EAST LOS ANGELES OFFICE
5228 Whittier Boulevard ◆ Los Angeles, CA 90022
Phone (213) 640-3883 ◆ Fax (213) 640-3911

Legal Aid Foundation of Los Angeles

FAX COVER SHEET

To:	**Deanne Loonin**	**From:**	Elena H. Ackel
Company:	NCLC 77 Summer Street, 10th Floor Boston, MA 02110-1006	**Pages:**	~~60~~ 2
Fax:	Fax: 617 542-8028	**Date:**	November 9, 2005
Phone:	617 542-8010	**Re:**	PIRG represented by Public Citizen re subpoena matters

☐ Urgent ☐ For Review ☐ Please Comment ☐ Please Reply ☐ Please Recycle

The seven parts are ≈ 200+ pages long, so I'll send them Fed Ex instead of tying up your fax line.

#339

Clarisa Herrera - Fwd: FW: 087-26 LAFLA

Attention: Deepak Gupta
fax: (202) 588-7795
Part 4 of 5
48 pages

From: Clarisa Herrera
To: dgupta@citizen.org; Elena Ackel
Date: 11/7/2005 12:22 PM
Subject: Fwd: FW: 087-26 LAFLA

Dear Mr. Gupta,

I sent you the fax documents in batches that match the numbers on the cover sheet.

1. Subpeona for the Office of Administrative Hearings.
2. Brooks Institute of Photography Notice of Conditional Approval
3. Our Response to suboena
4. Sanctions Motion (this one I am about to send with this new cover page).
5. Here is an additional **63 page pdf with the Motion for Protective Order** that was not included on the original cover sheet info. – part five I will not fax.

Thank you very much.

6. our draft P&A
7. Public Citizen's subpeona pleadings (58,

Sincerely,

Clarisa Herrera
Legal Secretary for Consumer Law / Trade School Unit
and Government Benefits Unit
LEGAL AID FOUNDATION OF LOS ANGELES
5228 Whittier Boulevard
Los Angeles, California 90022-3883

phone (213) 640-3926
fax (213) 640-3911 (attention: Clarisa)
cherrera@lafla.org

→ Public Citizen

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of: ***Bureau for Private Postsecondary and Vocational Education adv. Brooks Institute of Photography***

Agency / Agency Case No. 06147

OAH No. 2005080993

☐ **SUBPOENA:** *Requesting Testimony* ☑ **SUBPOENA DUCES TECUM:** *Requesting the Production of Records or Things*

THE PEOPLE OF THE STATE OF CALIFORNIA SEND GREETINGS TO: Custodian of Records	*(name and address of person being subpoenaed)* Los Angeles Legal Aid, East L.A. Office, 5228 Whittier Blvd., Los Angeles, CA 90022
1. At the request of ☐ Petitioner ☑ Respondent *(party name)* Brooks Institute of Photography	*(name, address and telephone number of contact person)* Tiffany Mitchell, Greenberg Traurig, LLP, 2450 Colorado Ave., Ste. 400E, Santa Monica, CA 90404

2. **You are hereby commanded, business and excuses being set aside, to appear as a witness on:**

(date) _____, **at** *(time)* _____, **and then and there to testify at:** *(location)*

☐ OAH, 560 J Street, Suite 300, Sacramento CA 95814

☐ OAH, 320 West Fourth Street, Room 630, Los Angeles CA 90013

☐ OAH, 1515 Clay Street, Suite 206, Oakland CA 94612

☐ OAH, 1350 Front Street, Room 6022, San Diego CA 92101

☐ Other: _____, California.

☐ 3. You are not required to appear in person if you produce the records described in the accompanying affidavit and a completed declaration of custodian of records in compliance with Evidence Code sections 1560, 1561, 1562, and 1271. (1) Place a copy of the records in an envelope (or other wrapper). Enclose your original declaration with the records. Seal them. (2) Attach a copy of this subpoena to the envelope or write on the envelope the case name and number, your name and date, time, and place from item 2 (the box above). (3) Place this first envelope in an outer envelope, seal it, and mail it to the Office of Administrative Hearings at the address checked in item 2. (4) Mail a copy of your declaration to the attorney or party shown in item 1.

☑ 4. You are not required to appear in person if you produce the records described in the accompanying Attachment A and a completed declaration of custodian of records in compliance with Evidence Code section 1561.
By September 21, 2005 *(date)*, **send the records to:** Worldwide Network, 1533 Wilshire Blvd., Los Angeles, CA 90017. **Do not release the requested record to the deposition officer prior to the time and date specified above.**

NOTE: This manner of production may not satisfy the requirements of Evidence Code section 1561 for admission at hearing.

☐ 5. You are ordered to appear in person and to produce the records described in the accompanying affidavit. The personal appearance of the custodian or other qualified witness and the production of the original records is required by this subpoena. The procedure authorized by subdivision (b) of section 1560, and sections 1561 and 1562 of the Evidence Code will not be deemed sufficient compliance by this subpoena.

6. **Disobedience to this subpoena will be punished as contempt of court in the manner prescribed by law.**

7. **Witness Fees**: Upon service of this subpoena, you are entitled to witness fees and mileage actually traveled both ways, as provided by law, if you so request. You may request them before your scheduled appearance from the person named in item 1. *See Government Code sections 11450.05, 11450.50, 68092.5-68093, and 68096.1-68097.10.*

8. **IF YOU HAVE ANY QUESTIONS ABOUT WITNESS FEES OR THE TIME OR DATE YOU ARE TO APPEAR, OR TO BE CERTAIN THAT YOUR PRESENCE IS REQUIRED ON THE DATE AND TIME SPECIFIED ABOVE, CONTACT THE PERSON REQUESTING THIS SUBPOENA, LISTED IN ITEM 1 ABOVE, BEFORE THE DATE LISTED IN ITEM 2 ABOVE.**

(Date Issued) 9/1/05 *(Signature of Authorizing Official)* Tiffany Mitchell

L[redacted]

(Printed Name) Tiffany Mitchell *(Title)* Attorney at Law

DECLARATION FOR SUBPOENA DUCES TECUM

(Any party issuing a subpoena for production of books and/or records must complete this section.)

The undersigned states that the books, papers, documents and/or other things named in attachment A hereto and requested by this subpoena are material to the proper presentation of this case, and good cause exists for their production by reason of the following facts:

Respondent Brooks Institute of Photography ("BIP") requires the documents described in Attachment A hereto to investigate whether Bureau for Private Postsecondary and Vocational Education ("BPPVE") employees improperly divulged information regarding its investigation of BIP to third parties. In addition, the documents are necessary to investigate the allegations set forth in BPPVE's July 11, 2005 Notice of Conditional Approval to Operate.

(Use additional pages, if necessary, and attach them to this subpoena.)

Executed September 1, 2005, at Santa Monica, California.
I declare under penalty of perjury that the foregoing is true and correct.

Tiffany Mitchell
(Signature of Declarant)

METHOD OF DELIVERY of this subpoena:

☐ **Personal Service** – In accordance with Code of Civil Procedure sections 1987 and 1988, delivery was effected by showing the original and delivering a true copy thereof personally to:

☐ **Messenger Service** – In accordance with Government Code section 11450.20, an acknowledgement of the receipt of this subpoena was obtained by the sender after it was delivered by messenger to:

☑ **Certified Mail, Return Receipt Requested** – I sent a true copy of this subpoena via certified mail, return receipt requested to:
(name and address of person)

Los Angeles Legal Aid, East L.A. Offices
5228 Whittier Blvd.
Los Angeles, CA 90022

at the hour of 4:30 p. m., on Sept. 1, 2005,

City of Santa Monica, State of California.

Tiffany Mitchell
(Signature of Declarant)

ATTACHMENT A

Definitions

The term "Document(s)" shall have the same meaning as the term "Writing" set forth in *California Evidence Code § 250.*

The term "Relating to" shall mean directly or indirectly constituting, containing, embodying, concerning, evidencing, showing, comprising, reflecting, identifying, relating to, stating, referring to, dealing with, commenting on, responding to, describing, involving, mentioning, discussing, recording, supporting, negating, or in any way pertaining to the subject.

The term "Communications" shall mean any exchange or transmission of information of any kind to another person, whether accomplished by person to person, by telephone or through any other medium, including, but not limited to, discussions, conversations, negotiations, conferences, meetings, speeches, memoranda, letters, electronic mail, voice mail, notes, statements or questions.

Document Request

1. Any and all documents relating to any communications between any Los Angeles Legal Aid employees, including without limitation communications by and between Elena H. Ackel, Esq, and any employee of the Bureau for Private Postsecondary and Vocational Education ("BPPVE") relating to Brooks Institute of Photography ("BIP") and/or Career Education Corporation ("CEC").

2. All documents provided to you by any employee of the BPPVE relating to BIP and/or CEC.

3. Any and all documents relating to any communications between you and any television, print, radio or other media representatives (including without limitation Gretchen Morgenson of the New York Times, Morgan Green of the Santa Barbara News Press, any other journalists or reporters, and/or any employees of CBS) regarding BPPVE, BIP and/or CEC.

4. Any and all documents relating to any communications between you and any investment firms, banks, or agencies (including without limitation Warburg Pincus and/or UBS Investment Research) regarding BPPVE, BIP or CEC.

5. All documents relating to any communications between you and Mark A. Kleiman, Esq. and/or Janet L. Spielberg, Esq.

6. All documents relating to all communications between or among any persons regarding BPPVE, BIP and/or CEC not otherwise requested above

7. All telephone logs relating to any communications requested above.

8. All facsimile logs relating to any communications requested above.

9. All telephone bills relating to any communications requested above.

COPY

DECLARATION OF SERVICE

Case Caption: In the Matter of: Brooks Institute of Photography

I, the undersigned, declare that I am over eighteen (18) years of age and not a party to the within entitled cause. I am employed in the County of Sacramento, and my business address is 400 R Street, Suite 5000, Sacramento, California 95814.

On July 11, 2005, I served the foregoing document described as:

NOTICE OF CONDITIONAL APPROVAL

by placing it in an envelope addressed to the last known address of the person to whom it is addressed, as follows:

Dr. Greg Strick – President
Brooks Institute of Photography
801 Alston Road
Santa Barbara, CA 93108

Regular and Certified Mail No. 7004 2890 0000 2794 8983
Return Receipt Requested

I am familiar with our Department's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal Service on that same day with certified mail and first class mail postage thereon fully prepaid at Sacramento, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one working day after the date of deposit for mailing in this declaration.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 11th day of July, 2005.

Lynnelle Case

STATE OF CALIFORNIA

ARNOLD SCHWARZENEGGER, *Governor*

State of California Department of Consumer Affairs

BUREAU FOR PRIVATE POSTSECONDARY AND VOCATIONAL EDUCATION

Physical Address: 400 "R" Street, Suite 5000 • Sacramento, CA 95814-6200
Mailing Address: P.O. Box 980818 • West Sacramento, CA 95798-0818
Phone: (916) 445-3427 • FAX: (916) 323-6571

July 11, 2005

Dr. Greg Strick, President
Brooks Institute of Photography
801 Alston Road
Santa Barbara, CA 93108

Certified Mail Number 7004 2890 0000 2794 8983
Return Receipt Requested

RE: Notice of Conditional Approval to Operate
Institution Code No. 4201871

Dear Dr. Strick:

Under the authority granted the Bureau for Private Postsecondary and Vocational Education ("Bureau") under sections 94900 and 94901 of the California Education Code, the Bureau notifies you, Dr. Greg Strick, President of Brooks Institute of Photography ("Brooks Institute"), that the Bureau has determined that an unconditional grant of approval to operate is not in the public interest. Based upon the Renewal Application, information and materials submitted by Brooks Institute in response to the subsequent Compliance Visit Report and materials and information reviewed during the Unannounced Visit that followed, Brooks Institute of Photography is granted a *Conditional Approval* to operate effective from July 11 2005 through June 30, 2007 (a period of not more than two years). This expiration date may be earlier as a consequence of action taken by the Bureau resulting from site visit findings or other information brought to the attention of this Bureau. This *Conditional Approval* is limited to the following programs:

Diploma in Professional Photography
Diploma in Film and Video Production
Associate of Arts in Visual Journalism
Bachelor of Arts in Visual Communication
Bachelor of Arts in Professional Photography
Bachelor of Arts in Film and Video Production
Bachelor of Arts in Visual Journalism
Master of Science in Photography

Under California Education Code section 94840, an application for re-approval must be submitted at least ninety days prior to the termination of your approval. Please reference the attached *Conditional Approval* documents listing the school title, site address and code number, approved programs and term of approval. You will be contacted prior to a Site Visit, informed of the composition and qualifications of the Visiting Committee, and given an opportunity to challenge that composition.

INSTITUTION'S RIGHT TO A HEARING

Pursuant to Education Code sections 94901(c)(3), 94965, and 94975, and Government Code section 11500 and following, you may make a written request for a hearing within 15 days of the date on which this letter is served on you by certified mail. A written request for a hearing may be made by delivering or mailing, within 15 days of service of this letter, a signed and dated statement to the effect that Brooks Institute of Photography requests a hearing of the Bureau's conditional approval of its application for renewal to operate to: Sheila Hawkins, Education Administrator, Bureau for Private Postsecondary and Vocational Education, 400 R Street, Suite 5000, Sacramento, CA 95814.

Should you request a hearing, you may, but need not be, represented by counsel at all stages of the proceeding. You also have the right to be present at the hearing, to cross-examine witnesses, and to present evidence.

If you request a hearing, further information regarding your right to discovery and to request a postponement of the hearing for good cause will be provided to you with the notice of hearing. Unless a written request for a hearing is signed by you or on your behalf, and is delivered or mailed to the Bureau within 15 days after service of this letter, Brooks Institute of Photography will waive or forfeit the right to an administrative hearing, and the Bureau's conditional approval of Brooks Institute's renewal application will become final on the day following the last day to request a hearing.

NOTICE REGARDING STIPULATED SETTLEMENTS

Education Code section 94975 provides for the disposition of any issues involved in the hearing by stipulation or settlement prior to the hearing date. A stipulated settlement is a binding written agreement between you and the Bureau regarding any or all of the matters charged and the consequences thereof. Such a stipulation must have the approval of the Bureau but, once approved, would be incorporated into a final order.

I. BACKGROUND AND HISTORY OF THE APPLICATION

The Bureau is within the Department of Consumer Affairs and is responsible for regulating California's private postsecondary educational institutions in compliance with the Private Postsecondary and Vocational Education Reform Act of 1989 ("Act" – California Education Code sections 94700 and following). In order to operate legally in California, schools that are not exempt must obtain "approval to operate" from the Bureau and meet minimum educational standards under the Act (Education Code section 94831).

Brooks Institute of Photography is owned and operated exclusively as a Limited Liability Corporation, which is wholly owned by Career Education Corporation located at 2985 Greenspoint Parkway, Suite 600, Hoffman Estates, Illinois. The Bureau approved Career Education Corporation's ownership of Brooks Institute on May 4, 1999. Brooks Institute submitted an application for renewal to operate in the State of California, received on October 4, 2004. As part of the evaluation of the renewal application, the Bureau conducted an on-site assessment of Brooks Institute's records on November 8 and 9, 2004. The on-site review was prompted, in part, by allegations of unethical business practices made by a former employee of Brooks Institute to Brooks Institute's accrediting agency, the Accrediting Council for Independent Colleges and Schools (ACICS). The following is a brief chronology of Brooks Institute's application for renewal to operate

October 4, 2004	The Bureau receives Brooks Institute's application for renewal to operate.
November 8, 2004	Bureau for Private Postsecondary and Vocational Education representatives Marcia Trott and Lynnelle Case conduct an on-site

	assessment of Brooks Institute by randomly selecting student records for review, including fifty student records from the drop/cancellation list.
December 1, 2004	Marcia Trott, Senior Education Specialist, sends a report to Brooks Institute detailing general findings and issues of non-compliance and violations of the Act.
December 31, 2004	The Bureau receives Brooks Institute's response to the December 1, 2004 report.
January 31, 2005	The Bureau receives Brooks Institute's revised response to the December 1, 2004 report.
February 23, 2005	Nicole L. Burke, an employee of the Bureau for Private Postsecondary and Vocational Education, visits Brooks Institute posing as a potential student.
February 28, 2005	Bureau for Private Postsecondary and Vocational Education representatives Marcia Trott, Lynnelle Case, and Deborah Godfrey conduct an unannounced visit to Brooks Institute

Reconciliation of the December 1, 2004 Compliance Visit Report

The Bureau has completed an evaluation of Brooks Institute's application for renewal to operate as a private postsecondary educational institution. The November 8 and 9, 2004 on-site evaluation culminated in a compliance report, dated December 1, 2004, outlining findings and specific areas of non-compliance by Brooks Institute. Brooks Institute responded to this report on December 31, 2004, and provided additional and amended information on January 31, 2005. Non-compliance issues included, in part, offering an unapproved program entitled "Pre-Graduate Studies"; the failure to provide prospective students with the "Transferability of Units and Degrees Earned at Our School" disclosure form; and the omission of required information in the catalog and on the enrollment agreement. Also cited were issues regarding Brooks Institute's admissions policies and procedures, as well the omission of material facts in the catalog regarding loan indebtedness a student may incur while enrolled in a Brooks Institute program. Brooks Institute satisfactorily responded to several of the non-compliance issues identified by the Bureau, including:

- admissions policies and procedures
- catalog omissions
- unapproved educational titles
- organization of student records
- enrollment agreements
- Notice Concerning Transferability of Units and Degrees Earned at Our School
- scholastic regulations and graduation requirements
- tuition, fee and refund schedules

The December 1, 2004 compliance report also cited violations, including one regarding the "School Performance Fact Sheet" and another regarding "Ethical Principles and Practices" among others, that have not been sufficiently resolved. In consideration of these unresolved issues, the Bureau conducted an unannounced visit to Brooks Institute in February 2005, which also yielded evidence of non-compliance related to the

Student Tuition Recovery Fund (STRF). It is these violations and acts of non-compliance that are the bases for each of the allegations outlined in Sections A through C of this document.

II. BASES FOR CONDITIONAL APPROVAL

The Bureau has completed its review and assessment of the Brooks Institute of Photography renewal application to operate as a private postsecondary educational institution pursuant to Education Code section 94900. Education Code section 94901(c)(2) defines the circumstances under which it is appropriate for the Bureau to grant a Conditional Approval to operate:

> "If the institution is in compliance with this chapter, but has operated within three years before the filing of the application in violation of this chapter then in effect, or if the council determines that an unconditional grant of approval to operate is not in the public interest, the council may grant a conditional approval to operate subject to whatever restrictions the council deems appropriate. The council shall notify the institution of the restrictions or conditions, the basis for the restrictions or conditions, and the right to request a hearing to contest them. Conditional approval shall not exceed two years."

The following violations substantiate the Bureau's reasons why it is not in the public interest to grant a full, unconditional approval to operate to Brooks Institute at this time.

A. BROOKS INSTITUTE PRESENTED FALSE OR MISLEADING INFORMATION TO PROSPECTIVE STUDENTS REGARDING EMPLOYMENT OPPORTUNITIES.

Brooks Institute presented false and misleading information to prospective students regarding employment opportunities in three respects: (1) availability of jobs; (2) potential salaries; and (3) career placement services provided.

Generally, the Bureau may refuse to issue or renew an approval if the institution violates any standard, rule, or regulation under the chapter governing private postsecondary and vocational institutions. (Education Code § 94830(a).) The Bureau has the authority to refuse to issue or renew an approval if the institution presents to prospective students information that is false or misleading relating to employment opportunities. (Education Code § 94830(h).) In addition, the Reform Act prohibits an institution or representative of an institution from "advertis[ing] concerning job availability, degree of skill and length of time required to learn a trade or skill unless the information is accurate and in no way misleading." (Education Code § 94831(f).)

The Act enumerates certain misrepresentations that violate the Act:

> "No institution or representative of an institution shall make or cause to be made any statement that is in any manner untrue or misleading, either by actual statement, omission, or intimation." (Education Code § 94832(a).)

> "No institution or representative of an institution shall engage in any false, deceptive, misleading, or unfair act in connection with any matter, including the institution's advertising and promotion, the recruitment of students for enrollment in the institution, the offer or sale of a program of instruction, course length, course credits, the withholding of equipment, educational materials, or loan or grant funds from a student, training and instruction, the collection of payments, or job placement." (Education Code § 94832(b).)

The Act then mandates that certain disclosures be made to prospective students: "Each institution offering a degree or diploma program designed to prepare students for a particular vocational, trade, or career field shall provide to each prospective student a school performance fact sheet disclosing all of the following information:

...

(3) The number and percentage of students who begin the program and secure employment in the field for which they were trained. In calculating this rate, the institution shall consider as not having obtained employment, any graduate for whom the institution does not possess evidence, documented in his or her file, showing that he or she has obtained employment in the occupation for which the program is offered.

