

Summary of Arguments  
For A Motion to Quash A Records Subpoena

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This is a summary of the arguments used by the Whatcom County Library System in its motion to quash the FBI subpoena it had received in June 2004. The brief itself is a part of the grand jury file in the matter and remains a confidential document which cannot be shared outside the grand jury proceedings. The substance of the brief is not restricted, however, and is summarized below. Individuals' names have been redacted where appropriate for their privacy.

### **Summary of Argument**

The Court is urged to quash the subpoena at issue in the Motion to Quash because it infringes upon constitutionally protected rights; because there is no substantial nexus between the information sought and the subject of the grand jury proceedings; because the information is not readily available to the Library District; and because even if it were available, the requested production would be excessively burdensome to the Library District.

### **Factual Background**

The subpoena duces tecum was served on the Library on June 18, 2004. The subpoena seeks "...names and any other identifying information, including addresses, of persons who borrowed a book entitled, "Bin Laden, the Man Who Declared War on America" by Yossef Bodansky, bar code number 33202005606382, from November 15, 2001 to the present." (The FBI agent in the case stated that) the FBI had been contacted by an individual who, while reading the book, had noticed a handwritten note on one of its pages. The note said:

“If the things I’m doing is considered a crime then let history be a witness that I am a criminal. Hostility toward America is a religious duty and we hope to be rewarded by God.”

The following day, the Library’s counsel wrote (the agent) and advised that preliminary research revealed that the note in the book was an almost direct quote of a statement made by Osama bin Laden in a 1998 interview, with a transcript posted on the Time education website (copy attached

## Argument

### A. First Amendment Rights Warrant Strong Protection in Grand Jury Proceedings

#### 1. Grand Jury Proceedings Include First Amendment Protections and Require the Government to Meet a Significant Burden of Proof

Fundamental First Amendment rights enjoy strong protections under the law in every circumstance, including grand jury proceedings. As the Ninth Circuit observed in *Bursey v. U.S.*, 466 F.2d 1059; 1972 U.S. App. LEXIS 8672; 1 Media L. Rep. 2652 (1972):

No governmental door can be closed against the (First) Amendment. No governmental activity is immune from its force. That the setting for the competition between rights secured by the First Amendment and antagonistic governmental interests is a grand jury proceeding is simply one of the factors that must be taken into account in striking the appropriate constitutional balance...There are differences between grand jury investigations and other forms of governmental activity to which the First Amendment has been applied, but none of the differences provides any basis for applying the First Amendment less rigorously to grand jury proceedings. 466 F.2d 1059 at 1082

The U.S. Supreme Court expressed a similar view in *Branzburg v. Hayes*, 408 U.S. 665

(1972):

We do not expect that courts will forget that grand juries must operate within the limits of the First Amendment. 408 U.S. 665 at 710

## **2. Fundamental First Amendment Rights Are At Issue Here**

A library is a cornerstone of First Amendment rights, an institution built on the concept of free expression of ideas. Free exchange of information in this context is a fundamental First Amendment right of the library; the patron; and the public. *Kreimer v. Bureau of Police*, 958 F.2d 1242 (3<sup>rd</sup> Cir., 1992), citing and discussing *Martin v. City of Struthers*, 319 U.S. 141, 63 S.Ct. 862, 87 L. Ed. 1313 (1943), and *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L. Ed. 2d 510 (1965).

The Supreme Court has recognized, several times, that individuals have a fundamental First Amendment right to receive information, free of the chilling effects of regulation of that right. In *Stanley v. Georgia*, 394 U.S. 557, 89 S.Ct. 1243, 22 L. Ed. 2d 542 (1969), the Court observed that “it is now well established that the Constitution protects the right to receive information and ideas.” Citing *Martin*, *Lamont* and *Griswold*, the Court explained that the “right to receive information and ideas, regardless of their social worth . . . is fundamental to our free society.” *Stanley v. Georgia*, 394 U.S. 557, 89 S.Ct. 1243 at 1253. This Court has also observed the fundamental nature of these rights. See *Aldrich v. Knab*, 858 F. Supp. 1480 (W.D.Washington, J. Zilly, 1994)

