the subpoena. Copies of these letters and of the remaining exchange of letters discussed in this affidavit are attached as Exhibit B.

6. Mr. Goward and I spoke on March 6, 2008. He explained that although the DA's office was not after the political content of the speech in the posts in question, it **was** concerned about the content of the speech. As an analogy, he said to imagine that there is a child sex ring, and members of the ring want to communicate with each other when a young Asian girl will be ready for delivery. They do not say it explicitly, but they use code words. I replied that this analogy seemed far-fetched, as applied to a post that denounced Dawn Sandow by attaching a picture of a witch on a broomstick, or to a detailed explanation of how Sandow is allegedly registered to vote at a false address, based on such public records as newspaper reports and voter registration cards. I asked him, what criminal activity do these posts signal and how? He responded that he did not need to tell me. I argued that he was going to have to be specific in persuading the judge to override the right of anonymous speech under the First Amendment and Article 1, Section 8 of the New York Constitution, so why not be specific now? He said he would think about that.

7. We also discussed the question of notifying the anonymous posters. He suggested that his office might be open to our notifying the posters by email, but I explained that my clients do not have email addresses for most of the posters, just Internet Protocol numbers, so they would have to be notified by a post on the Room Eight blog. He objected to such a posting, but said that he would check with his superiors and get back to me.

8. By letter dated March 12, 2008, Mr. Goward sent me a new listing of postings whose authors he sought to identify, doubling to 28 the total number of posts, along with a hard copy of the posts at issue. A copy of this list is attached as Exhibit C. Although some of the newly identified posts referenced Dawn Sandow, unlike the original list of fourteen, a significant number of the newly identified posts did not relate specifically to her, but related instead to Jay Savino, the Bronx Republican leader, or to other Republican personalities. I responded by letter dated March 26, 2008,

and sought both a specific explanation of why they regarded the posts as wrongful speech, and permission for my clients to publicly disclose the subpoena.

9. After my clients noticed that Republican Dissident had removed his entire blog from Room Eight, as discussed in the Tsabar Affidavit, I notified Mr. Goward of that fact.

10. In a series of conversations with Ms. Iaconis on May 8, she told me that we would be receiving a set of new subpoenas, returnable later in May, and advised me that we should now file our motion to quash. She indicated that there was one additional post (for a total of 29) whose author they sought to identify. She faxed me a copy of two new subpoenas.

11. We discussed the issue of notice to the posters, but Ms. Iaconis was only willing to allow my clients to send a notice of subpoena by email. She agreed to think further about whether my clients would be permitted to post a notice on the blog itself where the anonymous posters other than Republican Dissident – the only poster for whom my clients had an email address – could learn of the threat to their anonymity. Ms. Iaconis still did not explain why provision of such notice posed a risk to their investigation. I also urged her to give me specific information about what was being investigated and how these particular posters were needed to pursue that investigation.

12. Ms. Iaconis told me that there would be no contempt proceedings against my clients for failure to comply with the new subpoenas so long as we filed our motion to quash by May 22, 2008. It was my understanding, therefore, that enforcement of the subpoena would be stayed pending the final ruling on our motion to quash. She indicated that her office would respond to that motion at some point after the Memorial Day weekend, after which we would endeavor to establish a date for oral argument. She offered to send an entirely new subpoena that contained a comprehensive list of the posts whose authors they sought to identify.

13. By letter dated May 8, 2008, I confirmed that the District Attorney would not prosecute

my clients for notifying Republican Dissident by email of the subpoena. During the following week, I received the three new subpoenas in the mail, along with a copy of the 29th post. These subpoenas are attached as Exhibit D.

14. I have been litigating issues of Internet anonymity for much of the past eight years. Although ISP's or web site hosts who received subpoenas to identify their users occasionally oppose such subpoenas on the merits, it is much more common for an ISP to notify the user of the subpoena and tell the user that the information will be released if no motion to quash is filed within a certain amount of time, usually within fifteen days or so. Google and Yahoo!, for example, which have been subpoena recipients in many of the cases in which I have been involved, routinely take that position.

Paul Alan Levy

Subscribed and sworn before me this 21st day of May, 2008