(4) The average annual starting wages or salary of graduates of the institution's program, if the institution makes a claim to prospective students regarding the starting salaries of its graduates, or the starting salaries or local availability of jobs in a field. The institution shall disclose to the prospective student the objective sources of information necessary to substantiate the truthfulness of the claim.

Each school that offers or advertises placement assistance for any course of instruction shall file with the council its placement statistics for the 12-month period or calendar year immediately preceding the date of the school's application for annual review for every course of instruction." (Education Code § 94816(a).)

Allegations:

1. BROOKS INSTITUTE PROVIDED FALSE OR MISLEADING INFORMATION REGARDING EMPLOYMENT OPPORTUNITIES.

Representatives of Brooks Institute provided false and misleading information regarding employment opportunities to then-prospective students who graduated in 2003, as well as to prospective students entering programs in 2005. Deceptive practices misrepresented job placement and employment tenure that were in direct contradiction with its own placement records, as well as national and state labor statistics.

On or about April 4-5, 2005, the Bureau sent out 121 e-mail surveys to a sampling of 2003 graduates asking what representations were made by Brooks Institute regarding employment opportunities. Of those, fourteen graduates responded.[1] Brooks Institute made the following representations to these prospective students with regards to career opportunities:

Graduate # 3[2]: "I enrolled in the program because I loved photography and was told that after going to Brooks I would have a 95% chance of finding a job after graduation. The admissions representative told me I would have a 95% chance of finding a job after graduation. Brooks did no [sic] meet those expectations, as I don't have a photo related job."

[1] The e-mail addresses were provided by Institute from its database. Many were no longer viable.
[2] Individual students are referred to herein by number to protect the privacy of the students. The identities of students will be disclosed at any potential hearing or pursuant to any valid request for discovery. At any potential hearing, complainant will move for an order limiting the disclosure of the identities of these students to this proceeding and/or resulting appeals.

Brooks Institute records indicate this 2003 baccalaureate graduate in Professional Photography was "college-placed" in part-time[3] employment. As recorded, this graduate's employment began eight months after graduation as a "Web Developer" with a wage of $12.00 per hour. "Web Developer" is not a placement in the field of Professional Photography. Institute records also reflect total loan indebtedness for this 2003 graduate of approximately $76,600.

Graduate # 6: "I was told that job placement was almost 100% after graduation with income sufficient to warrant the loans necessary for me to attend. This turned out to be un-true. It took me fifteen months to find industry work, and still it isn't earning me as much as I spent in school." In response to the Bureau's survey question, *"Are you working in an occupation for which your degree or diploma prepared you for?"* Graduate #6 stated, "Yes. To the extent that I am a courier for a production company. I still am not using the skills that I honed in school."

Brooks Institute records indicate this 2003 baccalaureate graduate in Film/ Video Production was self-placed in part-time hourly employment seven months prior to graduation. The job title listed by Brooks Institute was "film/video production." In other Brooks Institute records (*Employment Verification Form),* the job title for this graduate is listed as a "film screener" at a movie theater with a wage of $6.50 per hour. Institute records also reflect total loan indebtedness for this 2003 baccalaureate graduate of approximately $112,000.

Brooks Institute also made representations to prospective students for programs beginning in 2005 when it provided the *Student Performance Fact Sheet* with figures and statistics for the 2003 graduates. The *Fact Sheet* represented the following:

Program	Of those Students who Completed Their Program in 2003, the Number and Percentage who Secured Employment in the Field
Bachelor of Arts in Professional Photography	92 / 8[illegible]%
Diploma in Professional Photography	2 / 6[illegible]%
Bachelor of Arts in Film and Video Production	13 / 8[illegible]%
Diploma in Film and Video Production	There were no starts in this program that were scheduled to complete in 2003.
Bachelor of Arts in Visual Journalism	6 / 85%
Associate of Arts in Visual Journalism	6 / 85%
Master of Science in Photography	1 / 100%
Bachelor of Arts in Visual Communication	There were no starts in this program that were scheduled to complete in 2003.

These representations have proven false. The Bureau's review and verification of Brooks Institute records resulted in lower placement figures than those reported above because the records were contradicted by graduates and employers during the Bureau's investigation. Five of the fourteen 2003 graduates (#s 1, 3, 6, 11 and 13) are not working in a field related to their degree, yet Brooks Institute records reflect all five as employed in industry-related jobs.

The difficulty experienced by these and other 2003 graduates of Brooks Institute's educational programs in securing employment in the field of study is borne out by state and national employment

[3] Brooks Institute did not provide a definition of "part time" employment. However, "part time" employment is defined in Education Code § 94854(k)(2) as at least 17.5 hours, but less than 32 hours, per week for a period of at least 60 days in the occupations or job titles to which the program of instruction is represented to lead, provided the student completes a handwritten statement at the beginning of the program and at the end of the program which states that the student's educational objective is part-time employment.

projections and other labor statistics. Nationally, the job outlook for Photographers projects average growth, but competition for job openings will be intense. In California, this occupation is projected to increase by only 5.8 percent, representing 400 net openings in the ten-year period beginning in 2002, with just 180 employment openings per year statewide.[4]

In addition to its diploma and degree programs in Photography, Brooks Institute offers three other degree programs with a different, but shared, focus:

- Associate of Arts in Visual Journalism
- Bachelor of Arts in Visual Journalism
- Bachelor of Arts in Film and Video Production

Graduates of these programs expect to be employed as film and video editors and skilled camera operators. As with Professional Photographers, the national job outlook for Film and Video Editors projects average growth coupled with keen competition for job openings through 2012. However, growth will be tempered by the increase in offshore motion picture production. In California, the demand for Film and Video Editors is projected to have average growth of just 200 annual openings statewide in the ten-year period beginning in 2002.

The demand for Television, Video, and Motion Picture Camera Operators in California is projected to have average growth tempered by increased offshore movie production, resulting in only 170 annual openings statewide through 2012. Nationally, the job outlooks for the Television, Video, and Motion Picture film and video editors and camera operators is expected to grow about as fast as the average for all occupations through 2012. However, as with the Photographer occupational outlook, the competition for job openings will be intense because the number of individuals interested in positions as videographers and movie camera operators usually is much greater than the number of openings. Growth will also be tempered by the increase in offshore motion picture production.

2. BROOKS INSTITUTE PROVIDED FALSE AND MISLEADING INFORMATION REGARDING POTENTIAL SALARIES TO PROSPECTIVE STUDENTS.

On or about February 23, 2005, a Bureau employee posing as a potential student, met with admission representative Hank Aizpuru at Brooks Institute. She asked about how much she could anticipate making once she graduated, and Mr. Aizpuru replied, "The sky's the limit." When she asked again, he stated, "I don't know ... $50,000 to $150,000 in your first year." He repeated to her that the "sky's the limit," and that with that income she would be able to pay for her tuition at Brooks Institute.

This type of misrepresentation is pervasive. Information obtained by the Bureau from its surveys of 2003 graduates indicate that Brooks Institute made the following representations to prospective students with regard to potential salaries:

Graduate # 3: "I was told, while I was at school, that a starting wage for an apprentice in the field for which I was training was $150/day." Brooks Institute records indicate this 2003 baccalaureate program graduate in Professional Photography was "college-placed" in part-time employment, nine months after graduation, as a "Web Developer" with a wage of $12.00 per hour. ("Web Developer" is not considered a placement in the field of Professional Photography.) Institute records also show total loan indebtedness for this baccalaureate-degree recipient of approximately $75,600.

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[4] Data source: *2002-2012 Employment Projections by Occupation*, Labor Market Information Division, California Employment Development Department.

Graduate # 6: "I was told that job placement was almost 100% after graduation with income sufficient to warrant the loans necessary for me to attend. I have to work 60-80 hours a week in order to cover the substantial debt incurred at Brooks. The admissions rep had me expecting almost twice the income that I earn now. I am a courier for a production company. I still am not using the skills that I honed in school." Drooks Institute records indicate this 2003 baccalaureate graduate in Film/Video Production was self-placed in part time hourly employment seven months prior to graduation. The position's job title is listed in Brooks Institute records as a "film screener" at a movie theater with a wage of $6.50 per hour. Brooks Institute records also show total loan indebtedness for this 2003 baccalaureate-degree recipient of approximately $112,000.

Further, Bureau investigation of Brooks Institute records regarding student salaries and wages found the following:

- Brooks Institute's placement records indicate that 106 (67.5 percent) of 157[5] graduates in 2003 were employed part-time.
- For the 45 graduates in 2003 who were reported in Brooks Institute records as employed full-time[6], the average income was approximately $26,000. The average loan indebtedness of this same[7] group of 2003 graduates was approximately $74,000.
- Six 2003 graduates, with an average loan indebtedness of approximately $9[illegible],700 each – the earliest of which had graduated 22 months earlier – were reported in Brooks Institute records as still not placed as of February 2005.
- Brooks Institute records show that there was not a single 2003 diploma or degree recipient, at any degree level, whose reported wages coupled with the individual's employment tenure, was sufficient to generate even the lower $50,000 estimate of earning potential represented by Mr. Aizpuru to the Bureau employee who posed as a potential student.

3. INSTITUTE PRESENTED FALSE AND MISLEADING INFORMATION TO PROSPECTIVE STUDENTS REGARDING CAREER PLACEMENT SERVICES.

In November 2004, the Bureau contacted eleven of the 2003 Brooks Institute graduates. Results of the November 2004 and April 2005 surveys show that students who graduated in 2003 were told during their pre-enrollment interviews, as well as throughout their educational tenure at Brooks Institute, that they would receive career placement assistance. Additionally, Brooks Institute's 2003 catalog (for prospective students beginning a program in 2003) advertised the career placement services provided to enrolled students:

"Career Services – Brooks Institute has a department specifically designed to assist students in finding employment upon graduation. Career Services offers assistance in resume writing and alumni networking. Additionally, the faculty and the Alumni Association are constantly being informed of opportunities for graduates through photographic conventions and personal contacts with members of the profession. The increasing network of Brooks Institute alumni also enhances employment prospects for graduates, and many alumni either refer employers to the Institute or recruit from Brooks

[5] Six 2003 graduates were reported in Brooks Institute placement records as "waived," meaning they were unavailable or ineligible for employment. As such, they are exempt from "placement" consideration and are not included here.
[6] Brooks Institute did not provide a definition of "full-time" employment. However, "full-time" employment is defined in Education Code § 94854(k)(2) as at least 32 hours per week for a period of at least 60 days in the occupations or job titles to which the program of instruction is represented to lead.
[7] Indebtedness information for one of the forty-five 2003 graduates was not found in Brooks Institute records.

Institute themselves. Career Services maintains a listing of these professional jobs opportunities for students about to graduate and for alumni wishing to relocate."

These statements were misrepresentations. Eleven of the 2003 Brooks Institute graduates the Bureau contacted in November 2004 stated that they had not received job placement services from Brooks Institute. Of the fourteen Brooks Institute graduates contacted by e-mail in April 2005, all except Graduate #11 indicated that they did not receive any placement assistance from Brooks Institute.[8] Graduate # 11 stated that he had received "some" assistance. Information obtained by the Bureau from its surveys of former students indicate that Brooks Institute made the following representations to prospective and enrolled students with regard to placement services:

Graduate #9 (April 2005 survey): "My expectations were that if I worked hard at Brooks and excelled in my degree program (which I did) that I would have assistance in gaining employment. I was lead to believe on many occasions that I would have opportunities upon graduation that I do not have. I feel it is unfair for them to claim that they will assist their graduates in gaining employment when they do not. I do not mean to say that I think Brooks should be directly responsible for finding me a job, but when they imply that they will help and then do not, it is frustrating. I, like many others who have attended Brooks, have very large student loans. I counted on finding a good job, even entry level employment in my field after graduation, to work my way up and begin to pay them off. I feel that I was misled to believe that Brooks would assist me in finding a good job in my field, and I am disappointed with the school's lack of support."

Institute records indicate this 2003 baccalaureate graduate in Professional Photography, whose total loan indebtedness is approximately $73,350, was self-placed in part-time employment, beginning on January 1, 2003, as a Digital Artist with a wage of $8.00 per hour. Brooks Institute recorded this placement on October 24, 2003, the day before the student's graduation.

Graduate # 14 (April 2005 survey): "My admissions rep told me, my grandparents, and my parents about the 98% placement after graduation, which was the major reason I chose to attend Brooks. I later found out, AFTER I GRADUATED AND BEGAN LOOKING FOR JOBS, that any job after graduation was counted as "placement" even if it had nothing to do with photography. Even though this made me really mad and disappointed, I did get a job through career services. However, it is teaching students after school, ONE HOUR A WEEK. I feel like I have been lied to and no, my expectations are far far far from being met." The graduate reported the employer as a local public charter school.

Brooks Institute records indicate this 2003 baccalaureate graduate in Professional Photography was employed by Brooks Institute itself – not by a local public charter school, as stated by the graduate – to "assist teachers with shoots." According to the student's description, it appears that the placement was not in the field of "Professional Photography. The electronic record submitted by Brooks Institute in February 2005 lists a part-time wage of $6.00 per hour while the Employment Verification Form in the placement file for the same individual indicates an annual salary of $9,000. Institute records also show this 2003 graduate's total loan indebtedness of more than $18,200.

In summary, it is alleged that Brooks Institute engaged in a pervasive pattern of misrepresentations made to prospective students regarding employment opportunities, salaries, and career placement services. The pervasive nature of Brooks Institute's conduct is reflected in the scripts included in the training manual for

[8] One 2003 Brooks Institute graduate was contacted and responded both during the Bureau's November 2004 and February 2005 surveys. Her response has been recounted only once.

Admissions Representatives. The segment called *Looking at Other Schools* instructs the representatives to offer as enticement: "Brooks job placement while they're in school, and career placement once they graduate – lifetime career placement. Compare where our graduates are (salary, employers, types of jobs) with a Brooks education." It is clear that the representatives influenced students' decisions to attend Brooks Institute, only to find that the job market was not how it was represented and students could receive no assistance in finding the jobs they were told existed.

Determination of Violation(s):

Based on the foregoing, it is alleged that Brooks Institute provided false and misleading information regarding the potential salaries, employment opportunities of graduates in their chosen fields of study, and the availability of career placement services. Providing false information to prospective students is in violation of Education Code Section 94830(h) and is grounds for refusal to issue or renew an application.

B. INSTITUTE FURNISHED FALSE, MISLEADING, OR INCOMPLETE INFORMATION TO THE BUREAU.

Education Code section 94830(b) authorizes the Bureau to refuse to issue or renew an approval to operate, if the institution furnishes "false, misleading, or incomplete information to the council, or the failure to furnish information requested by the council or required by this chapter."

Education Code section 94830(g) authorizes the Bureau to refuse to issue or renew an approval if the institution fails to "maintain the minimum educational standards prescribed by this chapter, or to maintain standards that are the same as, or substantially equivalent to, those represented in the school's applications and advertising."

An Annual Report must be submitted to the Bureau. "Each institution approved to operate under this chapter shall be required to report to the council, by July 1 of each year, or another date designated by the council, the following information for educational programs offered in the prior fiscal year:

(a) (1) The total number of students enrolled, by level of degree or type of diploma program.
(2) The number of degrees and diplomas awarded, by level of degree.
(3) The degree levels offered.
(4) Program completion rates.
(5) The schedule of tuition and fees required for each term, program, course of instruction, or degree offered.
(6) Financial information demonstrating compliance with subdivisions (b) and (c) of Section 94804 and subdivisions (b) and (c) of Section 94855, if applicable.
(7) Institutions having a probationary or conditional status shall submit an annual report reviewing their progress in meeting the standards required for approval status.
(8) A statement indicating whether the institution is or is not current on its payments to the Student Tuition Recovery Fund.
(9) Any additional information that the council may prescribe." (Education Code § 94808(a).)

Brooks Institute must also make disclosures to prospective students in a *School Performance Fact Sheet.* "Each institution offering a degree or diploma program designed to prepare students for a particular vocational, trade, or career field shall provide to each prospective student a school performance fact sheet disclosing all of the following information:

...

(3) The number and percentage of students who begin the program and secure employment in the field for which they were trained. In calculating this rate, the institution shall consider as not having obtained employment, any graduate for whom the institution does not possess evidence, documented in his or her file, showing that he or she has obtained employment in the occupation for which the program is offered.

(4) The average annual starting wages or salary of graduates of the institution's program, if the institution makes a claim to prospective students regarding the starting salaries of its graduates, or the starting salaries or local availability of jobs in a field. The institution shall disclose to the prospective student the objective sources of information necessary to substantiate the truthfulness of the claim.

Each school that offers or advertises placement assistance for any course of instruction shall file with the council its placement statistics for the 12-month period or calendar year immediately preceding the date of the school's application for annual review for every course of instruction." (Education Code § 94816(a).)

Allegations:

Brooks Institute furnished false, misleading or incomplete information to the Bureau with regard to school performance, both in the Annual Report and in the *School Performance Fact Sheet*.

As part of Brooks Institute's response to the Bureau's December 2004 report of non-compliance, Brooks Institute's *School Performance Fact Sheet* was submitted to the Bureau. The *Fact Sheet* consists of three categories of information: (1) the number of students who were scheduled to complete their program in 2003; (2) the number and percentage of those students who actually completed their program in 2003; and (3) of those students who completed their program in 2003, the number and percentage who secured employment in the field for which they were trained. Information in these three areas is listed on the *Fact Sheet* for each degree program offered by Brooks Institute.

The Bureau attempted to verify the figures reported by Brooks Institute on its *School Performance Fact Sheet* by seeking comparable data posted on the U. S. Department of Education (USDE) internet website. During this verification process, the Bureau found a single statement regarding Brooks Institute's graduate rate (or completion rate, as used by Bureau): "Graduation rates are not present because of an insufficient number of cases." This statement is false and misleading because 1) sufficient student records exist with which Brooks Institute could generate a "graduation rate;" and 2) Brooks Institute reported program completion figures (or graduation rates) to the Bureau through its *School Performance Fact Sheet*

Brooks Institute's records obtained by the Bureau during the February 2005 site visit contradicted the program completion figures reported on the *Fact Sheet* for each of the six degree programs for which numbers and percentages were reported. The Bureau also found additional inaccurate and contradictory information in February 2005 regarding the percentage of students who completed their programs in 2003 (on schedule) that was reported to the Bureau on Annual Report Form 2003-2a, Line 9 of Brooks Institute's 2003 Annual Report. The Bureau noted that Brooks Institute's Annual Report figures for 2003 regarding program completion, which should have been the same as the figures reported by Brooks Institute on its *School Performance Fact Sheet*, were different from each other. Further, the Bureau found that neither set of figures were accurate when compared to Institute records for the same period that were submitted to the Bureau in February 2005.

In the third category of the *Fact Sheet*, with regard to those students who completed their program in 2003, listing the number and percentage who secured employment in the field, Brooks Institute's records obtained by the Bureau during the February 2005 site visit contradicted the figures reported on the *Fact Sheet* for each of the six degree programs for which numbers and percentages were reported.

Education Code 94816(a)(4) requires the disclosure of starting salary and wage information on *School Performance Fact Sheets*. The Bureau has also incorporated the reporting of this information in institution Annual Reports. Such information is required to be reported for all programs that lead to a specific career, as in the case of Professional Photography. Brooks Institute's 2003 Annual Report to the Bureau also contained false and misleading information, or was incomplete in substantive respects with regard to salaries and wages of graduates. In all cases, the average annual starting wages of Brooks Institute graduates was omitted from the Annual Report Forms [2003-2a (Degree), Line 13] for all degree programs offered by Brooks Institute, even though these data were found in Brooks Institute's records that were submitted to the Bureau.

Further, placement figures reported in Brooks Institute's 2003 Annual Report, as well as its *School Performance Fact Sheet*, was subsequently proven false or inaccurate by graduates and employers contacted by the Bureau during its April 2005 verification process.

During April 2005, the Bureau interviewed eleven employers of 2003 Brooks Institute graduates to verify the information on the *Employment Verification Forms* ("*Form*") included by Brooks Institute in the placement files for those graduates. The following is a narrative of the Bureau's review of this information and related Brooks Institute records, including responses regarding placement from the November 2004 survey:

- According to Brooks Institute records, Graduate #15 completed his educational program in June 2003, with approximately $57,200 in total loan indebtedness, receiving a baccalaureate degree in Professional Photography. The *Form* for Graduate #15, completed by Brooks Institute on December 28, 2003, indicates that he was employed as a photo assistant starting on August __, 2003, two months after graduation, with a wage of $9.00 per hour. Other Brooks Institute records indicate this employment placement was Institute-generated.

  In April 2005, the employer confirmed to the Bureau that Graduate #15 did some freelance work as an "intern" approximately three to four years prior. Thus, the employment would have occurred in 2001 or 2002 (while the graduate was still in school), not shortly after graduation in mid-2003 as reflected on the *Form*. In addition, internships[9] are student assignments conducted for education credit, whether compensated or not and, as such, do not constitute employment for "placement" purposes. Even if Graduate #15 did not receive education credits, freelance work does not constitute a placement.