Courts have held that the right to freedom of association includes the right to privacy of information concerning membership in an association. See *NAACP v. Alabama*, 357 U.S. 449, at 462 (1958). Here, the Library District’s right to freedom of

association is infringed upon by a compelled disclosure of patrons, and by the chilling effect that disclosure is likely to have on its patrons' use of library resources. The chilling effect of a demand for patron records is clear. *See In Re Kramerbooks*, 26 Media L. Rep. (BNA) 1599, at 1601 (1998). In a similar vein, the law also recognizes an individual's right to exercise First Amendment rights anonymously. *See McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995)

The State of Washington has long recognized the privacy of library records, and the need to protect records indicating a person's reading choices from public disclosure. The State's Public Disclosure Law, RCW 42.17.010 *et seq.*, imposes sweeping public disclosure to government records and proceedings, but contains a strong and explicit exemption for library records:

(1) The following are exempt from public inspection and copying:... (1) any library records, the primary purpose of which is to maintain control of library materials, or to gain access to information, which discloses or could be used to disclose the identity of a library user. RCW 42.17.310(1)(1).

Similar considerations are evident in the Video Privacy Protection Act, 18 U.S.C. §2710, which was enacted after the disclosure of a Supreme Court nominee's video rental records, in the course of the nominee's confirmation hearings, raised privacy concerns.

Libraries have the right to disseminate information freely, confidentially, and without the chilling effects of disclosure. The library's role as a gatherer and disseminator of information is akin to the role of the journalist, whose confidential information is well respected under the law. A First Amendment privilege claim must be weighed against the need for disclosure, and the test requires the reviewing court to

determine that the information sought is relevant; that there is a compelling reason for its disclosure; that other means of obtaining the information have been exhausted; and that the information sought “goes to the heart” of the seeker’s case. *Mark v. Shoen*, 48 F.2d 412, 415-516 (9<sup>th</sup> Cir. 1995).

**B. When First Amendment Rights Are At Issue, the Government Must Demonstrate a Compelling Need, a Substantial Connection, and An Inquiry That Is As Limited As Possible.**

The law requires a court considering First Amendment concerns in a grand jury matter to hold the government to strict standards, requiring the government to “convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest...” *Branzburg v. Hayes*, 408 U.S. 665 at 701.

This test requires a great deal from the government. First, it must establish a legitimate, compelling interest; secondly, it must demonstrate that any infringement of First Amendment rights is incidental and no greater than is clearly essential. Most importantly, the government must also demonstrate a “substantial connection” between the information sought and the subject of the investigation:

When governmental activity collides with First Amendment rights, the Government has the burden of establishing that its interests are legitimate and compelling and that the incidental infringement upon First Amendment rights is no greater than is essential to vindicate its subordinating interests. (citations omitted). .... When the collision occurs in the context of a grand jury investigation, the Government’s burden is not met unless it establishes that the Government’s interest in the subject matter of the investigation is “immediate, substantial, and subordinating,” that there is a **“substantial connection” between the information it seeks to have the witness compelled to supply and the overriding**

**governmental interest in the subject matter of the investigation**, and that the means of obtaining the information is not more drastic than necessary to forward the asserted governmental interest. The investigation must proceed “step by step . . . [and] an adequate foundation for inquiry must be laid before proceeding in such manner as” may inhibit First Amendment freedoms. (*Gibson v. Florida Legislative Investigation Comm.*, *supra*, 372 U.S. at 551, 557, 83 S. Ct. at 899, *see also Shelton v. Tucker*, *supra*, 364 U.S. at 487-490, 81 S. Ct. 247.) In laying that foundation the Government is not required to establish that the activities about which the witness has been called to testify are criminal; it does not have to show the result of an investigation to justify conducting it. (citations omitted). However, it is **obliged to show that there is a substantial possibility that the information sought will expose criminal activity within the compelling subject matter of the investigation**. *Burse v. U.S.*, 466 F.2d 1059 at 1083. (emphasis added)

Thus, the government is required to demonstrate an actual and substantial connection between the information it is seeking and criminal activity which is the subject of the grand jury investigation. The connection is not assumed; that is why an “adequate foundation for inquiry must be laid” from the beginning, and assessed “step by step” throughout the process.

### **C. The Facts of This Case Do Not Meet the Standards Required For Disclosure**

In this case, the required “actual and substantial connection” has not been established by the government, probably because it cannot be established. Though the focus of the grand jury’s investigation is not identified, a reasonable assumption in this case is that it relates to international terrorism. Even assuming that the subject of the grand jury’s investigation is related to the government’s compelling interest in preventing and prosecuting crimes of terrorism, the information sought here does not advance or even relate to that goal.