- According to Brooks Institute records, Graduate #16 completed her educational program in June 2003, with approximately $53,600 in total loan indebtedness, receiving a baccalaureate degree in Professional Photography. The *Form* for Graduate #16, completed by Brooks Institute on February 2, 2004, indicates that she was placed in employment eight months after graduation as a part-time photo

[9] The term "internship" is synonymous with "practicum" and is defined by Brooks Institute's accrediting agency, the Accrediting Council for Independent Colleges and Schools (ACICS), as "a supervised practical experience that is the application of previously studied theory. Normally, three hours of work in a practical setting has the credit equivalency of one hour of classroom lecture. Under the supervision of a faculty or staff member, a written agreement shall be developed that outlines the arrangement between the institution and the practicum site, including specific learning objectives, course requirements, and evaluation criteria." ACICS Glossary of Definitions, pg. GLO-6, May 1, 2005.

assistant on February 1, 2004, at $21.00 per hour. Other Brooks Institute records indicate this employment placement was Institute-generated.

When contacted by the Bureau in April 2005, the employer stated that Graduate #16 had not been a paid employee, but that she had been an unpaid intern for a couple of months. Although this position does not appear to have been a for-credit "internship" since it occurred post-graduation, it clearly was not a "placement."

- According to Brooks Institute records, Graduate #17 completed her educational program in June 2003, with approximately $57,100 in total loan indebtedness, receiving an associate of arts degree in Visual Journalism. The *Form* for Graduate #17, completed by Brooks Institute on November 4, 2003, indicates that she was employed as a photo editor beginning on September 1, 2003, but the *Form* does not list any wage or salary data. Data submitted to the Bureau in February 2005 shows Graduate # 17 was placed by Brooks Institute in part-time employment with a wage of $7.00 per hour.

  When contacted by the Bureau in April 2005, the employer confirmed that Graduate #17 did work as an "intern" in 2004 – not in 2003 as recorded on the Brooks Institute *Form* – for a total of three months, earning a total of $750.00. Although this position does not appear to have been a for-credit "internship" since it occurred post-graduation, it clearly was not a "placement."

- According to Brooks Institute records, Graduate #18 completed his educational program in August 2003, with approximately $18,300 in total loan indebtedness, receiving a baccalaureate degree in Professional Photography. The *Form* for Graduate #18 was completed by Brooks Institute on August 2, 2003, the day after graduation. It indicates that Graduate # 18 was employed a full year prior to graduation, on August 1, 2002 as a photo assistant with a part-time annual salary of $17,000. When the Bureau reviewed this individual's placement file, it also indicated that Graduate #18 had been employed beginning on August 1, 2002, but as an Industrial Photographer with a part-time wage of $16.00 per hour.

  In response to the Bureau November 2004 survey, Graduate #18 stated that his status with the employer of record was that of an unpaid internship that he used for experience in handling and operating scientific cameras. As previously noted, internships are student assignments conducted for education credit, whether compensated or not and, as such, do not constitute employment for "placement" purposes.

- According to Brooks Institute records, Graduate # 19 completed her educational program in December 2003, with approximately $145,000 in total loan indebtedness, receiving a baccalaureate degree in Professional Photography. Brooks Institute placement information for Graduate # 19 indicates that she was self-placed in full-time employment, as of the first day she enrolled as a student at Brooks Institute, as a "Portrait Photographer" with an annual salary of $26,000. The *Form* for Graduate # 19, however, indicates the position title as a "Groomer & Photographer" with job duties described as "Groom pets (dogs) & take their portrait for clients."

  The placement was recorded on the Brooks Institute *Form* on March 1, 2004, three months after graduation, but reflected an employment start date three and a half years earlier (on September 1, 2000). The Bureau does not consider this case to meet the definition of placement since the graduate was already employed in the position prior to enrollment at Brooks Institute, and prior to acquiring the baccalaureate degree.

The contradictory information recorded by Brooks Institute in its placement files vis-à-vis the confirmed statements of facts outlined above are evidence of Brooks Institute's false, misleading, or incomplete representations to the Bureau on the *School Performance Fact Sheet* and in the 2003 Annual Report in connection with student placements.

Determination of Violation(s):

Based on the foregoing, the Bureau has determined that Brooks Institute provided false, misleading or incomplete information to the Bureau regarding the placement and salaries of its 2003 graduates, in violation of Education Code section 94808 and 94816. A violation of the Reform Act is grounds to refuse to issue or renew an application under Education Code section 94830(b).

C. INSTITUTE PROVIDED INACCURATE AND UNDERREPORTED STUDENT TUITION RECOVERY FUND (STRF) DATA TO THE BUREAU.

Education Code section 94830(q) authorizes the Bureau to refuse to issue or renew an approval to operate, or to revoke an institution's approval, if the institution fails "to pay any fees, order for costs and expenses under Section 94935, assessments, or penalties owed to the council, as provided in this chapter."

Each institution is required to "collect the amount assessed by the bureau in the form of a Student Tuition Recovery Fund fee from its new students, and remit these fees to the bureau during the quarter immediately following the quarter in which the fees were collected from the students, or from loans funded on behalf of the students, except that an institution may waive collection of the Student Tuition Recovery Fund fee and assume the fee as a debt of the institution." (Education Code § 94945(a)(1)(B).)

Education Code section 94945(a)(3) requires that assessments made pursuant to this section shall be made in accordance with both of the following:

(A) Each new student shall pay a Student Tuition Recovery Fund assessment for the period of January 1, 2002, to December 31, 2002, inclusive, at the rate of three dollars ($3) per thousand dollars of tuition paid, rounded to the nearest thousand dollars.

(B) Commencing January 1, 2003, Student Tuition Recovery Fund fees shall be collected from new students at the rate of two dollars and fifty cents ($2.50) per thousand dollars of tuition charged, rounded to the nearest thousand dollars. For new students signing enrollment agreements between January 1, 2002, and December 31, 2002, inclusive, the assessment rate of three dollars ($3) per thousand dollars of tuition paid, rounded to the nearest thousand dollars, as provided in subparagraph (A) of this paragraph, shall remain the assessment rate for the duration of the student's enrollment agreement.

Allegations:

Brooks Institute submitted incomplete Student Tuition Recovery Fund (STRF)-related information to the Bureau and underreported, underpaid, and incorrectly assessed and remitted students' STRF fees to the Bureau in violation of Education Code section 94945. The inconsistencies can be grouped into two categories: 1) the calculations by Brooks Institute to assess STRF fees on eligible (and ineligible) students enrolled; and 2) the application of STRF assessments by the institution with regard to California residency and non-residency of enrolled students.

The Bureau reviewed the general ledgers of the 2003 graduates, which were collected during the February 2005 visit, as well as fifty student records of those students who dropped or withdrew in the 2003 and 2004 calendar year, collected during the November 2004 visit. During the review of these documents, the Bureau found that the institution incorrectly calculated the students' fee for the STRF assessment. The incorrect calculations for some of the assessments were due to inaccurate rounding of tuition charged to the nearest thousand dollars, while other assessments were simply miscalculated. However, the Bureau could not determine the formulas or methodologies used by Brooks Institute that resulted in the miscalculated assessments, as there was no consistency in the formulas used.

While these instances may appear minimal as individual cases, when multiplied by the total number of eligible students, the difference is significant. The Bureau's investigation found evidence of thirty-five additional STRF-eligible students than the 1,277 that were reported by Brooks Institute for a total of 1,312 for 2002. According to an audit by the Bureau's STRF unit of the submitted data, the lower figure reported by Brooks Institute resulted in underpayment to the STRF of at least $3,117. The audit also found that Brooks Institute's misapplication of the STRF assessment on California resident and non-resident students in 2002 resulted in the underpayment to the STRF of $8,354.40.

As stated in the previous paragraph, the Bureau found that the California residency and non-residency of the students for the STRF is inconsistently and incorrectly applied. The Bureau randomly selected 39 student records and reviewed the general ledger for each year the student was enrolled. The findings are as follows:

- Fifteen of 39 randomly selected student records reviewed for compliance were determined to be non-California residents and, therefore, non-eligible for STRF assessments. However, twelve of these fifteen non-eligible (non-California resident) students were assessed STRF fees.

- Application of the STRF assessment on both STRF-eligible (California resident) and non-eligible (non-California resident) students was inconsistent from year to year. The Bureau found that Student #39 – who was not a California resident and, therefore, was non-eligible for STRF – was assessed for STRF by Brooks Institute in the first year she was enrolled, but not in the second year. She was then assessed STRF fees in the third year.

- Brooks Institute reported 1,277 STRF-eligible students to the Bureau for the 2002 Reporting Year (Line B). However, the Bureau found evidence of 1,312 STRF-eligible students for that same period. This under-reporting has resulted in underpayment by Brooks Institute to the STRF.

In Brooks Institute's 2003 Annual Report to the Bureau, it reported total enrollment of 2,806 students enrolled in all degree programs for the 2003 calendar year. This same total student enrollment figure for calendar year 2003 is required to be reported on STRF assessment forms filed by Brooks Institute with the Bureau. However, according to the Bureau's STRF unit review of the records supporting its 2003 STRF assessments, the 2003 Annual Report figure of 2,806 total students reported by Brooks Institute "does not reconcile to the number of students reported on either Line (A) or Line (B) of the assessment reports as filed for the 2003 year."

Determination of Violation(s):

Based on the foregoing, the Bureau has determined that Brooks Institute underreported, underpaid, and incorrectly assessed STRF fees in violation of Education Code section 94945. A violation of the Act is grounds for refusal to issue or renew an application under Education Code section 94830(q). In addition,

the foregoing provides the basis for the Bureau's determination that Brooks Institute has provided false information to the Bureau, in violation of Education Code section 94830(a).

III. RESTRICTIONS OR CONDITIONS ON APPROVAL

The conditions under which Brooks Institute receives this approval are as follows:

Condition 1. Brooks Institute will report quarterly to the Bureau on its progress toward full compliance with the conditions of this approval. The first quarterly report will be due within thirty days from the last day of the month of the quarter in which Brooks Institute receives the Conditional Approval. In the first report, Brooks Institute will develop a timeline, which will be subject to approval by the Bureau, establishing target dates for compliance with each Condition as set forth herein. In each subsequent report, Brooks Institute will report on its progress toward fulfillment of each condition within the timelines established, and provide the Bureau with copies of any forms, manuals, or guidelines developed. This report shall be sent to the following address until the Conditional Approval has been removed:

Marcia Trott
Senior Education Specialist-Degree Program
Bureau for Private Postsecondary and Vocational Education
400 R Street, Suite 5000
Sacramento, CA. 95814

The first report will become the foundation for subsequent reports submitted to the Bureau by Brooks Institute for future and currently enrolled students, and shall include the following:

- The names, addresses, and telephones numbers of each student currently enrolled in Brooks Institute, as well as the title of the degree program in which the students are enrolled.
- For each individual named above, Brooks Institute will provide the date the student was admitted and the date of the first class attended.
- For each individual named above, Brooks Institute will provide the student's status as a California resident or non-resident student.
- For each individual named above that withdraws or cancels, Brooks Institute will provide the last day attended, as well as the reason provided for the discontinuation of the program and the total amount of federal financial aid loans and/or private loans each student is obligated to pay for his or her education as of the last date attended at Brooks Institute.

The first report shall also include the following verifiable information for 2003 graduates and all graduates thereafter:

- The names, addresses, and telephones numbers of each graduate of Brooks Institute (sorted by graduation year) that includes the title of the degree earned, the date of graduation, the date of placement, the placement start date, and the date that the placement was verified.
- For each individual named above, Brooks Institute will provide the total amount of federal financial aid loans and/or private[10] loans that students and/or their parents (in the form of Parent PLUS[11] loans) have

[10] When grants, scholarships, and federally sponsored loans are not enough to cover the cost of a student's education, the student and/or their parents can obtain additional funding through one of several alternative private loan options: a Signature Student Loan or a Tuition Answer Loan (SM). Although neither of these loans is federally sponsored, they are both education loans designed to help

incurred to pay for the education to include all loan disbursements made through Brooks Institute. This information will be the foundation for disclosing potential long-term debt upon graduation, a realistic average of the dollars borrowed, and disclosure in the catalog.

- For each individual named above, Brooks Institute will provide the current or starting salary or wage for each graduate who has secured employment, and indicate whether the job is in a field related to the area of study.

Condition 2. Brooks Institute will meet with Bureau staff within six months of the date of this approval letter to monitor progress toward compliance with the conditions of approval as set forth herein. All conditions shall be met prior to the submission of the Brooks Institute's application of re-approval.

Condition 3. Brooks Institute will evaluate its current placement policies and procedures vis-à-vis the Bureau's findings noted herein and provide this information to the Bureau with the first quarterly report. Brooks Institute will provide to the Bureau notification of any future changes made to these policies and procedures and be able to demonstrate at the request of the Bureau that the process has been utilized and monitored with regard to the placement of students. For each current graduate and all future graduates, Brooks Institute must demonstrate that those graduates have secured employment based on criteria that shall include the following:

- The process and policies developed by Brooks Institute for placement will include a definition of "secure employment" that is not considered temporary or unpaid and will not include internships or one-time events.
- Brooks Institute will provide a written statement from the employer that the graduate is employed along with a brief description of his or her job duties, or a written statement *from the graduate* that he or she has secured employment along with a brief description of his or her job duties.
- Brooks Institute will provide a description of each document it will require in the placement file for each graduate.
- Brooks Institute will provide its process for auditing the placement information, including what will be required in the placement file and how it will be verified.

Condition 4. Brooks Institute will refrain from enrolling students into any of its degree or non-degree programs until the following have been demonstrated to the Bureau:

- Brooks Institute will verify the placement information for each 2003 graduate, determine if each has obtained secure employment, and provide to the Bureau accurate "placement" numbers and percentages for 2003 graduates. This information will be submitted in the form of a corrected *School Performance Fact Sheet*, with a revision date. This corrected form will immediately be distributed and explained to prospective and currently enrolled students. This notice shall be signed by both the student and a representative of Brooks Institute and evidenced in the student's file.
- Brooks Institute will assure that any manuals developed or used by its Admissions Representatives include accurate information, scripts based upon real and verifiable data, and portrayal of Brooks Institute's ratio of the number of enrollments allotted versus the number of students enrolled that is not unrealistically

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students obtain the funding needed to attend the school of their choice. Each of these loan options enable students to borrow up to the full cost of their education, including tuition and fees, room and board, books and supplies, transportation and even living expenses.

[11] The federally sponsored Parent Loan for Undergraduate Students (PLUS) Loans enable parents to borrow to pay the education expenses of each child who is a dependent undergraduate student enrolled at least half time in an approved college or university. These loans are available through both the Direct Loan and FFEL programs. Most of the benefits to parent borrowers are identical in the two programs. Generally, repayment must begin within 60 days after the loan is fully disbursed. There is no grace period for these loans. This means interest begins to accumulate at the time the first disbursement is made. Parents must begin repaying both principal and interest while the student is in school.

inflated or otherwise misleading. Any such manual will include a comprehensive and accurate analysis of the national and state labor statistics regarding employment opportunities in the field of study. This information is to be portrayed as a material fact in the Brooks Institute catalog.

Condition 5. Should Brooks Institute request Bureau approval to add new educational programs while it is operating under a Conditional Approval, the Bureau will consider any such request contingent upon the progress, or lack thereof, Brooks Institute has made in meeting the Conditions outlined herein.

Condition 6. Brooks Institute must provide the following disclosure to each current student and potential student in writing:

"This Institute has received a conditional approval to operate from the Bureau for Private Postsecondary and Vocational Education ("Bureau"). A conditional approval means that this Institute was found to be operating in violation of the statutes and regulations that govern private postsecondary educational institutions, and therefore it was not in the public interest to give this Institute a full unconditional approval to operate in this State. This designation allows Brooks Institute to operate while the Bureau monitors compliance with applicable regulations, statutes and restrictions placed upon this Institute."

This notice shall be signed by both the student and a representative of Brooks Institute and evidenced in the student's file. This disclosure must also be placed in Brooks Institute's current catalog under "Institutional Authority to Grant Degrees" so that students and potential students know that Brooks Institute is operating under a conditional approval.

Condition 7. The full and qualitative review of Brooks Institute's application for renewal will be comprehensive and, as such, the review will not be limited to the findings in this approval document.

Condition 8. Brooks Institute will review the assessments it made to the Student Tuition Recovery Fund for 2002, 2003, 2004, and to-date in 2005. Brooks Institute will determine the amount that should have been charged for each student enrolled during this time period and the amount actually charged. Brooks Institute will remit the difference to the Bureau. It will also provide verifiable documentation that it has refunded those assessments incorrectly assessed or calculated to each student, if applicable. Further, if students were not assessed sufficiently, Brooks Institute will pay that amount to the Bureau and *will not* charge the students.

Condition 9. Brooks Institute of Photography violated provisions of California Education Code 94816, 94831, and 94832, which may result in the unenforceability of any contract or agreement arising from the transaction in which the violation occurred, pursuant to Education Code section 94985(a). No later than August 31, 2005, Brooks Institute of Photography must provide a plan to the Bureau that provides in detail how it will provide equitable restitution to all students enrolled from May 4, 1999 to the present. The Bureau must approve this plan before it is implemented.

Note: Brooks Institute is permitted to submit to the Bureau much of the required information electronically on CD-ROMs or DVDs.

Brooks Institute may, not less than one year after the effective date of this Notice, petition the Bureau for a modification of the Conditional Approval.

Violation of any conditions of the conditional approval is grounds for revocation of the approval to operate. If any violation of the conditional approval occurs, the bureau shall serve respondent with a

notice of revocation, and after notice and hearing, impose the discipline of revocation on respondent's license. If during the period of probation, an accusation, statement of issues, or other notice of administrative action has been filed against respondent's approval to operate, or the attorney general's office has been requested to prepare such an accusation, or other notice of administrative action, the effective dates of the conditional approval set forth in this decision shall be automatically extended and shall not expire until the accusation, or notice of administrative action has been acted upon by the bureau.

IV. GROUNDS FOR CONDITIONAL APPROVAL:

Brooks Institute of Photography violated the Reform Act by willfully misleading, falsifying, and omitting critical information that persuaded prospective students to enroll in educational programs that were advertised and promoted as preparation for a high paying career in their respective fields of study. Brooks Institute then encouraged students to constantly apply and receive student financial loans from governmental and private lenders in considerable excess of the students' potential earnings to repay those loans. Further, required data submitted by Brooks Institute to the Bureau was found to be inaccurate, incomplete, and misleading. These actions are prohibited by Education Code sections 94832(a), (b). Violations of the Reform Act are grounds for denial of a renewal application and revocation of a current approval to operate under Education Code section 94830(a). Violation of Section 94832 provides further grounds for denial of a renewal application and revocation of a current approval to operate under Education Code section 94985(a) Further, fraudulent and deceptive acts constitute grounds for denial of Brooks Institute's renewal application for approval to operate under Business and Professions Code section 480(a)(2).

Although these acts are cause for a denial of Brooks Institute's approval to operate, the Bureau is cognizant of the number of students currently enrolled and the negative impact a revocation and denial would have on the students and their families. The Bureau finds that the resources available to Brooks Institute are sufficient to meet the minimum standards of California Education Code and its regulations. If compliance is not met within the reasonable period of time set forth in this document, the Bureau will move to revoke Brooks Institute's approval to operate.

In closing, again please be advised that unless a timely appeal is received by the Bureau, Brooks Institute of Photography waives its right to an administrative hearing on this action.

Sincerely,

Barbara Ward

BARBARA WARD
Chief
Bureau for Private Postsecondary and Vocational Education

Attachments

STATE OF CALIFORNIA - STATE AND CONSUMER SERVICES AGENCY

ARNOLD SCHWARZENEGGER, Governor

State of California Department of Consumer Affairs

Bureau for Private Postsecondary and Vocational Education
400 R Street, Suite 5000, Sacramento, CA 95814-6200
P.O. Box 980818, West Sacramento, CA 95798-0818
(916) 445-3427
www.bppve.ca.gov

In accordance with the provisions of California Education Code 94900 and/or 94915, the Bureau for Private Postsecondary and Vocational Education approves (conditionally)

BROOKS INSTITUTE OF PHOTOGRAPHY

1321 Alameda Padre Sierra
Santa Barbara, Ca 93108
School Code #: 4201871

INSTITUTIONAL APPROVAL

This institution has received **conditional** approval to operate from the Bureau for Private Postsecondary and Vocational Education ("Bureau"). A conditional approval to operate means that the Bureau has determined that the institution is in compliance with this chapter, but has operated within three years before the filing of the application in violation of this chapter. Therefore, the Bureau has determined that an unconditional grant of approval to operate is not in the public interest.

Subject to earlier termination in accordance with the law.

[redacted]

Approval #: 20021
Effective Date: July 11, 2005
Expiration Date: June 30, 2007

Sheila Hawkins, Private Postsecondary Education Administrator

This document is valid if all fees are current. Subject to earlier termination in accordance with the law.

This approval document may be accompanied by the 'Approved/Registered Program List' and the 'Approved Branch/Satellite Location List' if applicable. These documents outline educational services and approved sites.

State of California Department of Consumer Affairs

Bureau for Private Postsecondary and Vocational Education
400 R Street, Suite 5000, Sacramento, CA 95814-6200
P.O. Box 980818, West Sacramento, CA 95798-0818
(916) 445-3427
www.bppve.ca.gov

Approved/Registered Program List

In accordance with the provisions of California Education Code 94900 and/or 94915 and/or Article 9.5, the Bureau for Private Postsecondary and Vocational Education conditionally approves:

BROOKS INSTITUTE OF PHOTOGRAPHY

1321 Alameda Padre Sierra
Santa Barbara, Ca 93108

School Code #: 4201871
Site Type: Main

to offer the following program(s)/course(s):

Program Name	Program Approved	Program Type
AA VISUAL JOURNALISM	04/04/2001	Degree
BA FILM & VIDEO PRODUCTION	06/26/2001	Degree
BA PROFESSIONAL PHOTOGRAPHY	01/01/1995	Degree
BA VISUAL COMMUNICATION	09/05/2001	Degree
BA VISUAL JOURNALISM	04/04/2001	Degree
MS PHOTOGRAPHY	01/01/1995	Degree
FILM & VIDEO PRODUCTION	06/29/2001	Non-Degree

The program list above represents all currently approved/registered educational services for this institution. The Main, Branch, or Satellite locations of this institution may offer any subset of this list. Branch and Satellite location(s) may only offer educational services that are approved at the Main location as stated in Section 94719 and 94743(a) of the Private Postsecondary and Vocational Education Reform Act.

Marcia Trott, Senior Education Specialist

This document is valid if all fees are current. Subject to earlier termination in accordance with the law.

Approved/Registered Program List

School Name: BROOKS INSTITUTE OF PHOTOGRAPHY
School Code: 4201871 (Institution Code: 4201871.....Site Type: Main)

Program Name	Program Approved	Program Type
PROFESSIONAL PHOTOGRAPHY	01/01/1995	Non-Degree

Degree Programs: 6
Non-Degree (Vocational) Programs\Courses: 2
Total Programs/Courses: 8

The program list above represents all currently approved/registered educational services for this institution. The Main, Branch, or Satellite locations of this institution may offer any subset of this list. Branch and Satellite location(s) may only offer educational services that are approved at the Main location as stated in Section 94719 and 94742(a) of the Private Postsecondary and Vocational Education Reform Act.

Marcia Troll, Senior Education Specialist

This document is valid if all fees are current. Subject to earlier termination in accordance with the law.

Dennis L. Rockway 107771
Toby Rothschild 45860
Legal Aid Foundation of Los Angeles
1102 Crenshaw Boulevard
Los Angeles, California 90019
(323) 801-7928
(323) 801-7945 Fax

BEFORE THE

OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of: Bureau for Private Postsecondary and Vocational Education adv. Brooks Institute of Photography	Agency/Agency Case No. 06417 OAH No. 2005080993
	OBJECTION TO SUBPOENA DUCES TECUM

The Legal Aid Foundation of Los Angeles hereby objects to the Subpoena Duces Tecum propounded upon it by Respondent Brooks Institute of Photography.

The grounds upon which this objection is made are as follows:

1. The Subpoena is not accompanied by an affidavit which conforms with the provisions of Code of Civil Procedure Section 1985(b).
2. The Subpoena is an over broad and unreasonable demand.
3. The Subpoena seeks documents protected by the attorney-client privilege.
4. The Subpoena seeks documents protected by the attorney work product doctrine.
5. The Subpoena seeks documents which are neither relevant nor reasonably calculated to lead to the discovery of admissible evidence.

6. The Subpoena seeks documents which would be unduly burdensome and oppressive to produce.

LEGAL AID FOUNDATION OF LOS ANGELES

September 20, 2005

By:_____
Dennis L. Rockway

SERVICE LIST

Tiffany Mitchell, Esq.
Greenberg, Traurig, LLP
2450 Colorado Avenue
Suite 400E
Santa Monica, California 90404

Worldwide Network
1533 Wilshire Boulevard
Los Angeles, California 90017

Janet Lindner Spielberg, Esq.
Law Offices of Janet Lindner Spielberg
12400 Wilshire Boulevard
Suite 400
Los Angeles, California 90025

LAW OFFICES OF
JANET LINDNER SPIELBERG

12400 WILSHIRE BOULEVARD
SUITE 400
LOS ANGELES, CA 90025
PHONE 310-392-8801
FAX 310-278-5938

Elena Ackel
Los Angeles Legal Aid, East L.A. Offices
5228 Whittier Blvd.
Los Angeles, CA. 90022

September 7, 2005

Dear Ms. Ackel:

This letter confirms my understanding of our phone conversation earlier today in which you indicated that neither you, nor Los Angeles Legal Aid, intended to produce the documents being requested in the Subpoena Duces Tecum pertaining to the administrative law action between Brooks Institute of Photography and the Bureau for Private Post Secondary and Vocational Education.

I am requesting that if either you or anyone in the Los Angeles Legal Aid office makes any decision that involves producing any of those documents, please give me ample notice to make a Motion for a Protective Order. I believe that I am entitled to make such a motion as any conversations we had related to Career Education Corporation schools should be protected by the work-product doctrine.

In addition I'd like to inform you and Los Angeles Legal Aid that I am serving a written objection to Document Request #5 pertaining to communications between you and/or Los Angeles Legal Aid and myself. Please note that California Civil Code §1985.3 (g) indicates:

> "No witness or deposition officer shall be required to produce personal records after receipt of notice that the motion has been brought by consumer, or after receipt of a written objection from a nonparty consumer, except upon order of the court in which the action is pending or by agreement of the parties, witnesses, and consumers affected."

It seems clear to me that once I've made a written objection and given you notice of it, you and Los Angeles Legal Aid will have grounds not to comply with the part of Document Request # 5 pertaining to any communications with me.

Best regards,

Janet Spielberg

Janet Lindner Spielberg (221926)
LAW OFFICES OF JANET LINDNER SPIELBERG
12400 Wilshire Boulevard
Suite 400
Los Angeles, California 90025
Tel: (310) 392-8801
Fax: (310) 278-5938

In the Matter of:

BUREAU FOR PRIVATE POSTSECONDARY AND VOCATIONAL EDUCATION

adv.

BROOKS INSTITUTE OF PHOTOGRAPHY

Agency Case No. 06147

OAH No. 2005080993

OBJECTIONS TO SUBPOENA DUCES TECUM PROPOUNDED BY BROOKS INSTITUTE OF PHOTOGRAPHY

Pursuant to California Civil Code §1985.3 (g), Janet Spielberg makes the following objections regarding the request for documents propounded to non-parties Legal Aid of Los Angeles and Elena Ackel from Brooks Institute of Photography:

I. GENERAL OBJECTIONS

Janet Spielberg asserts the following General Objections to the Documents Requested (the "General Objections"), each of which is hereby incorporated by reference into the response to each individual Document Request below. From time to time, and for purpose of emphasis, Janet Spielberg may restate one or more of the General Objections as specific objections to an individual Document Request. Such restatement, or the failure to restate, should not be taken as a waiver of any General Objection not restated.

1. Janet Spielberg objects to the scope of the Document Requests. The request asks for all documents related to all communications, whether or not such communications were in any way related to the administrative law action between the Bureau for Private Postsecondary and Vocational Education and Brooks Institute of Photography. Such requests are overly broad, oppressive, unduly burdensome and not reasonably calculated to lead to the discovery of admissible evidence.

2. Janet Spielberg objects to the Document Requests in so far as they seek information or documents that are privileged by, and/or protected from, disclosure by the attorney-client privilege, the work-product doctrine, the privacy privilege, or any other privilege or immunity.

3. Janet Spielberg reserves the right, but is not obligated, to supplement her objections based upon newly-discovered evidence or information of which Janet Spielberg is not aware at this time.

DOCUMENTS REQUESTED

REQUEST FOR DOCUMENTS NO. 5:

_____All documents relating to any communications between you and Mark A. Kleiman, Esq. and/or Janet L. Spielberg, Esq.

//

RESPONSE TO REQUEST FOR DOCUMENTS NO. 5:

In addition to the foregoing general objections, Janet Spielberg objects to this request on the grounds that the documents described are attorney work product, and are not relevant to the subject matter.

Dated: September 8, 2005

Janet Lindner Spielberg
Law Offices of Janet Lindner Spielberg
12400 Wilshire Boulevard
Suite 400
Los Angeles, California 90025

PROOF OF SERVICE

STATE OF CALIFORNIA)
)ss.:
COUNTY OF LOS ANGELES)

I am employed in the county of Los Angeles, State of California, I am over the age of 18 and not a party to the within action; my business address is 12400 Wilshire Boulevard, Suite 920, Los Angeles, California 90025.

On September 8, 2005, I served the document(s) described as by placing a true copy(ies) thereof enclosed in a sealed envelope(s) addressed as follows:

I served the above document(s) as follows:

— BY OVERNIGHT DELIVERY via Federal Express. I am familiar with the practice at my place of business for collection and processing of correspondence for overnight delivery by Federal Express. Such correspondence will be deposited with a facility regularly maintained by Federal Express for receipt on the same day in the ordinary course of business. I placed the envelope(s) for collection and delivery by Federal Express with delivery fees paid or provided for in accordance with ordinary business practices.

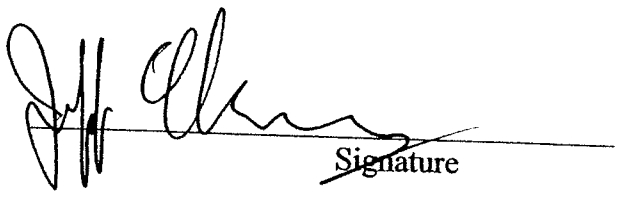
— BY FACSIMILE TRANSMISSION. I caused a facsimile machine transmission from facsimile machine telephone number (310) 442-7756 to the facsimile machine telephone number(s) listed on the attached Service List. Upon completion of said facsimile machine transmission(s), the transmitting machine issued a transmission report(s) showing the transmission(s) was/were complete and without error.

X BY MAIL. I am familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in an affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on September 8, 2005, at Los Angeles, California 90025.

Jeff Chemerinsky
Type or Print Name



Signature

SERVICE LIST

Tiffany Mitchell
Greenberg Traurig, LLP
2450 Colorado Aveue
Suite 400E
Santa Monica, CA 90404

Elena Ackel
Los Angeles Legal Aid
5228 Whittier Blvd.
Los Angeles, CA 90022

Worldwide Network
1533 Wilshire Blvd.
Los Angeles, CA 90017

Los Angeles Legal Aid, East L.A. Office
5228 Whittier Blvd.
Los Angeles, CA 90022

Elena Ackel - Brooks Institute Matter

From: "Rashida Adams" <adams@caldwell-leslie.com>
To: <drockway@lafla.org>, "Toby Rothschild" <TRothschild@lafla.org>
Date: 10/28/2005 5:35:10 PM
Subject: Brooks Institute Matter
CC: <biwasaki@lafla.org>, "Elena Ackel" <EAckel@lafla.org>, "David Pettit" <pettit@caldwell-leslie.com>

PRIVILEGED AND CONFIDENTIAL

We just received the attached Motion for Sanctions and supporting declarations from Brooks Institute. Our response will be due on November 10th. We will be in touch at the beginning of next week regarding our response to this Motion.

Thank you,
Rashida Adams

Rashida Adams

Caldwell Leslie
Caldwell Leslie Newcombe & Pettit, PC
1000 Wilshire Boulevard, Suite 600
Los Angeles, CA 90017-2463
Tel 213.629.9040 Fax 213.629.9022
adams@caldwell-leslie.com
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GREENBERG TRAURIG, LLP
FRANK E. MERIDETH (SBN 46266)
JEFF E. SCOTT (SBN 126308)
GREGORY A. NYLEN (SBN 151129)
JORDAN D. GROTZINGER (SBN 190166)
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2450 Colorado Avenue, Suite 400E
Santa Monica, California 90404
Telephone: (310) 586-7700
Facsimile: (310) 586-7800

Attorneys for Respondent
BROOKS INSTITUTE OF PHOTOGRAPHY

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

BUREAU FOR PRIVATE POSTSECONDARY AND VOCATIONAL EDUCATION,

Petitioner,

v.

BROOKS INSTITUTE OF PHOTOGRAPHY,

Respondent.

Case No. 06147

OAH No. L2005080993

RESPONDENT'S NOTICE OF MOTION AND MOTION TO CERTIFY FACTS JUSTIFYING CONTEMPT SANCTIONS AGAINST THE LEGAL AID FOUNDATION OF LOS ANGELES AND FOR MONETARY SANCTIONS; RESPONDENT'S REQUEST FOR $6,105 IN MONETARY SANCTIONS; MEMORANDUM OF POINTS AND AUTHORITIES

[SUPPORTING DECLARATIONS OF GREGORY J. STRICK, Ph.D., TRACY LORENZ, JEFF E. SCOTT, GREGORY A. NYLEN AND TIFFANY S. MITCHELL FILED CONCURRENTLY]

Date:	November 14, 2005
Time:	1:30 p.m.
Location:	OAH Los Angeles

NO WAIVER OF HEARING

Settlement Conference:	November 25, 2005
Pre-hearing Conference:	December 12, 2005
Hearing Date:	February 1, 2006

TO THE COURT AND ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT on Monday, November 14, 2005, at 1:30 p.m., at the Office of Administrative Hearings, 320 West 4th Street, Suite 630, Los Angeles, California 90013, Respondent Brooks Institute of Photography ("BIP") will and hereby does move, pursuant to California Government Code sections 11450.5-11450.50, 11455.10(e), 11455.20(a), 11507.6(e) and California Education Code sections 94975(d)(1) and 94975(e), for an Order certifying facts justifying a contempt sanction against third party Legal Aid Foundation of Los Angeles ("LAFLA") due to LAFLA's refusal to produce documents in its possession, custody or control that are responsive to the following document demands attached to and incorporated in the subpoena *duces tecum* (the "Subpoena") Petitioner Brooks Institute of Photography ("BIP") served upon LAFLA in this proceeding:

(a) Document Request No. 1, which seeks the production of any and all documents relating to any communications between any LAFLA employees, including without limitation communications by and between Elena H. Ackel, Esq., and any employee of the Bureau for Private Postsecondary and Vocational Education (the "Bureau") relating to BIP and/or Career Education Corporation ("CEC");

(b) Document Request No. 2, which seeks the production of all documents provided to LAFLA by any employee of the Bureau relating to BIP and/or CEC;

(c) Document Request No. 3, which seeks the production of all documents relating to any communications between LAFLA and any television, print, radio or other media representatives (including without limitation Gretchen Morgenson of the *New York Times*, Morgan Green of the *Santa Barbara News Press*, any other journalists or reporters, and/or any employees of CBS) regarding the Bureau, BIP and/or CEC;

(d) Document Request No. 4, which seeks the production of all documents relating to any communications between LAFLA and any investment firms, banks, or agencies (including without limitation Warburg Pincus and/or UBS Investment Research) regarding the Bureau, BIP and/or CEC;

(e) Document Request No. 5, which seeks the production of all documents relating to any communications between LAFLA and Mark A. Kleiman and/or Janet L. Spielberg, Esq.;

(f) Document Request No. 6, which seeks the production of all documents relating to any communications between or among any persons regarding the Bureau, BIP and/or CEC not otherwise requested above; and

(g) Document Request No. 8, which seeks the production of all telephone bills relating to any communications requested above.

PLEASE TAKE FURTHER NOTICE THAT LAFLA's opposition to this Motion is due on November 10, 2005.

PLEASE TAKE FURTHER NOTICE THAT the Motion will be made on the grounds that the documents described above are highly relevant and material to the issues raised in this administrative proceeding, in that the documents relate to (a) the extent to which LAFLA has been acting as an agent for the Bureau in communicating confidential information concerning the Bureau's "investigation" of BIP to third parties, including class action and other lawyers, the media and/or the investment community; and (b) the extent to which LAFLA is assisting or involved in the Bureau's investigation, and how LAFLA and other third parties obtained information relating to the investigation, which relates directly to BIP's unclean hands defense and demonstrates the corruption of the investigative process.

PLEASE TAKE FURTHER NOTICE THAT because LAFLA's refusal to produce relevant documents in its possession, custody or control that are responsive to the Subpoena is without substantial justification, is frivolous and is in bad faith, BIP also moves the Administrative Law Judge in this proceeding pursuant to Government Code section 11455.30(a) for an order awarding monetary sanctions against LAFLA in the amount of $6,105, representing the reasonable attorneys' fees BIP has incurred in preparing this Motion.

PLEASE TAKE FURTHER NOTICE THAT this Motion is based on this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities, the concurrently filed Declarations of Gregory J. Strick, Ph.D., Tracy Lorenz, Jeff E. Scott, Gregory A. Nylen, and Tiffany S. Mitchell and attached exhibits in support thereof, all pleadings and papers on file in this matter, and such other and further evidence and oral arguments as may be considered by the Administrative Law Judge in ruling upon this Motion.

PLEASE TAKE FURTHER NOTICE THAT pursuant to Los Angeles OAH Local Rule 6, BIP does not waive oral argument on this Motion, and does not stipulate to hear the Motion telephonically.

DATED: October 28, 2005

GREENBERG TRAURIG, LLP

By _____

GREGORY A. NYLEN
Attorneys for Respondent
BROOKS INSTITUTE OF PHOTOGRAPHY

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MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

Brooks Institute of Photography ("BIP") will prove at the hearing in this administrative action that the Bureau for Private Postsecondary and Vocational Education (the "Bureau") alleges claims that are factually unsustainable and that are based on an investigation that is legally defective. BIP will show that the Bureau's investigative process was corrupted by the fact that it ignored mandatory procedures required under the Education Code. BIP will also show that the Bureau attempted to bolster its claim for relief to which it admits it is not entitled by releasing information regarding its baseless claims to the investment community in a ham-fisted attempt to depress the value of stock in BIP's parent company, Career Education Corporation ("CEC"), and thereby pressure BIP into acquiescing to the Bureau's punitive demands. BIP will also show that the Bureau released the same information to the press to try to generate negative publicity regarding BIP and CEC for the same nefarious purposes. This is precisely the sort of endemic misuse of the Bureau's licensing authority that is resoundingly condemned in a recent report by an independent Operations Monitor the Bureau was required by law to hire to investigate its activities, which provides in relevant part:

> "[T]he Bureau sometimes attempts to 'leverage' its approval authority to achieve concessions from an institution. The somewhat ad-hoc manner in which the Bureau subsequently uses its approval authority to address apparent, and actual violations contributes to perceptions that institutions are treated differently depending on personal relationships, political influence, or other factors."[1]

As explained below, BIP has substantial evidence to corroborate its assertion that the Bureau has abused its authority, and to support BIP's unclean hands defense and claim that the Bureau's investigative process was corrupt. However, BIP believes it can obtain substantial additional evidence that will allow it to prove overwhelmingly that the Bureau used third parties as conduits to provide

[1] B. Frank, BPPVE Operations and Administrative Monitor, Initial Report: California Department of Consumer Affairs, Bureau for Private Postsecondary and Vocational Education, at 155 (September 26, 2005) (a copy of this report is attached as Exhibit 13 to the concurrently filed Declaration of Gregory Nylen).

information regarding its "investigation" to the press, the investment community, and class action lawyers.

These third parties include the Legal Aid Foundation of Los Angeles ("LAFLA") and an attorney for that organization, Elena Ackel, Esq. As discussed below, Ms. Ackel is a notoriously outspoken critic of for-profit education. BIP believes that Ms. Ackel and LAFLA may be acting as agents for the Bureau in communicating confidential information concerning the Bureau's investigation of BIP to third parties, and improperly assisting the Bureau in connection with its purported "investigation" of BIP, which is supposed to be conducted by a properly impaneled "visiting committee" comprised of educators and other qualified individuals with specific areas of expertise, not by Bureau employees influenced by undisclosed outsiders.

Accordingly, BIP served a subpoena *duces tecum* (the "Subpoena") on LAFLA in this action. The Subpoena seeks (a) documents relating to communications between the Bureau and LAFLA concerning BIP and/or its parent company CEC, (b) documents provided by the Bureau to LAFLA concerning BIP and/or CEC, and (c) documents relating to communications between LAFLA, on the one hand, and the media, investment community, class action lawyers, or any other third parties, on the other hand, concerning BIP or CEC. The class action lawyers who are the subject of the Subpoena include Mark Kleiman, who is intimately involved in prosecuting class action litigation against BIP and CEC, and who apparently faxed information he obtained from the Bureau concerning its incomplete and improper "investigation" to a major Wall Street firm that had publicly taken a negative position on the value of CEC stock, and Janet Spielberg, who is counsel of record in a pending class action against BIP and CEC.