The government wants to know which people have borrowed this book,

presumably to try to identify one of them as the person who wrote a quotation by Osama bin Laden in a book about Osama bin Laden. The fact is that this information is irrelevant to an investigation of international terrorism: writing a passage from an interview published on an educational web site indicates little if anything of the copier's personal views, nothing regarding criminal activity, and nothing at all about the problem of terrorism.

Even if the Court were to cast aside all concerns about the chilling effect of an FBI inquiry to these borrowers (those who can be identified from the Library District's limited records, see below), and permit the inquiry, and even if the inquiry yielded the identity of the quote-copier, any connection between that quote-copier and crimes of terrorism would be so tenuous that it would fall far short of the "substantial connection" the law requires. A substantial connection would exist only if the subject of the grand jury investigation is the problem of borrowers writing in library books, clearly an unlikely subject for a federal grand jury investigation.

Because fundamental rights are at issue, the court must scrutinize the connections asserted by the government between the information sought and the problem the grand jury seeks to address. That is why the Supreme Court has emphasized the need to require the government to lay the foundation, step by step, proving each element before moving on to the next. *Gibson v. Florida Legislative Investigation Comm.*, *supra*, 372 U.S. at 551, 557, 83 S. Ct. at 899, quoted in *Burse v. U.S.*, 466 F.2d 1059 at 1083, *supra*.

The government is also required to show that the information it seeks is limited as much as possible, to avoid an inquiry that is too broad. There is no showing of that

here. To the contrary, the subpoena casts a wide net that ensnares people simply because they have checked out this particular book. In other words, the subpoena targets people *solely and exclusively* because they exercised fundamental First Amendment rights by checking out, and possibly reading this book. Even the USAPATRIOT Act, which does not apply here because it is not the basis for this subpoena, prohibits an inquiry which is based solely on a person's exercise of constitutionally protected rights. USAPATRIOT Act, Act Oct. 26, 2001, P.L. 107-56, Title II, § 215, 115 Stat. 287.

In short, the exacting standards required under the law clearly have not been met.

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**D. In Addition to the Fundamental Constitutional Considerations Involved, Disclosure Should Be Prohibited Because It Is Burdensome**

Rule 17(c) of the Federal Rules of Criminal Procedure provides a court with discretion to “quash or modify the subpoena if compliance would be unreasonable or oppressive.” This requires the court to balance the burden of compliance with the subpoena, against the government's interest in obtaining the information sought. *United States v. R. Enterprises, Inc.*, 498 U.S. 292 (1991) If the logistics of producing the subpoenaed information are likely to be burdensome to the subpoenaed party, the balance tips in favor of quashing the subpoena, and the government should be required to show a greater likelihood that the materials sought will be relevant and probative. *United States v. R. Enterprises, Inc.*, 498 U.S. 292 (1991)

In the instant case, the Library District's information is limited and not easily accessible. As detailed in the Declaration of \_\_\_\_\_, the Library's

Support Services Manager, the records contain only the names of the current book borrower (in this case, the individual who contacted the FBI about the notes in this book), and a maximum of one previous borrower, if that previous borrower borrowed the book within ninety (90) days before June 18, 2004 (the date the records were isolated in response to this subpoena, to prevent the routine process of recording over previous data which otherwise would occur)<sup>1</sup> This information is of dubious relevance, as discussed above.

Assuming that the data were even available, the cost of labor alone is estimated to be \$1,800 or more, with additional costs to obtain the proper hardware on which to perform the search. (See Declaration of \_\_\_\_\_)

**E. The Library District Can Not Comply with this Subpoena as it Does Not Have Possession of the Information Requested.**

As noted in the Declaration of \_\_\_\_\_, the County Library stores its historical circulation data on a backup system that is maintained by and in the custody of the Bellingham Public Library. Information about the past borrowers of this book from the County Library is contained on data tapes that the City Library controls, and which the City Library will not make available – even to the County Library - absent a valid subpoena or court order. Recognizing that this is a technical defense which could be overcome by the issuance of an additional subpoena, the County Library District urges the court to not only quash this subpoena, but to also deny any future subpoenas to either the County or City Libraries on the substantive grounds set forth in this memorandum.

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<sup>1</sup> If there is a history of unpaid fines, it is possible that additional names might be available.