Although LAFLA acknowledged that it has documents responsive to each of these categories of document requests attached to the Subpoena, it has refused to produce any documents except those relating specifically to communications with the Bureau regarding the Bureau's purported "investigation" of BIP and the specific issues raised in the Bureau's defective Notice. The only grounds LAFLA provided in the meet and confer process for refusing to produce the remaining responsive documents (including documents it admits it has relating to communications between LAFLA, class action lawyers, the media, and the investment community concerning BIP and/or CEC) are that the

documents are somehow not relevant. *LAFLA does not contend that any of these documents are otherwise protected by any privilege.*

LAFLA's relevancy objection is entirely without merit. BIP is entitled to discover whether third parties such as LAFLA are assisting or involved in the Bureau's investigation, and how LAFLA and other third parties obtained information relating to the investigation. BIP also is entitled to know if the Bureau improperly disclosed confidential information to LAFLA in connection with its investigation, as it relates directly to BIP's unclean hands defense and demonstrates the corruption of the investigative process.

There also is no merit to Ms. Spielberg's separately served objection that her communications with LAFLA concerning BIP or CEC are protected by the attorney-client or work product privileges. There is no evidence Ms. Spielberg ever represented LAFLA in any capacity, let alone in connection with any issues concerning BIP or CEC. Moreover, LAFLA is the holder of any attorney-client privilege that would conceivably attach to communications with Ms. Spielberg, and it has represented that none of the documents it has relating to those communications are protected by *any* privilege.

Accordingly, this Motion should be granted in its entirety, and the Administrative Law Judge should certify facts justifying a contempt sanction against LAFLA in Superior Court and order sanctions against LAFLA in the amount of $6,105 because its objections were made in bad faith.

II.

STATEMENT OF RELEVANT FACTS

A. BIP's 60 Years Of Commitment To Excellence In Postsecondary Education.

BIP is one of the leading photography postsecondary institutions in the world today, with campuses in Santa Barbara and Ventura. BIP has operated as an educational institution in Santa Barbara since 1945. Declaration of Gregory J. Strick, Ph.D. ("Strick Dec."), ¶ 2. BIP offers Bachelor of Arts Degree Programs in Professional Photography, Film & Video Production, Visual Communication, and Visual Journalism; a Masters of Science Degree Program in Photography; an Associate of Arts degree program in visual Journalism; and Diploma Programs in Professional Photography and Film & Video Production. BIP's education programs constantly are evolving so that its students may keep up with current industry technologies and media. For example, BIP's Visual Journalism curriculum goes far

beyond traditional photojournalism and cross-trains students to use still cameras, computers and digital video cameras, allowing them to deliver projects to traditional print media, the Internet and/or the forthcoming digital environment. *Id.* ¶ 3.

Today, BIP has more than 2000 enrolled students from many nations. BIP alumni have worked for distinguished organizations including the *Los Angeles Times* and other national media outlets, Hallmark Publishing, the Cousteau Society, HBO, Kodak, and literally scores of other leaders in visual media fields. BIP faculty and alumni also have received many awards and honors. Strick Dec., ¶ 4.

B. The Bureau's Improper "Investigation" Of BIP.

The Bureau regulates certain types of private, postsecondary schools, including BIP, and derives its authority exclusively from enabling legislation codified at Education Code sections 94700 *et seq.*

On or about September 30, 2004, BIP routinely applied to the Bureau for renewal of its authority to operate postsecondary institutions in the State of California (the "Renewal Application"). At the time, its license was set to expire on December 31, 2004. Strick Dec., ¶ 5, Ex 1.

On October 20, 2004, BIP received a letter from the Bureau stating that "Bureau representatives" were going to visit BIP on November 8 and 9 to review certain files. Strick Dec., ¶ 6, Ex. 2.

According to Education Code section 94901(a)(1), the Bureau was supposed to impanel a "visiting committee" to conduct a qualitative review and assessment within 90 days of receiving the Renewal Application. Pursuant to Education Code section 94901(c), the visiting committee "*shall* be composed of educators and other individuals with expertise . . . from degree granting institutions legally operating within the state." (Emphasis added.) Assuming the visiting committee was impaneled properly, it was supposed to provide BIP with a report of its visit before it was even disclosed to the Bureau. CAL. CODE REGS. tit. 5, § 71465(b) (2005).

C. The Bureau's Communication To LAFLA Regarding Allegations Against BIP.

On November 4, 2004, the Chief of the Bureau's degree-granting unit which regulates BIP, Sheila Hawkins, sent an e-mail to Ms. Ackel at LAFLA. In her e-mail, Ms. Hawkins forwarded a message from another Bureau employee, Marcia Trott, regarding the background of certain allegations against BIP. Declaration of Gregory A. Nylen ("Nylen Dec."), ¶ 7, Ex. 16. The e-mail included an

admission that the Accrediting Council for Independent Colleges and Schools was "not able to find any evidence of wrongdoing on the part of the school." *Id.*

D. The Bureau's Improper "Visit" To BIP And December 1, 2004 Letter To BIP.

Four days later, on November 8 and 9, 2004, the Bureau sent Ms. Trott and Lynelle Case, another Bureau employee, to visit BIP to conduct an onsite "assessment" of the school. Strick Dec., ¶ 7. These Bureau employees, who were not a properly impaneled visiting committee as required by Education Code section 94901, allegedly reviewed 162 student files and contacted eleven BIP graduates to evaluate their personal experience with BIP's placement services. *Id.*

As a result of the Bureau's legally ineffective visit, the Bureau sent a letter to BIP on December 1, 2004 (the "December 1 Letter"), which outlined preliminary "findings" that BIP was "not operating in full compliance with the statute and regulations that govern private postsecondary institutions in California." Strick Dec., ¶ 8, Ex. 3. The Bureau requested responses from BIP to these preliminary findings so the Bureau could complete its investigation and make a final decision on the Renewal Application. *Id.*

E. The Bureau's Communications To Class Action Lawyers And LAFLA Regarding The Bureau's December 1 Letter And Improper "Investigation" Of BIP.

Notwithstanding the purportedly preliminary nature of the Bureau's investigation, on December 13, 2004, the Bureau faxed its December 1 Letter to Mark Kleiman, a plaintiffs' lawyer now intimately involved in prosecuting a class action and related litigation against BIP and its parent company, Career Education Corporation ("CEC"). Declaration of Tracy Lorenz ("Lorenz Dec."), ¶ 2, Exs. 7-8. Shortly thereafter, Mr. Kleiman apparently faxed the December 1 Letter to a major Wall Street firm that had publicly taken a negative position on the value of CEC stock. Lorenz Dec., ¶¶ 2-3, Exs. 7-8. More recently, Mr. Kleiman actively rallied students to make negative comments about CEC to the press for the specific stated purpose of depressing the value of CEC stock. Declaration of Tiffany S. Mitchell ("Mitchell Dec."), ¶ 8, Ex. 26.

In addition, Mr. Kleiman facilitated communications between BIP students and another plaintiffs' attorney, Janet Spielberg, with whom Mr. Kleiman shares an office suite. Ms. Spielberg already filed an action against BIP, and is seeking to have the matter certified as a class action lawsuit.

Mitchell Dec., ¶ 5, Ex. 23.

On December 14, 2005, the day after the Bureau faxed the December 1 Letter to Mr. Kleiman, Ms. Hawkins forwarded the Bureau's December 1, 2004 letter to BIP regarding the Renewal Application to Ms. Ackel at LAFLA. A copy of this e-mail was contained in the few documents that LAFLA produced on October 6, 2005 in response to the Subpoena BIP served on LAFLA in this action. Nylen Dec., ¶ 8, Ex. 17.

F. BIP's Response To The Bureau's December 1 Letter.

On December 30, 2004, BIP responded in detail to the Bureau's December 1 Letter. In its response, BIP reiterated its commitment to "demonstrating compliance with all BPPVE requirements," addressed each of the Bureau's concerns in detail, and explained how BIP was implementing appropriate steps to address those concerns. BIP also explained how the Bureau's December 1 Letter was inaccurate in several respects. On January 28, 2005, BIP submitted a revised response. Strick Dec., ¶¶ 9-10, Exs. 4-5. On February 23 and 28, 2005, respectively, a Bureau employee made an undercover "secret shopper" visit to BIP posing as a prospective student, and Marcia Trott and Lynnelle Case of the Bureau made an unannounced visit to BIP to review more records. *Id.* ¶ 11.

G. The Bureau's Notice of Conditional Approval to Operate BIP.

On July 11, 2005, the Bureau issued a Notice of Conditional Approval (the "Notice"). Pursuant to Education Code Section 94975(c), BIP timely requested an administrative hearing to contest the Notice on July 22, 2005. Strick Dec., ¶ 12, Ex. 6. Declaration of Jeff E. Scott ("Scott Dec."), ¶ 2, Ex. 9.

It appears that, as before, the Bureau promptly leaked the Notice to third parties for the purpose of causing BIP economic harm (and some of the discovery that BIP propounded is to find out how the Bureau tipped off the press and the class action lawyers at that time, and to explore whether the class action lawyers actually were involved in the "investigation"). The press and the class action lawyers immediately received the Notice. Mitchell Dec., ¶ 3, Ex. 21. Notably, a copy of the Notice also found its way into LAFLA's files. Nylen Dec., ¶ 8.

H. **BIP's Subpoena to LAFLA And Subsequent Meet And Confer Efforts With LAFLA's Counsel.**

On September 1, 2005, BIP issued a subpoena (the "Subpoena") to LAFLA requesting the production of business records described below in detail. The document requests attached to the Subpoena sought the production of (a) documents relating to communications between the Bureau and LAFLA concerning BIP and/or CEC, (b) documents provided by the Bureau to LAFLA concerning BIP and/or CEC, and (c) documents relating to communications between LAFLA, on the one hand, and the media, investment community, Mr. Kleiman or Ms. Spielberg, or any other third parties, on the other hand, concerning BIP or CEC. BIP complied with the procedural requirements for issuing the Subpoena by completing the form provided by the Office of Administrative Hearings, including a declaration showing good cause for the production of documents, and by perfecting service upon LAFLA.[2] Mitchell Dec., ¶ 9, Ex. 27.

On September 8, 2005, Ms. Spielberg served objections to the Subpoena. Mitchell Dec., ¶ 10, Ex. 28. She later confirmed that she was only serving the objections on behalf of herself, and not on behalf of LAFLA. Scott Dec., ¶ 4, Ex. 11. On September 21, 2005, LAFLA served objections to the Subpoena. Mitchell Dec., ¶ 14, Ex. 30.

Counsel for BIP then met and conferred through a series of letters and telephone calls with David Pettit, outside counsel for LAFLA, regarding LAFLA's objections to the Subpoena. *See* Nylen Dec., ¶¶ 2 & 4-6 & 9-10, Exs. 12 & 14-16 & 18-19. Ultimately, LAFLA agreed only to produce documents provided to LAFLA by the Bureau or relating to communications between LAFLA and the Bureau that directly concern the Bureau's investigation of BIP or the issues raised expressly in the Notice. Although LAFLA admitted having other documents responsive to each of the document requests attached to the Subpoena in its possession, custody or control (with the exception of fax and telephone logs), LAFLA refused to produce the documents based solely on the purported objection that the documents are not relevant. LAFLA does not contend that *any* of those documents are protected by

[2] Although subpoenas *duces tecum* do not require such an affidavit pursuant to Code of Civil Procedure section 2020.410(c), BIP provided the declaration anyway.

any privilege. *Id.* On October 6, 2005, LAFLA produced only a handful of responsive documents in response to the Subpoena. Nylen Dec., ¶ 7.

III.

LEGAL ARGUMENT

A. BIP Is Entitled To Subpoena Relevant Documents From LAFLA Under The Education And Government Codes.

Education Code section 94975 provides the "exclusive method for prehearing discovery" in administrative proceedings initiated under the statute. Educ. Code § 94975(d)(1). Section 94975(e) provides that "[b]efore the hearing has commenced, the bureau shall issue subpoenas at the written request of any party for the attendance of witnesses or the production of documents or other things in the custody or under the control of the person subject to the subpoena." Section 94975(e) also provides that "[s]ubpoenas issued pursuant to this section are subject to Section 11510 of the Government Code."

Government Code section 11510 has been repealed and replaced by Government Code sections 11450.05-11450.50. Section 11450.20 provides that the presiding Administrative Law Judge "shall" issue subpoenas at the request of a party in an administrative law proceeding, "in accordance with Sections 1985 to 1985.4, inclusive, of the Code of Civil Procedure." Code of Civil Procedure section 1985(a) provides that in response to a subpoena *duces tecum,* a party may require a witness to produce "any books, documents, or other things under the witness's control which the witness is bound by law to produce in evidence."

Although Education Code section 94975(e) does not specify the particular types of documents that may be obtained from third parties by subpoena, section 94975(d)(1) provides in general that parties may require another party to produce "any writing, as defined by Section 250 of the Evidence Code, or thing that is in the custody, or under the control, of the party receiving the request *and that is relevant and not privileged*" (emphasis added). Similarly, Government Code section 11507.6(e) provides that parties may discover any "writing or thing which *is relevant and which would be admissible in evidence*" (emphasis added).

These code sections do not define the term "relevant." However, courts have held that when an agency's subpoena power is invoked to secure discovery, a court or administrative law judge may look

to the general standards for discovery set forth under California law. *See Shively v. Stewart (Bd. of Med. Exam'rs)*, 65 Cal. 2d 475, 481 (1967).

Code of Civil Procedure section 2017.010 provides that "[a] party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action . . . if the matter either is itself admissible in evidence *or appears reasonably calculated to lead to the discovery of admissible evidence*" (emphasis added). Similarly, Evidence Code section 351 provides that "[e]xcept as otherwise provided by statute, *all* relevant evidence is admissible" (emphasis added). Evidence Code section 210 provides that "'[r]elevant evidence' means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having *any* tendency in reason to prove or disprove *any* disputed fact that is of consequence to the determination of the action" (emphasis added).

Under these standards, evidence is considered relevant if it might "reasonably assist a party in evaluating its case, preparing for trial, or facilitating a settlement. Admissibility is *not* the test, and it is sufficient if the information sought might reasonably lead to other, admissible evidence." *Glenfed Dev. Corp. v. Superior Court (Nat'l Union Fire Ins. Co. of Pittsburgh)*, 53 Cal. App. 4th 1113, 1117 (1997) (emphasis in original). Relevant discovery also includes that relating to a claim or defense of a party to the action. *Gonzalez v. Superior Court (City of San Fernando)*, 33 Cal. App. 4th 1539, 1545 (1995).[3]

While a party who seeks to compel the production of documents under California law generally must show "good cause" for the request, this burden is met simply by a factual showing of relevance when there is no privilege issue or claim of attorney work product. *Glenfed*, 53 Cal. App. 4th at 1117.

These pretrial discovery procedures "are designed to minimize the opportunities for fabrication and forgetfulness, and to eliminate the need for guesswork about the other side's evidence, with all doubts about discoverability resolved in favor of disclosure." *Glenfed*, 53 Cal. App. 4th at 1119. The courts must apply discovery standards liberally in accordance with the Discovery Act's underlying principles. *Colonial Life & Accident Ins. Co. v. Superior Court (Perry)*, 31 Cal.3d 785, 790 (1982).

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[3] The Attorney General has applied these broad standards of relevance in its own opinions. *See, e.g., Office of the Attorney General*, Op. No. 88-1102, 72 Ops. Cal. Atty. Gen. 226, 1989 WL 408279, at *11 (Cal. A.G. Oct. 26, 1989) (quoting Evidence Code sections 210 and 351).

If a third party refuses to produce relevant, non-privileged documents in response to a properly issued and served subpoena *duces tecum* in an administrative proceeding, the party propounding the subpoena may bring a motion before an administrative law judge to certify facts that justify a contempt sanction in Superior Court in the county where the proceeding is conducted. *See* Gov. Code § 11455.10(e) ("[a] person is subject to the contempt sanction for any of the following in an adjudicative proceeding before an agency: . . . (e) Failure or refusal, without substantial justification, to comply with a . . . subpoena"), and § 11455.20(a) ("[t]he presiding officer or agency head may certify the facts that justify the contempt sanction against a person to the superior court in and for the county where the proceeding is conducted"). *See also Parris v. Zolin*, 12 Cal. 4th 839, 842 (1996) ("[A]n administrative agency's obligation under section 11525 is met by transmitting a certification of facts of an apparent contempt to the superior court. Receipt of the certification triggers the obligation of the superior court to issue an order to show cause to the person who appears to be in contempt. The jurisdiction of the superior court to initiate a contempt proceeding to enforce the agency subpoena arises on receipt of the certification.").

In this case, as discussed below, the documents requested in the Subpoena BIP served upon LAFLA are all highly relevant and material to the issues raised in this administrative proceeding. Accordingly, because LAFLA has only objected to the production of responsive documents on the purported grounds that the documents are not relevant, the Administrative Law Judge should certify facts justifying a finding in Superior Court that LAFLA is in contempt of the Subpoena.

B. BIP Is Entitled to Communications Between LAFLA, On The One Hand, And Media Representatives And/Or The Investment Community, On The Other, Because Such Documents Are Highly Relevant To This Case.

Document Request No. 3 attached to the Subpoena seeks the production of "[a]ny and all documents relating to any communications between [LAFLA] and any television, print, radio or other media representatives (including without limitation Gretchen Morgenson of the *New York Times*, Morgan Green of the *Santa Barbara News Press*, any other journalists or reporters, and/or any employees of CBS) regarding [the Bureau], BIP and/or CEC." Document Request No. 4 attached to the Subpoena seeks the production of "[a]ny and all documents relating to any communications between

[LAFLA] and any investment firms, banks, or agencies (including without limitation Warburg Pincus and/or UBS Investment Research) regarding [the Bureau], BIP and/or CEC".

LAFLA's counsel admitted that LAFLA has documents responsive to both of these requests, but LAFLA has refused to produce them solely on the purported grounds that they are not relevant to any issues in this case. *See* Nylen Dec., ¶¶ 2 & 4-6 & 9-10, Exs. 12 & 14-16 & 18-19. LAFLA is wrong and the documents are highly relevant and material for several independent reasons.

For example, BIP is entitled to discover the extent to which LAFLA has been acting as an agent for the Bureau in communicating confidential information concerning the Bureau's "investigation" of BIP to third parties, including the media and/or the investment community. BIP originally propounded the Subpoena because it was informed and believed that Ms. Ackel, an outspoken critic of for-profit schools, assisted the Bureau with its "investigation" of BIP since at least early 2005. The limited number of documents that LAFLA did produce in response to the Subpoena on October 6, 2005 proved BIP is on the right track. For example, the documents included an e-mail dated November 4, 2004 from Sheila Hawkins (the Chief of the Bureau's degree-granting unit which regulates BIP) to Ms. Ackel, forwarding a message from Bureau employee Marcia Trott regarding the background of certain allegations against BIP (including an admission that ACICS was "not able to find any evidence of wrongdoing on the party of the school"). Nylen Dec., ¶ 7, Ex. 16. This e-mail was sent four days before Ms. Trott and another Bureau employee visited BIP. On December 14, 2004, Ms. Hawkins forwarded the Bureau's December 1, 2004 letter to BIP regarding its Renewal Application to Ms. Ackel. *Id.* at ¶ 8, Ex. 17. LAFLA also had a copy of the Bureau's Notice in its files. *Id.* at ¶ 8.

Clearly, BIP's Subpoena was not harassment—it was a legitimate discovery tool that produced relevant evidence showing a direct connection between LAFLA and the Bureau relating to the Bureau's investigation of BIP. BIP is therefore entitled to discover whether third parties such as LAFLA are assisting or involved in that investigation, and how LAFLA and other third parties obtained information relating to the investigation. These documents relate directly to BIP's unclean hands defense and demonstrate the corruption of the investigative process, and support BIP's defense that the Bureau's actions in violation of its enabling statutes are void. *See Kaiser Foundation Health Plan, Inc. v. Zingale*, 99 Cal. App. 4th 1018, 1024 (2002) ("[i]f a state agency was created by statute, the agency's

authority is circumscribed by the relevant legislation") and *Ass'n. for Retarded Citizens v. Department of Development Services*, 38 Cal.3d 384, 391 (1985) ("[a]dministrative action that is not authorized by, or is inconsistent with, acts of the Legislature is void").

As discussed above, Mr. Kleiman has attempted to manipulate the value of CEC stock to put pressure on CEC to pay a significant financial settlement to the attorney (Janet Spielberg) who is his suite mate and to whom he apparently sent the information leaked to him by the Bureau. Mitchell Dec. ¶ 5. BIP is investigating a potential conspiracy between the Bureau, the class action lawyers, Wall Street firms and others (including Ms. Ackel) to trade on bad news about CEC stock arising from publicity following the Bureau's leaded investigation results regarding BIP to Ms. Ackel, Mr. Kleiman and the investment community.

BIP is also entitled to discover the nature of Ms. Ackel's communications to the media outlets that carried stories relating to the investigation of BIP, including the story by Morgan Green in the *Santa Barbara News Press* featuring Ms. Ackel's baseless and defamatory comments regarding the school. *See* Mitchell Dec., Ex. 3 (*News Press* article in which Ms. Ackel is quoted as stating that "Brooks is not an isolated case. Its (faults) are replicated at quite a few schools, but no corrective action has been ordered until this"). Documents relating to these communications may shed more light on the issue of whether Ms. Ackel is assisting the Bureau in disseminating information relating to its improper investigation to the media for the purpose of harming BIP and/or CEC.

C. <u>BIP Is Entitled to Communications Between LAFLA, On the One Hand, and Mark A. Kleiman, Esq. And/Or Janet L. Spielberg, Esq., On the Other</u>.

Document Request No. 5 attached to the Subpoena seeks the production of "[a]ll documents relating to any communications between [LAFLA] and Mark A. Kleiman, Esq. and/or Janet L. Spielberg, Esq." Mitchell Dec., ¶ 9, Ex. 27. BIP offered to limit this request to documents concerning such communications to the extent they relate "in any manner to Career Education Corporation, BIP, and/or the Bureau's investigation of and/or proceedings with respect to BIP." LAFLA admitted it had documents responsive to this request but refused to produce them, even with BIP's proposed limitation, and *despite the fact that LAFLA is not claiming that any of the responsive documents are protected by the attorney-client or any other privilege*. Nylen Dec. at ¶ 10, Ex. 19. The only purported ground

LAFLA provided for refusing to produce the documents it that they are supposedly not relevant. *Id.*

Once again, LAFLA is wrong because these documents are highly relevant and material to the issue of whether LAFLA is acting as an agent for the Bureau in disseminating information relating to the Bureau's investigation of BIP to third parties in an effort to harm the school. As explained above, the Bureau leaked its preliminary findings regarding its investigation of BIP to Mr. Kleiman and it appears that he immediately sent that letter to a major Wall Street investment firm that covers CEC stock. Lorenz Dec., ¶ 2, Ex. 7. BIP was supposed to receive an independent visiting committee's report before the Bureau even saw it. CAL. CODE REGS. tit. 5, §71465(b). Instead, the Bureau conducted its own "investigation" and then leaked its preliminary findings to private lawyers and investors. LAFLA has admitted that it has documents relating to communications it had with these lawyers, including Kleiman and Spielberg—the same plaintiffs' attorneys who are working closely together to develop a class action case against BIP, based largely on the Notice and the administrative action. Mitchell Dec., ¶¶ 5 & 7 , Exs. 23 & 25. These documents relating to LAFLA's communications with Spielberg and/or Kleiman relating to BIP and/or CEC are *directly* relevant to prove the Bureau's improper investigation and the corruption of the administrative process.

Moreover, the perfunctory objections Ms. Spielberg served in response to the Subpoena have no merit. For example, her objection that her communications with LAFLA regarding BIP or CEC are somehow protected by the attorney-client or work product privileges is groundless because there is no evidence that Ms. Spielberg represented LAFLA in connection with any matters concerning BIP or CEC. Even if she did represent LAFLA, it would be the holder of any attorney-client privilege that may apply to communications with Ms. Spielberg,[4] and LAFLA is not claiming that *any* of the documents it is refusing to produce relating to communications with Ms. Spielberg are protected by *any* privilege. *See* Nylen Dec. at ¶ 10, Ex. 19.[5]

Likewise, Ms. Spielberg's general objection that the documents requested by the Subpoena are somehow protected by "the privacy privilege" or "any other privilege or immunity" is completely

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[4] *See* Cal. Evid. Code § 953.

[5] To the extent the attorney-client or work product privileges apply at all, LAFLA should be required to produce a privilege log so that BIP may properly evaluate the claim of privilege.

without foundation. She does not explain the nature of the "privacy privilege" or identify any other specific "privilege or immunity," and does not tie this general, boilerplate objection to any specific document request attached to the Subpoena.

In addition, Ms. Spielberg's objection that communications between her and LAFLA relating to BIP and CEC are somehow not relevant is without merit for the reasons set forth above.

Finally, Ms. Spielberg's general, boilerplate objection that the Subpoena is somehow "overly broad, oppressive," and "unduly burdensome" is also not tied to any specific document request and is entirely without basis. The document requests attached to the Subpoena are narrowly tailored for the reasons set forth above.

D. <u>BIP Is Entitled To Communications Between LAFLA And The Bureau Relating To BIP Or CEC That Do Not Directly Relate To The Notice Or Investigation Of BIP</u>.

Document Request No. 1 attached to the Subpoena seeks the production of "[a]ny and all documents relating to any communications between any [LAFLA] employees, including without limitation Elena H. Ackel, Esq., and any employee of the [Bureau] relating to" BIP and CEC. Document Request No. 2 attached to the Subpoena seeks the production of "[a]ll documents provided to [LAFLA] by any employee of the [Bureau] relating to BIP and/or CEC." Document Request No. 6 attached to the Subpoena seeks the production of "[a]ll documents relating to all communications between or among any persons regarding [the Bureau], BIP and/or CEC not otherwise requested above."

In response to this Request, LAFLA has agreed to produce only those documents directly relating to the Bureau's "investigation" of BIP and the issues expressly raised in the Bureau's Notice. Nylen Dec., ¶¶ 4-6 & 9, Exs. 14-15 & 19. Although LAFLA admitted it has other documents in its possession, custody or control that are responsive to this request, it has refused to produce them solely on the purported ground that they are not relevant. *Id.*

BIP is not required to rely on LAFLA's word regarding the relevancy of specific documents, particularly when those documents pertain to BIP and the Bureau, the entity which issued the Notice giving rise to this administrative action. These documents are relevant and material for the reasons explained above.

E. BIP Is Entitled To LAFLA's Telephone Bills Relating To The Communications Described Above.

Document Request No. 9 attached to the Subpoena seeks the production of all telephone bills relating to any communications requested above. Because LAFLA represented that it does not keep telephone or facsimile logs (which BIP sought in Request Nos. 7 and 8 attached to the Subpoena), BIP is entitled to discover LAFLA's telephone bills in order to determine the date, time, and duration of any communications described above, and also in order to confirm the telephone numbers for incoming and outgoing calls.

F. BIP Is Entitled To Monetary Sanctions In The Amount Of $6,105.

Government Code section 11455.30(a) authorizes monetary sanctions in the amount of $6,105 to compensate BIP for its reasonable attorneys' fees incurred in filing this Motion. *See* Nylen Dec., ¶ 11. Scott Dec., ¶ 6. LAFLA's refusal to produce documents responsive to the Subpoena is in bad faith for the reasons set forth above. LAFLA's intransigence also was unnecessary because the LAFLA knew that these issues would be squarely raised in this Motion.

IV.

CONCLUSION

For all of the foregoing reasons, this Motion should be granted in its entirety.

DATED: October 28, 2005

GREENBERG TRAURIG, LLP

By _____

GREGORY A. NYLEN
Attorneys for Respondent
BROOKS INSTITUTE OF PHOTOGRAPHY

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the aforesaid county, State of California; I am over the age of 18 years and not a party to the within action; my business address is **2450 Colorado Avenue, Suite 400E, Santa Monica, CA 90404.**

On October 28, 2005, I served the **NOTICE OF MOTION AND MOTION TO CERTIFY FACTS JUSTIFYING CONTEMPT SANCTIONS AGAINST THE LEGAL AID FOUNDATION OF LOS ANGELES AND FOR MONETARY SANCTIONS; RESPONDENT'S REQUEST FOR $6,105 IN MONETARY SANCTIONS; MEMORANDUM OF POINTS AND AUTHORITIES** on the interested parties in this action by placing the true copy thereof, enclosed in a sealed envelope, postage prepaid, addressed as follows:

SEE ATTACHED SERVICE LIST

☒ **(BY PERSONAL SERVICE)**
I caused to be delivered such envelope by hand to the offices of the addressee. Executed on October 28, 2005, at Santa Monica, California.

☒ **(STATE)** I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

☐ **(FEDERAL)** I declare under penalty of perjury that the foregoing is true and correct, and that I am employed at the office of a member of the bar of this Court at whose direction the service was made.

Executed on October 28, 2005, at Santa Monica, California.

Ann Rutledge

SERVICE LIST FOR LAFLA MOTION

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BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

BUREAU FOR PRIVATE POSTSECONDARY AND VOCATIONAL EDUCATION, Pettitioner, v. BROOKS INSTITUTE OF PHOTOGRAPHY, Respondent.	Case No. 06147 OAH No. L2005080993 **DECLARATIONS OF GREGORY J. STRICK, Ph.D., GREGORY A. NYLEN, JEFF E. SCOTT, TRACY LORENZ AND TIFFANY S. MITCHELL IN SUPPORT OF MOTIONS TO CERTIFY FACTS JUSTIFYING CONTEMPT SANCTIONS AGAINST (1) THE LEGAL AID FOUNDATION OF LOS ANGELES AND (2) MARK ALLEN KLEIMAN, ESQ.** **[MOTIONS FILED CONCURRENTLY HEREWITH]** Date: November 14, 2005 Time: 1:30 p.m. Location: OAH Los Angeles Pre-hearing Conference: December 12, 2005 Hearing Date: February 1, 2006

Declaration

DECLARATION OF GREGORY J. STRICK, Ph.D.

I, Gregory J. Strick, Ph.D., declare and state:

1. I have personal knowledge of the facts described below, and if called upon to testify in this action as to the truth of such facts, I could and would competently do so.

2. I am the President of Brooks Institute of Photography ("BIP"). BIP is one of the leading photography postsecondary institutions in the world today, with campuses in Santa Barbara and Ventura, California. BIP has operated as an educational institution in Santa Barbara since 1945.

3. BIP offers Bachelor of Arts Degree Programs in Professional Photography, Film & Video Production, Visual Communication, and Visual Journalism; an Associate of Arts degree program in Visual Journalism; a Master of Science Degree Program in Photography; and Diploma Programs in Professional Photography and Film & Video Production. BIP's educational programs are constantly evolving so that the institution's students may keep up with current industry technologies and media. For example, BIP's Visual Journalism curriculum goes far beyond traditional photojournalism and cross-trains students to use still cameras, computers and digital video cameras, allowing them to deliver a story or project to traditional print media, the Internet and/or the forthcoming digital environment.

4. Today, BIP has more than 2000 students enrolled from many nations. BIP alumni have worked for distinguished organizations, including the Los Angeles Times and other national media outlets, Hallmark Publishing, the Cousteau Society, HBO, Kodak, and literally scores of other leaders in visual media fields. In addition, BIP alumni have received numerous prestigious awards and honors, including an Emmy® Award for best documentary, the United Nations Environment Programme Award, the Golden Light Award, the CINE Golden Eagle Award, inclusion on the Top 100 List of Contemporary Fine Artists, and the Japanese American Citizens' League Legacy Grant. BIP faculty have also received similarly prestigious awards and honors, including a Cleo Award, Emmy® Awards, a Pulitzer Prize, the United Nations' Portrait Photographer of the Year Award, awards from the Typographic Industries of America and Printing Industries of America, and First Place Pictures of the Year awards issued annually by the University of Missouri and the National Press Photographer's Association. Brooks faculty members have also received the very highest awards from the Professional Photographers of California.

5. On or about September 30, 2004, BIP applied to the Bureau for Private Postsecondary and Vocational Education (the "Bureau") for renewal of its approval to operate a postsecondary institution in the State of California (the "Renewal Application"). At the time, BIP's license was set to expire on December 31, 2004. A true copy of the September 30, 2004 Renewal Application is attached hereto as Exhibit 1.

6. On October 20, 2004, the Bureau sent BIP a letter stating that "Bureau representatives" were going to visit one of BIP's campuses on November 8 and 9 to "review student files." A true copy of the October 20, 2004 letter is attached hereto as Exhibit 2.

7. On November 8 and 9, 2004, Marcia Trott and Lynnelle Case (who I am informed and believe are Bureau employees) came to BIP to conduct an on-site "assessment" of BIP. At the "assessment," Ms. Trott and Ms. Case reportedly reviewed 162 student files and, after they left, contacted eleven graduates to evaluate their personal experiences with BIP's placement services.

8. On or about December 1, 2004, the Bureau sent a letter to BIP outlining its preliminary findings from the November 8 and 9, 2004 visit. A true copy of the December 1, 2004 letter is attached hereto as Exhibit 3.

9. On December 30, 2004, BIP responded in detail to the Bureau's December 1 letter. A true copy of the December 30 letter (without exhibits) is attached hereto as Exhibit 4.

10. On January 28, 2005, BIP submitted a revised response to the Bureau. A true copy of the January 28, 2005 revised response (without exhibits) is attached hereto as Exhibit 5.

11. On February 28, 2005, Marcia Trott and Lynnelle Case, along with another Bureau employee, "conducted an unannounced visit" to BIP. I subsequently learned through the Notice referenced below that the Bureau sent an undercover employee posing as a student to BIP to further investigate the school.

12. On July 11, 2005, the Bureau sent a Notice of Conditional Approval to Operate (the "Notice") to BIP. A true copy of the Notice is attached hereto as Exhibit 6. The Bureau did not present its new findings in the Notice in preliminary form or allow BIP an opportunity to respond prior to issuing the Notice.

///

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this Declaration was executed this 27th day of October, 2005, at Westlake Village, California.

Gregory J. Stuck

Gregory J. Stuck, Ph.D.

Declaration

DECLARATION OF TRACY K. LORENZ

I, Tracy K. Lorenz, declare and state:

1. I have personal knowledge of the facts set forth below. If called upon, I could and would testify competently to these facts under oath.

2. On December 14, 2004, I received an email from an investor in the stock of my employer, Career Education Corporation ("CEC"). A true copy of that email is attached as Exhibit 7. Exhibit 8 is a true copy of the document that was attached to the e-mail. I have redacted the name of the investor and the investor's company until such time as some confidentiality/protective order is in place in order to protect the confidentiality of the investor's identity.

3. As reflected in Exhibit 7, the email and attachment that the investor sent to me was forwarded to the investor by Kelly Flynn. I know Ms. Flynn, and understand that she covers CEC stock for the investment markets and is employed by UBS Investment Research.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this Declaration was executed this 28 day of October, 2005, in Hoffman Estates, Illinois.

Tracy K. Lorenz

Tracy K. Lorenz

Declaration

DECLARATION OF JEFF E. SCOTT

I, Jeff E. Scott, declare:

1. I am an attorney with the law firm Greenberg Traurig, LLP, counsel of record for Respondent Brooks Institute of Photography ("BIP") in this case, and am licensed to practice law in California. I have personal knowledge of the following facts, and would testify thereto if called upon to do so.

2. On July 22, 2005, I sent a timely notice to the Bureau for Private Postsecondary and Vocational Education (the "Bureau") requesting an administrative hearing in response to the administrative action (the "Administrative Proceeding") initiated by a Notice of Conditional Approval that was sent by BIP on or about July 11, 2005 (the "Notice"). A true copy of my July 22, 2005 letter is attached as Exhibit 9.

3. On September 13, 2005 I sent a letter to Janet Spielberg, Esq. regarding her objections to the subpoena that BIP issued to the Legal Aid Foundation of Los Angeles ("LAFLA") on September 1, 2005 ("LAFLA Subpoena"). A true copy of my September 13, 2005 letter is attached as Exhibit 10.

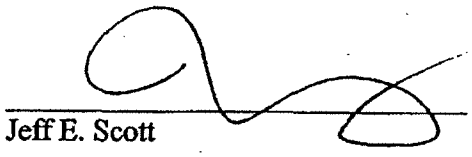
4. Ms. Spielberg responded by e-mail later that day. A true copy of Ms. Spielberg's September 13, 2005 e-mail is attached as Exhibit 11.

5. On or about October 10, 2005, Mark Kleiman called me to meet and confer regarding the subpoena duces tecum that BIP issued to Mr. Kleiman on September 19, 2005 (the "Kleiman Subpoena"). During that conversation, Mr. Kleiman stated that he didn't think the requested documents were relevant. I explained to him that they were relevant for several reasons, including the following: (a) they will demonstrate that Mr. Kleiman has obtained information from the Bureau in the middle of an investigation; (b) they will demonstrate that Mr. Kleiman then sent this information to the financial markets to damage BIP's parent company, Career Education Corporation's ("CEC") stock price; and (c) responsive documents may demonstrate a part of a larger plan to manipulate the market in CEC stock given Mr. Kleiman's public statements encouraging students to call the press to try to depress the value of CEC stock. I further explained my concern about the relationship Mr. Kleiman has with Janet Spielberg, an attorney who filed a class action suit against BIP in Santa Barbara Superior Court. In addition, I expressed concern regarding how Mr. Kleiman was able to obtain confidential information

from the Bureau during the preliminary stages of the Bureau's investigation of BIP, and told him that I was interested in finding out whether Mr. Kleiman sent the information that he received from the Bureau to Ms. Janet Spielberg who shortly thereafter filed the class action lawsuit. Mr. Kleiman responded that he believes everything he has said and done is protected by the First Amendment and that he has no obligation to produce any documents.

6. I spent one hour drafting each of the Motions to Certify Facts Justifying Contempt Sanctions. My hourly rate is $500. Therefore, BIP has incurred $500 for each Motion, or a total of $1,000.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this Declaration was executed on October 26, 2005 in Santa Monica, California.



Jeff E. Scott

Declaration

DECLARATION OF GREGORY A. NYLEN

I, Gregory A. Nylen declare and state as follows:

1. I am an attorney with the law firm Greenberg Traurig, LLP, counsel of record for Respondent Brooks Institute of Photography ("BIP") in this case, and am licensed to practice law in California. I have personal knowledge of the following facts stated herein except those facts based on information and belief and as to those facts I believe them to be true. If called upon to testify I could and would testify thereto.

2. On September 22, 2005 I sent a letter to Dennis Rockway of Legal Aid Foundation of Los Angeles ("LAFLA") in an effort to meet and confer regarding response to the subpoena that my office issued to LAFLA on September 1, 2005 ("LAFLA Subpoena"). A true and correct copy of the September 22, 2005 correspondence is attached hereto as Exhibit 12.

3. On or about September 26, 2005, the Bureau posted an "Operations and Administrative Monitor" Report on their web site located at http://www.bppve.ca.gov/initial_report.pdf. A true copy of excerpts from the lengthy document are attached hereto as Exhibit 13.

4. On September 28, 2005, outside counsel David Pettit sent a letter in response to my letter of September 22, 2005. A true copy of the September 28, 2005 correspondence is attached hereto as Exhibit 14.

5. On September 30, 2005 I met and conferred with Mr. Pettit in a telephone conversation regarding the LAFLA Subpoena. I sent a confirming letter that same day detailing the substance of our conversation. A true and correct copy of the September 30, 2005 correspondence is attached hereto as Exhibit 15.

6. On October 6, 2005, Mr. Pettit contacted me by telephone and informed me that he would send documents responsive to the LAFLA Subpoena the following day, but that the documents would be limited to those relating to (a) documents the Bureau provided to LAFLA regarding its investigation of BIP and/or CEC and (b) communications between the Bureau and LAFLA regarding its investigation of BIP and/or CEC, and the specific issues raised in the Bureau's July 11, 2005 Notice of Conditional Approval for BIP to operate.

7. On October 6, 2005, I received 40 pages of documents from LAFLA with an enclosed cover letter. Among the handful of documents I received from LAFLA was a document Bates Stamped LA00001-LA00002 that appears to be an e-mail dated November 4, 2004 from Sheila Hawkins to Elena Ackel, forwarding a message from Bureau employee Marcia Trott regarding the background of certain allegations against BIP. A true copy of this e-mail is attached hereto as Exhibit 16.

8. Also included in LAFLA's document production was a document Bates Stamped LA00006 that appears to be an e-mail dated December 14, 2004 from Ms. Hawkins to Ms. Ackel, in which Ms. Hawkins forwarded the Bureau's December 1, 2004 letter to BIP to Ms. Ackel. A true copy of this e-mail is attached hereto as Exhibit 17 . LAFLA also produced a copy of the Bureau's July 11, 2005 Notice.

9. On October 7, 2005 Mr. Pettit sent a letter to Mr. Nylen informing him that LAFLA had produced all documents *related to any investigation* of BIP or CEC by the Bureau or its parent agency the Department of Consumer Affairs. A true copy of the October 7, 2005 correspondence is attached hereto at Exhibit 18.

10. On October 10, 2005 Mr. Pettit sent another letter to me regarding the LAFLA Subpoena. A true copy of the October 10, 2005 correspondence is attached hereto as Exhibit 19.

11. I spent a total of 16 hours researching and drafting these Motions. My hourly rate is $425. Therefore, BIP has incurred $3,400 based on the Motion to Certify Facts Justifying Sanctions and Contempt Against the Legal Aid Foundation and has incurred $3,400 based on the Motion to Certify Facts Justifying Sanctions and Contempt against Mark Allen Kleiman, Esq. to a total of $6,800.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this Declaration was executed on October 28, 2005 in Santa Monica, California.

Gregory A. Nylen

Declaration

DECLARATION OF TIFFANY S. MITCHELL

I, Tiffany S. Mitchell, declare and state:

1. I am an attorney with the law firm Greenberg Traurig, LLP. I am duly licensed to practice law in the state of California. I have personal knowledge of the facts stated herein, except those statements based on information and belief, and as to those statements, I believe them to be true. If called upon to testify, I could and would competently do so.

2. On February 4, 2005 attorneys Michael D. Braun, Marc L. Godino and Janet Linder Spielberg filed a complaint in Santa Barbara Superior Court against Brooks Institute of Photography ("BIP") and its parent company Career Education Corporation ("CEC"). A true copy of the Complaint is attached hereto as Exhibit 20.

3. A true copy of an article written by Morgan Green that appeared in the *Santa Barbara News Press* on July 21, 2005 entitled "Action Against Brooks Is A First For Agency" is attached hereto as Exhibit 21. This article ran shortly after the Bureau for Private Postsecondary and Vocational Education (the "Bureau") issued its July 11, 2005 Notice of Conditional Approval.

4. A true copy of an article written by Gretchen Morgenson regarding BIP that appeared in the *New York Times* on July 24, 2005 is attached hereto as Exhibit 22.

5. Janet Spielberg is counsel of record for plaintiffs in a putative class action lawsuit filed against BIP and CEC in February, 2005. That lawsuit is based largely on the "findings" made by the Bureau during its "investigation" of BIP. I am informed and believe, based on representations, that attorney Mark Allen Kleiman, Esq. has stated publicly in, among other places, the document attached as Exhibit 23, that Mr. Kleiman shares office space with Ms. Spielberg, and has facilitated communications between Ms. Spielberg and BIP's current and former students. I am informed and believe that attached as Exhibit 23 are true copies of an email and attachment that were sent to BIP students on or about July 31, 2005. One of the students forwarded the e-mail and attachments to a BIP employee, who in turn sent it to our office. I have redacted private information from the e-mail until such time as some confidentiality/protective order is in place.

6. On August 16, 2005 I reviewed the website located at http://blog.myspace.com/index.cfm?fuseaction=blog.ListAll&friendID=22490267&Mytoken=20050816

190804ML. This URL address is part of myspace.com, a social networking portal website. On that day Mr. Kleiman posted a blog message on the myspace.com website that Amanda Johnson, a BIP alumna, maintains. A true copy of the this blog is attached hereto as Exhibit 24.

7. On August 17, 2005 I reviewed again the website described in the previous paragraph of this declaration. On that day Ms. Johnson posted a blog message that provided contact information for Mr. Kleiman and Ms. Spielberg. Ms. Johnson also posted an e-mail that she previously sent to Mr. Kleiman and Ms. Spielberg. A true copy of this blog posting is attached as Exhibit 25.

8. On August 22, 2005, I reviewed the same website. Mr. Kleiman posted a message on the website again explicitly encouraging students to communicate with the press for the express purpose of depressing CEC's stock value. A true copy of this blog posting is attached as Exhibit 26.

9. On September 1, 2005, I served the Legal Aid Foundation of Los Angeles ("LAFLA") with a subpoena duces tecum ("LAFLA Subpoena"). A true copy of the LAFLA Subpoena is attached hereto as Exhibit 27.

10. On September 8, 2005, Janet Spielberg served her objections to the LAFLA Subpoena. A true copy of Ms. Spielberg's objections are attached hereto as Exhibit 28.

11. On September 19, 2005, I served Mark Kleiman with a subpoena duces tecum (the "Kleiman Subpoena"). A true copy of the Kleiman Subpoena is attached hereto as Exhibit 29.

12. On or about September 20, 2005 I spoke with Dennis Rockway of LAFLA regarding its response to the LAFLA Subpoena. He informed me that Legal Aid was going to serve objections to the LAFLA Subpoena, and would not produce responsive documents.

13. On September 20, 2005 I also spoke with Janet Spielberg by telephone regarding her objections to the LAFLA Subpoena. Ms. Spielberg asserted that all communications between her and Ms. Elena Ackel or LAFLA were protected by either the work product doctrine or the Attorney-Client privilege, since Ms. Spielberg frequently consulted with Ms. Ackel and LAFLA regarding her clients' legal issues. However, Ms. Spielberg did not identify any of those "clients," and said she does *not* represent either LAFLA or Ms. Ackel in any capacity. Ms. Ackel further indicated that LAFLA frequently referred students to Ms. Ackel, although she admitted that LAFLA has never referred any BIP students to her.

14. LAFLA served its objections to the LAFLA Subpoena on September 21, 2005. A true copy is attached hereto as Exhibit 30.

15. On October 10, 2005 I received an e-mail from Mr. Kleiman regarding his intention to file a Motion to Quash the Kleiman Subpoena. A true copy of the e-mail is attached hereto as Exhibit 31. Later that day, I sent an e-mail in response to Mr. Kleiman's e-mail. A true copy of my October 10, 2005 e-mail is attached hereto as Exhibit 32.

16. On October 11, 2005 Mr. Kleiman served his Motion to Quash or, in the alternative, Motion for a Protective Order relating to the Kleiman Subpoena. A true copy of Mr. Kleiman's Motion is attached hereto as Exhibit 33.

17. I spent a total of 21 hours researching and drafting these Motions. My hourly rate is $210. Therefore, BIP has incurred $2,205 based on the Motion to Certify Facts Justifying Sanctions and Contempt Against the Legal Aid Foundation and has incurred $2,205 based on the Motion to Certify Facts Justifying Sanctions and Contempt against Mark Allen Kleiman, Esq. to a total of $4,410.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this Declaration was executed this 28 day of October, 2005, in Santa Monica, California.

Tiffany S. Mitchell

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the aforesaid county, State of California; I am over the age of 18 years and not a party to the within action; my business address is **2450 Colorado Avenue, Suite 400E, Santa Monica, CA 90404.**

On October 28, 2005, I served the **DECLARATIONS OF GREGORY J. STRICK, Ph.D., GREGORY A. NYLEN, JEFF E. SCOTT, TRACY LORENZ AND TIFFANY S. MITCHELL IN SUPPORT OF MOTIONS TO CERTIFY FACTS JUSTIFYING CONTEMPT SANCTIONS AGAINST (1) THE LEGAL AID FOUNDATION OF LOS ANGELES AND (2) MARK ALLEN KLEIMAN, ESQ.** on the interested parties in this action by placing the true copy thereof, enclosed in a sealed envelope, postage prepaid, addressed as follows:

SEE ATTACHED LISTS

☒ **(BY PERSONAL SERVICE)**
I caused to be delivered such envelope by hand to the offices of the addressee. Executed on October 28, 2005, at Santa Monica, California.

☒ **(STATE)** I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

☐ **(FEDERAL)** I declare under penalty of perjury that the foregoing is true and correct, and that I am employed at the office of a member of the bar of this Court at whose direction the service was made.

Executed on October 28, 2005, at Santa Monica, California.

Ann Rutledge

SERVICE LIST

Janet Burns, Esq.
California Department of Justice
300 So. Spring Street, Suite 1702
Los Angeles, CA 90013

Mark Kleiman
Law Office of Mark Kleiman
12400 Wilshire Boulevard, Suite 400
Los Angeles, CA 90025

Office of Administrative Hearings
320 West 4th Street, Suite 630
Los Angeles, California 90013

(2 COPIES)

SERVICE LIST FOR LAFLA MOTION

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California Department of Justice
300 So. Spring Street, Suite 1702
Los Angeles, CA 90013

Janet Lindner Spielberg, Esq.
Law Offices of Janet Lindner Spielberg
12400 Wilshire Boulevard, Suite 400
Los Angeles, CA 90025

David Pettit, Esq.
Caldwell, Leslie, Newcombe & Pettit, PC
1000 Wilshire Boulevard, Suite 600
Los Angeles, CA 90017

Office of Administrative Hearings
320 West 4th Street, Suite 630
Los Angeles, California 90013

(2 COPIES)

Clarisa Herrera - FW: 087-26 LAFLA

From: "Rashida Adams" <adams@caldwell-leslie.com>
To: <cherrera@lafla.org>
Date: 11/7/2005 11:14 AM
Subject: FW: 087-26 LAFLA

Clarissa-

Thanks for your message last week regarding Elena's whereabouts. As you requested, attached is a conformed copy of the Motion for Protective Order that we filed on October 27th. Please note that a hard-copy was also sent on October 28th, to Dennis Rockway's attention.

Thank you,
Rashida Adams

Rashida Adams

Caldwell Leslie
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COPY

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Attorneys for Non-Party Legal Aid Foundation of Los Angeles

OFFICE OF ADMINISTRATIVE HEARINGS
LOS ANGELES OFFICE

In the Matter of: Bureau for Private Postsecondary and Vocational Education adv. Brooks Institute of Photography	OAH No. L2005080993 **NOTICE OF MOTION AND MOTION FOR PROTECTIVE ORDER; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF; DECLARATION OF DAVID PETTIT IN SUPPORT THEREOF; EXHIBITS** **Date: November 14, 2005** **Time: 1:30 p.m.** **Place: Office of Administrative Hearings**

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on November 14, 2005, at 1:30 p.m, at the Office of Administrative Hearings, located at 320 West 4th Street, Los Angeles, California, Non-Party Legal Aid Foundation of Los Angeles ("LAFLA") will and hereby does move for a protective order in connection with Respondent Brooks Institute of Photography's ("BIP") Subpoena *Duces Tecum*, which was served on September 1, 2005. This Motion is made pursuant to California Government Code 11450.30 on the ground that there is good cause for the issuance of such order in that BIP's Subpoena *Duces Tecum* calls for third-party discovery that is not allowed under Section 94975(d)(1) of the Education Code or Sections 11507.5-11507.6 of the Government Code. This Motion is also made on the grounds that BIP's Subpoena *Duces Tecum* is unreasonable, oppressive, excessively overbroad, calls for documents not reasonably calculated to lead to admissible or relevant evidence, and documents which, if produced, would violate the privacy rights of LAFLA employees and other third parties.

All parties opposing this Motion for Protective Order must file and serve their opposition papers by November 10, 2005, no later than 4:30 p.m. Non-Party LAFLA does not wish to waive oral argument and will not stipulate to a telephonic hearing.

This Motion is based on this Notice of Motion, the attached Memorandum of Points and Authorities, the supporting Declaration of David Pettit, and any further argument presented at or before the hearing.

DATED: October 27, 2005

Respectfully submitted,

CALDWELL, LESLIE, NEWCOMBE & PETTIT
A Professional Corporation

By _____
DAVID PETTIT
Attorneys for Legal Aid Foundation of Los Angeles

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This petition for a protective order arises from a subpoena *duces tecum* served on the Legal Aid Foundation of Los Angeles ("LAFLA" or "the Firm") by Brooks Institute of Photography ("BIP" or "the School"), a party in the above-captioned matter. LAFLA is a nonprofit law firm that has provided free legal services to low-income individuals in the Los Angeles area since 1929. LAFLA has never instituted or participated in an action against BIP and is not a party to the above-captioned proceeding.

Section 94975(d)(1) of the California Education Code and Sections 11507.5-11507.6 of the California Government Code do not allow respondents in an Office of Administrative Hearings ("OAH") proceeding to pursue pre-hearing discovery of third parties. However, BIP's subpoena *duces tecum* seeks just that: wide-ranging pre-hearing discovery of the communications and activities of LAFLA, a third party. BIP's subpoena does not call for documents that would be of use at a hearing on the merits of the Notice of Conditional Approval to Operate ("Notice") issued by the Bureau for Private Postsecondary and Vocational Education ("Bureau"). Instead, BIP seeks to engage in an impermissible fishing expedition that is designed to compel production of entire categories of documents that are wholly unrelated to the OAH proceeding to which it and the Bureau alone are parties. Indeed, BIP's requests for documents regarding LAFLA's activities and private communications are not reasonably calculated to lead to evidence that is admissible, or even relevant, in the above-captioned OAH proceeding. BIP is simply not entitled to the third-party discovery it seeks from LAFLA.

In the face of this unreasonable, oppressive, and overly broad subpoena, LAFLA went beyond the call of duty and actually produced all of the materials in its possession that could possibly be relevant to the hearing, even though the relevance of even these documents was extremely tenuous. Despite LAFLA's cooperation, BIP has persisted in seeking compliance with subpoena requests that serve no purpose other than to harass and burden the Firm, and to invade the privacy rights of LAFLA employees and other third parties. Although BIP has asserted that the documents it requests are necessary to allow it to investigate whether the Bureau improperly

disseminated information about its investigation, many of BIP's requests do not even relate to communications from the Bureau. Instead the requests are directed to LAFLA's activities and communications with any number of unrelated third parties. Similarly, although BIP asserts that the requested documents will aid in BIP's investigation of the Notice allegations, the requests do not actually call for documents that would be related to the allegations. Indeed, even the rationales BIP has asserted to support its demands reveal that the School hopes to use its subpoena to engage in wide-ranging pre-hearing discovery, a tactic that is not permitted under Section 94975(d)(1) of the Education code and Sections 11507.5-11507.6 of the Government code. A protective order is called for in this case to protect LAFLA from BIP's improper and unreasonable demands for documents.

II. RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

On July 11, 2005, the Bureau issued BIP a Notice of Conditional Approval to Operate. The Notice reflects the Bureau's findings that, *inter alia*, BIP provided misleading and false information to prospective students regarding such matters as the employment placement and salaries of the School's graduates, BIP misled prospective students about the assistance they could expect to receive from the School's career placement office, and that BIP had underreported, underpaid, and incorrectly assessed and remitted students' Student Tuition Recovery Fund fees to the Bureau. According to the Notice, the Bureau made the above assessments based on information gleaned from the Bureau's surveys of former students, and the Bureau's own review of BIP's records. *See* Notice, at 4-16.

On September 1, 2005, BIP issued a subpoena *duces tecum* to LAFLA in the above-described matter. Although required to provide facts to support good cause for the production of the documents, the subpoena offers only two vague rationales to support the requests. The first is "to investigate whether [Bureau] employees improperly divulged information regarding its investigation of BIP to third parties," and the second, "to investigate the allegations set forth in [the Notice]. *See* Subpoena *Duces Tecum* to LAFLA (9/1/05), attached and incorporated hereto as Exhibit A, at 3. In an attachment, the subpoena requests documents in nine broad categories of information, most of which have no discernible relationship to the subject matter of the

hearing. For example, one category seeks any and all documents relating to any communications between LAFLA and media representatives regarding the Bureau, BIP, and/or the Career Education Corporation ("CEC"), BIP's parent company. Another demands all documents relating to any communications between LAFLA and two other attorneys, neither of whom are parties to this matter.[1] *Id.* at 4.

On September 20, 2005, LAFLA objected to BIP's subpoena on the grounds that it was overbroad, unreasonable, sought documents that were neither relevant nor reasonably calculated to lead to the discovery of admissible evidence, sought information protected by the attorney work product and attorney-client privileges, and was not accompanied by a proper affidavit pursuant to Code of Civil Procedure Section 1985(b). Over the course of three weeks, BIP and LAFLA met and conferred by telephone and letter in an attempt to resolve their disputes over the subpoena. To that end, LAFLA agreed to produce all documents, including communications, to or from the Bureau that related to the allegations contained in the Notice, excepting only e-mails that had been deleted and archived on backup tapes.[2] LAFLA then produced all of the documents in its custody, possession, or control that fell into this category.[3] *See* Pettit Decl., ¶¶ 6, 7.

Despite LAFLA's good-faith efforts to reach a reasonable resolution of its objections to the subpoena, BIP has continued to seek impermissible third-party discovery from LAFLA in the form of additional documents that do not relate to matters at issue in the above-captioned

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[1] At least one of these attorneys has filed a Motion to Quash a similar subpoena from BIP.

[2] LAFLA did not search for such materials due to the significant cost and time involved in retrieving and searching for deleted, archived e-mails from their backup tapes. LAFLA indicated that should BIP desire that deleted e-mails be searched, some form of cost-shifting would be appropriate. Following LAFLA's production of documents in response to the subpoena, BIP did not further demand that deleted, archived documents be searched. *See* Letter from David Pettit, Esq. to Gregory A. Nylen, Esq. (Sept. 28, 2005), attached as Exhibit 3 to Pettit Declaration.

[3] Since LAFLA was not a party to, or a participant in, the Bureau's investigation of BIP, the organization had only a small number of responsive documents to produce.

proceeding.[4] Because BIP has persisted in seeking such documents, LAFLA now files this motion for a protective order.

III. LAFLA IS ENTITLED TO A PROTECTIVE ORDER TO RELIEVE IT FROM ANY FURTHER OBLIGATION TO COMPLY WITH BIP'S SUBPOENA

A. OAH Has the Authority to Grant Protective Orders

Section 94975 of the Education Code and Section 11500 et seq. of the Government Code set forth procedures for the hearing of a Bureau decision. Section 11450.30 of the Government Code (formerly Section 11510) specifically provides that a person served with a subpoena *duces tecum* in an OAH proceeding may object by means of a motion for a protective order, including a motion to quash, and gives the presiding officer of the hearing the authority to resolve the matter. According to Section 11450.30(b) of the Government Code, the presiding officer may make an order "that is appropriate to protect the parties or the witness from unreasonable or oppressive demands, including violations of the right to privacy." *See also Fireman's Fund Ins. Co. v. Superior Court*, 233 Cal.App.3d 1138, 1141, 286 Cal.Rptr. 50, 51 (1991) (citing former Section 2031(f) of the Code of Civil Procedure for the proposition that the court may "make any order that justice requires to protect any . . . natural person or organization from unwarranted annoyance, embarrassment, or oppression, or undue burden and expense.").

B. The Wide-ranging Pre-hearing Discovery BIP Seeks Is Unavailable in Proceedings before the OAH

Section 94975(d)(1) of the Education Code and Sections 11507.5-11507.6 of the Government Code provide for only limited pre-hearing discovery which consists of an exchange of information between the institution challenging a Bureau decision and the Bureau. Neither provision authorizes pre-hearing discovery of third parties. Further, both code provisions explicitly state that the discovery set forth therein is *the only* means of discovery available to a

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[4] LAFLA does not know at this time exactly which of BIP's requests for production the School continues to pursue. However, counsel for BIP explicitly referenced the School's desire to secure LAFLA's compliance with BIP's requests for documents relating to communications between LAFLA and attorneys Mark Kleiman and Janet Spielberg, as well as documents relating to communications from or to LAFLA regarding CEC. Because BIP has failed to formally rescind any of its requests, LAFLA addresses the entire subpoena in this motion.

party to an OAH proceeding. *See* Gov't Code §§ 11507.5-11507.6; Educ. Code § 94975(d)(1). Section 94975(e) authorizes the issuance of subpoenas before the hearing, subject to former Section 11510 of the Government Code. Section 11510 specified that subpoenas were to be used only to compel the production of documents *at* an OAH hearing. *See Gilbert v. Superior Court*, 193 Cal.App.3d 161, 166, 238 Cal.Rptr. 220, 222 (1987) (holding that Section 11510 could not be used to compel documents 21 days before hearing). In 1997, Section 11450.10 replaced Section 11510, but differed only in that it allowed a subpoena *duces tecum* to be issued for "production of documents at any reasonable time and place or at a hearing." This difference changed the manner of production of such documents, but not the scope of pre-hearing discovery, as demonstrated by the fact that Section 11507.5 of the Government Code and Section 94975(d)(1) of the Education Code continue to explicitly state that their provisions constitute the exclusive method for pre-hearing discovery. Thus, while documents may be produced in advance of the hearing instead of at the hearing, Section 11450.10 does not give parties to an OAH proceeding license to engage in broad discovery of materials in the possession of third parties. *See* 9 Witkin Cal. Proc. 4th Admin. Proceedings § 85 ("Discovery is allowed to all parties to the proceeding, including the agency, but does not extend to discoverable matters in the possession of nonparties.").

Further, while courts have allowed some pre-hearing discovery in matters before the OAH, such discovery has been very narrow. *See Stevenson v. State Bd. of Med. Exam'rs*, 10 Cal. App.3d 433, 439, 88 Cal.Rptr. 815, 819 (1970) (noting that California Supreme Court in *Shively v. Stewart*, 65 Cal.2d 475, 55 Cal.Rptr. 217 (1966), allowed only limited pre-hearing discovery and did not approve general discovery in administrative proceedings); *Everett v. Gordon*, 266 Cal.App.2d 667, 674, 72 Cal.Rptr. 379, 383 (1968) (holding that licensed real estate brokers were not entitled to take depositions of material witnesses for general discovery purposes in administrative proceeding).

BIP's subpoena thus markedly exceeds the bounds of the discovery it is allowed in this proceeding. Neither the Education nor the Government code authorizes wide-ranging discovery of third parties that BIP's subpoena seeks to accomplish.

C. *BIP's Subpoena Is Unreasonable, Overbroad, and Oppressive*

The hearing of this matter relates to the Bureau's decision to deny BIP an unconditional approval to operate, nothing more. Yet, the documents BIP seeks from LAFLA, a third-party, have no discernible relationship to the Bureau's investigation of BIP, or the resulting findings contained in the Notice.

1. Request Nos. 1-2 Are Overbroad in that They Request Information about Institutions Other than BIP

While BIP's first and second requests seek documents relating to communications between LAFLA and the Bureau, even these requests are woefully overbroad and seek documents that are not probative of the issues to be considered at an OAH proceeding in this matter. As an initial matter, the relevance of communications between LAFLA, a third party, and the Bureau, even regarding BIP, is tenuous. The subject matter of the proceeding – the Bureau's Notice to BIP – is forthcoming about the sources of its information. The Notice indicates that the Bureau's on-site assessment was prompted by "allegations of unethical business practices made by a former employee of Brooks Institute to Brooks Institute's accrediting agency," and further describes the Bureau's own review of BIP's records, and its contacts with BIP graduates, as the source of the information upon which the Bureau based its conclusions.[5] The Notice does not cite information from other third-party sources, nor does it indicate that it received or solicited information from LAFLA or LAFLA employees. Thus, BIP's efforts to secure information from LAFLA regarding its communications with the Bureau are in no way supported or justified by information or allegations contained in the Notice, and thus exceed the bounds of permissible pre-hearing discovery.

However, even if BIP's request for documents relating to communications between LAFLA and the Bureau about BIP was reasonable, BIP's further demand for documents relating to communications between LAFLA and the Bureau about CEC is not. The Notice contains no information about CEC, other than to state that CEC owns BIP. As a result, communications

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[5] According to the Notice, the Bureau sent e-mail surveys to a sampling of 2003 BIP graduates. BIP provided the e-mail addresses to the Bureau. *See* Notice, at 5.

between LAFLA and the Bureau about CEC are completely irrelevant to a hearing of the Bureau's decision about BIP.

2. Request Nos. 3-5 Call for Documents that Have Nothing to Do with the Bureau's Investigation or the Notice

Requests numbers three to five of the subpoena seek:

> 3. Any and all documents relating to any communications between you and any television, print, radio or other media representatives (including without limitation Gretchen Morgenson of the New York Times, Morgan Green of the Santa Barbara News Press, any other journalists or reporters, and/or any employees of CBS) regarding BPPVE, BIP and/or CEC;
>
> 4. Any and all documents relating to any communications between you and any investment firms, banks, or agencies (including without limitation Warburg Pincus and/or UBS Investment Research) regarding BPPVE, BIP, or CEC; and
>
> 5. All documents relating to any communications between you and Mark A. Kleiman, Esq. and/or Janet L. Spielberg, Esq.

Exhibit A, at 4. The above requests are not designed to lead to admissible or even relevant evidence in this matter. They do not call for documents that are related to the Notice or communications from the Bureau. The breadth and irrelevant nature of these requests demonstrate that BIP is attempting to expand the limited discovery available in the OAH proceeding into a tool to gain access to communications between LAFLA, an uninterested third party in this matter, and other third parties unrelated to either BIP or the Bureau.

Further, while communications between LAFLA and the above-listed third parties about BIP would not be relevant to this proceeding, BIP's subpoena is not even limited to such communications. Instead the subpoena calls for communications between LAFLA and third parties about the Bureau, *or* CEC, and for *all* communications between LAFLA and Mr. Kleiman

and/or Ms. Spielberg, regardless of subject matter. BIP has certainly failed to offer adequate justification for why communications between LAFLA, a third party, and other third parties, about institutions other than BIP, could possibly be relevant to a hearing on the Notice.

BIP's third-party discovery attempts are not only impermissible in the context of an OAH proceeding, it is oppressive and burdensome to compel LAFLA to scour its records for documents that, even on their face, are extremely overbroad and are not calculated to lead to evidence relevant or admissible in a hearing regarding the Bureau's action against BIP. *See Obregon v. Superior Court*, 67 Cal.App.4th 424, 431, 79 Cal.Rptr.2d 62,66 (1998) (noting that "when discovery requests are grossly overbroad on their face, and hence do not appear reasonably related to a legitimate discovery need, a reasonable inference can be drawn of an intent to harass and improperly burden.").

3. Request No. 6 Is Overbroad, General, and Impermissible

Request No. 6 calls for "all documents relating to all communications between or among any persons regarding [the Bureau], BIP and/or CEC not otherwise requested above." Exhibit A, at 4. This request again calls for communications related to CEC, despite the fact that such communications would not be relevant to the hearing. Further, the request is extremely overbroad and seeks, presumably, even internal communications among LAFLA employees and communications between LAFLA and its clients, all of which would be protected from disclosure by attorney-client and work product privileges. Further, although BIP has asserted that Section 2020.410 of the Code of Civil Procedure relieved it of the need to file an affidavit accompanying the subpoena to demonstrate good cause for the production of the items requested, Section 2020.410 still requires that a subpoena *duces tecum* either specifically describe each item sought, or reasonably particularize each category of item.[6] *See* Code Civ. Proc. § 2020.410(a). Thus, in *Calcor Space Facility v. Superior Court*, 53 Cal.App.4th 216, 218, 61 Cal.Rptr.2d 567, 569 (1997), the court held that subpoenas calling for production of documents from third parties

[6] LAFLA originally objected on the grounds that BIP had not attached an affidavit in accordance with Code of Civil Procedure Section 1985(b). BIP asserted that section 2020.410(a) applied, rather than section 1985(b).

"must describe the documents to be produced with reasonable particularity. Generalized demands, insupportable by evidence showing at least the potential evidentiary value of the information sought, are not permitted." BIP's subpoena runs afoul of even this standard, which concerned the more liberal context of general discovery as opposed to the restricted discovery of OAH proceedings.

Not only does BIP's subpoena thus exceed the bounds of the pre-hearing discovery allowed in an OAH proceeding, the breadth and intrusive nature of the subpoena, as well as the irrelevance of the documents it seeks, illustrate BIP's intent to harass LAFLA for its real or perceived advocacy on behalf of the public and students with respect to the vocational school industry. However interested BIP may be in discovering LAFLA's activities as an advocate in relation to it or its parent company, it remains improper, unreasonable, and harassing for BIP to attempt to make these discoveries under the authority of a proceeding that is concerned with a single Bureau decision regarding only one institution, BIP. [7]

D. BIP's Subpoena Violates the Privacy Rights of LAFLA's Employees and Other Third Parties

Article I, Section 1 of the California Constitution affords individuals a right to privacy that is protected, even in the face of requests for disclosure in a discovery context. If a subpoena calls for documents that intrude on an individual's right to privacy, including the right to associate with others privately, such documents are protected from production absent a compelling state interest. When such documents are sought, a court must balance the interests of the parties to the matter and those of the third parties affected by the subpoena. In balancing these interests, the court will consider

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[7] Request nos. 7-9 seek telephone logs, fax logs, and telephone bills regarding any of the communications requested in the preceding requests. During the parties' meet and confer discussions, LAFLA indicated that it did not maintain relevant telephone or fax logs, and objected to producing any telephone bills on the grounds of attorney-client privilege, the attorney-work product doctrine, and the undue burden and expense of producing and redacting such documents. It is LAFLA's understanding that BIP seeks no further compliance with respect to these categories. If there remains a dispute regarding these categories, it is LAFLA's position that the requests are improper for all of the reasons described above, and further that the requests serve no purpose other than to harass LAFLA and to impermissibly monitor the organization's activities.

> the purpose of the information sought, the effect that disclosure will have on the parties and on the trial, the nature of the objections urged by the party resisting disclosure, and ability of the court to make an alternative order . . . or disclosure only in the event that the party seeking the information undertakes certain specified burdens which appear just under the circumstances.

Sehlmeyer v. Dep't of General Servs., 17 Cal.App.4th 1072, 1079, 21 Cal.Rptr.2d 840, 843-844 (1993) (*citing Greyhound Corp. v. Superior Court*, 56 Cal.2d 355, 382, 15 Cal.Rptr. 90 (1961)). Thus, in *Rancho Publications v. Superior Court*, 68 Cal.App.4th 1538, 81 Cal.Rptr.2d 274 (1999), the court refused to compel a third party newspaper to reveal the identities of individuals who had placed anonymous "advertorials" criticizing a hospital that was a party to the underlying defamation action. The court held that the associational privacy rights of the anonymous authors outweighed the hospital's interests in securing the information sought, and further noted that the authors' probable desire to "avoid being swept into litigation purely out of spite for speaking out on a hotly contested issue" warranted protection. *Id.* at 1550-1551, 81 Cal.Rptr.2d at 282.

Similarly, in the case at bar, BIP's subpoena calls for documents relating to the non-public communications of LAFLA employees and numerous other individuals, all of whom have a significant privacy interest in keeping their non-public communications confidential, and who do not wish to become embroiled in litigation to which they are not parties. The Constitution protects these interests absent a compelling state interest. There is absolutely no such compelling state interest in this case. The documents BIP seeks are completely irrelevant to the hearing of this matter, and the only purpose their disclosure would serve would be to harass LAFLA, its employees, and those with whom they may have communicated. It is clear that BIP's broad and impermissible requests for documents that are directed entirely to communications between third parties are intended to either halt or place a constitutionally unacceptable burden on legitimate public discussion about private post-secondary education. BIP should not be allowed to pursue such nefarious motives by means of an abusive subpoena.

Disclosure of documents relating to communications between LAFLA and third parties would constitute a weighty intrusion on the associational privacy of LAFLA employees and those with whom they have associated, and further would impede LAFLA's ability to serve as an effective advocate. However, denying disclosure would have virtually no effect on the hearing of this matter because the documents bear absolutely no relation to the issues to be heard. BIP's requests for the documents evince a desire to pursue discovery not allowed in this proceeding, and to chill the speech and activities of those who advocate for students at vocational schools, in violation of their constitutional privacy rights. In contrast, LAFLA's objections to producing these documents are supported by a desire to uphold and protect the privacy rights of its employees and other third parties, and to avoid the unreasonable and oppressive burden of searching for and producing documents that would have no probative value in the actual hearing.

E. LAFLA Has Already Produced All Documents in the Firm's Possession that Could Possibly Be Relevant for Use at the Hearing

Although it is LAFLA's view that the subpoena is improper in its entirety, overbroad, and seeks irrelevant information, the Firm did attempt to resolve its objections with BIP. Thus, LAFLA has already produced all documents that could possibly have been relevant to BIP's asserted justifications for issuing the subpoena: to investigate whether the Bureau had improperly divulged information to third parties about its investigation of BIP, and to investigate the allegations contained in the Notice. LAFLA produced all documents that reflected communications between its employees and the Bureau related to BIP. Thus, BIP's insistence, communicated through counsel, that LAFLA produce other documents responsive to the subpoena, is unreasonable and oppressive. As explained above, any documents not already produced have no relevance to the OAH proceeding, and are entirely outside the realm of what BIP is entitled to discover pursuant to Sections 11507.5-11507.6 of the Government Code and Section 94975(d)(1) of the Education Code. Further, any such additional documents impermissibly violate the associational privacy rights of LAFLA employees and other third parties.

A protective order is therefore necessary in order to protect LAFLA from BIP's demands that any further compliance with its subpoena is necessary, given that the subpoena calls for irrelevant documents that the School is not entitled to secure in this proceeding.

IV. CONCLUSION

For the foregoing reasons, a protective order is warranted in this case that excuses LAFLA from any further compliance with BIP's subpoena.

DATED: October 27, 2005

Respectfully submitted,

CALDWELL, LESLIE, NEWCOMBE & PETTIT
A Professional Corporation

By _____
DAVID PETTIT
Attorneys for Legal Aid Foundation of Los Angeles

EXHIBIT A

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of: *Bureau for Private Postsecondary and Vocational Education adv. Brooks Institute of Photography*

Agency / Agency Case No. 06147

OAH No. 2005080993

☐ **SUBPOENA:** *Requesting Testimony* ☑ **SUBPOENA DUCES TECUM:** *Requesting the Production of Records or Thing*

THE PEOPLE OF THE STATE OF CALIFORNIA SEND GREETINGS TO: Custodian of Records

(name and address of person being subpoenaed) Los Angeles Legal Aid, East L.A. Office, 5228 Whittier Blvd., Los Angeles, CA 90022

1. At the request of ☐ Petitioner ☑ Respondent

(party name) Brooks Institute of Photography

(name, address and telephone number of contact person) Tiffany Mitchell, Greenberg Traurig, LLP, 2450 Colorado Ave., Ste. 400E, Santa Monica, CA 90404

2. **You are hereby commanded, business and excuses being set aside, to appear as a witness on:**

(date) _____, at *(time)* _____, **and then and there to testify at:** *(location)*

☐ OAH, 560 J Street, Suite 300, Sacramento CA 95814

☐ OAH, 1515 Clay Street, Suite 206, Oakland CA 94612

☐ OAH, 320 West Fourth Street, Room 630, Los Angeles CA 90013

☐ OAH, 1350 Front Street, Room 6022, San Diego CA 92101

☐ Other: _____

☐ 3. You are not required to appear in person if you produce the records described in the accompanying affidavit and a completed declaration of custodian of records in compliance with Evidence Code sections 1560, 1561, 1562, and 1271. (1) Place a copy of the records in an envelope (or other wrapper). Enclose your original declaration with the records. Seal them. (2) Attach a copy of this subpoena to the envelope or write on the envelope the case name and number, your name and date, time, and place from item 2 (the box above). (3) Place this first envelope in an outer envelope, seal it, and mail it to the Office of Administrative Hearings at the address checked in item 2. (4) Mail a copy of your declaration to the attorney or party shown in item 1.

☑ 4. You are not required to appear in person if you produce the records described in the accompanying Attachment A and a completed declaration of custodian of records in compliance with Evidence Code section 1561.

By September 21, 2005 *(date)*, **send the records to:** Worldwide Network, 1533 Wilshire Blvd., Los Angeles, CA 90017. **Do not release the requested record to the deposition officer prior to the time and date specified above.**

NOTE: This manner of production may not satisfy the requirements of Evidence Code section 1561 for admission at hearing.

☐ 5. You are ordered to appear in person and to produce the records described in the accompanying affidavit. The personal appearance of the custodian or other qualified witness and the production of the original records is required by this subpoena. The procedure authorized by subdivision (b) of section 1560, and sections 1561 and 1562 of the Evidence Code will not be deemed sufficient compliance by this subpoena.

6. **Disobedience to this subpoena will be punished as contempt of court in the manner prescribed by law.**

7. **Witness Fees:** Upon service of this subpoena, you are entitled to witness fees and mileage actually traveled both ways, as provided by law, if you so request. You may request them before your scheduled appearance from the person named in item 1. *See Government Code sections 11450.05, 11450.50, 68092.5-68093, and 68096.1-68097.10.*

8. **IF YOU HAVE ANY QUESTIONS ABOUT WITNESS FEES OR THE TIME OR DATE YOU ARE TO APPEAR, OR TO BE CERTAIN THAT YOUR PRESENCE IS REQUIRED ON THE DATE AND TIME SPECIFIED ABOVE, CONTACT THE PERSON REQUESTING THIS SUBPOENA, LISTED IN ITEM 1 ABOVE, BEFORE THE DATE LISTED IN ITEM 2 ABOVE.**

(Date Issued) 9/1/05 *(Signature of Authorizing Official)* Tiffany Mitchell

OAH-1 (Rev. 10/00)

EXHIBIT A

(Printed Name) Tiffany Mitchell (Title) Attorney at Law

DECLARATION FOR SUBPOENA DUCES TECUM

(Any party issuing a subpoena for production of books and/or records must complete this section.)

The undersigned states that the books, papers, documents and/or other things named in attachment A hereto and requested by this subpoena are material to the proper presentation of this case, and good cause exists for their production by reason of the following facts:

Respondent Brooks Institute of Photography ("BIP") requires the documents described in Attachment A hereto to investigate whether Bureau for Private Postsecondary and Vocational Education ("BPPVE") employees improperly divulged information regarding its investigation of BIP to third parties. In addition, the documents are necessary to investigate the allegations set forth in BPPVE's July 11, 2005 Notice of Conditional Approval to Operate.

(Use additional pages, if necessary, and attach them to this subpoena.)

Executed September 1, 2005, at Santa Monica, California.
I declare under penalty of perjury that the foregoing is true and correct.

Tiffany Mitchell
(Signature of Declarant)

METHOD OF DELIVERY of this subpoena:

☐ **Personal Service** – In accordance with Code of Civil Procedure sections 1987 and 1988, delivery was effected by showing the original and delivering a true copy thereof personally to:

☐ **Messenger Service** – In accordance with Government Code section 11450.20, an acknowledgement of the receipt of this subpoena was obtained by the sender after it was delivered by messenger to:

☑ **Certified Mail, Return Receipt Requested** – I sent a true copy of this subpoena via certified mail, return receipt requested to:
(name and address of person)

Los Angeles Legal Aid, East L.A. Offices
5228 Whittier Blvd.
Los Angeles, CA 90022

at the hour of 4:30 p. m., on Sept. 1, 2005,
City of Santa Monica, State of California.

Tiffany Mitchell
(Signature of Declarant)

OAH-1 (Rev. 10/00) – REVERSE

ATTACHMENT A

Definitions

The term "Document(s)" shall have the same meaning as the term "Writing" set forth in *California Evidence Code § 250.*

The term "Relating to" shall mean directly or indirectly constituting, containing, embodying, concerning, evidencing, showing, comprising, reflecting, identifying, relating to, stating, referring to, dealing with, commenting on, responding to, describing, involving, mentioning, discussing, recording, supporting, negating, or in any way pertaining to the subject.

The term "Communications" shall mean any exchange or transmission of information of any kind to another person, whether accomplished by person to person, by telephone or through any other medium, including, but not limited to, discussions, conversations, negotiations, conferences, meetings, speeches, memoranda, letters, electronic mail, voice mail, notes, statements or questions.

Document Request

1. Any and all documents relating to any communications between any Los Angeles Legal Aid employees, including without limitation communications by and between Elena H. Ackel, Esq, and any employee of the Bureau for Private Postsecondary and Vocational Education ("BPPVE") relating to Brooks Institute of Photography ("BIP") and/or Career Education Corporation ("CEC").

2. All documents provided to you by any employee of the BPPVE relating to BIP and/or CEC.

3. Any and all documents relating to any communications between you and any television, print, radio or other media representatives (including without limitation Gretchen Morgenson of the New York Times, Morgan Green of the Santa Barbara News Press, any other journalists or reporters, and/or any employees of CBS) regarding BPPVE, BIP and/or CEC.

4. Any and all documents relating to any communications between you and any investment firms, banks, or agencies (including without limitation Warburg Pincus and/or UBS Investment Research) regarding BPPVE, BIP or CEC.

5. All documents relating to any communications between you and Mark A. Kleiman, Esq. and/or Janet L. Spielberg, Esq.

6. All documents relating to all communications between or among any persons regarding BPPVE, BIP and/or CEC not otherwise requested above

7. All telephone logs relating to any communications requested above.

8. All facsimile logs relating to any communications requested above.

9. All telephone bills relating to any communications requested above.

PETTIT
DECLARATION

DECLARATION OF DAVID PETTIT

I, David Pettit, declare the following to be true and correct:

1. I am an attorney admitted to practice in the State of California and a shareholder of the firm of Caldwell, Leslie, Newcombe and Pettit, counsel for Non-party Legal Aid Foundation of Los Angeles ("LAFLA"). I submit this declaration in support of LAFLA's Motion for a Protective Order. I have personal knowledge of the facts stated herein.

2. On September 20, 2005, Dennis L. Rockway, Director of Advocacy and Training for LAFLA, filed objections to the Brooks Institute of Photography ("BIP") subpoena *duces tecum*, served on LAFLA in the above-captioned Office of Administrative Hearing ("OAH") proceeding. Attached hereto as Exhibit 1 is a true and correct copy of the objections filed.

3. Attached hereto as Exhibit 2 is a true and correct copy of a letter from Gregory A. Nylen, Esq. to Dennis L. Rockway, Esq., dated September 22, 2005, which contains BIP's response to LAFLA's objections to the subpoena *duces tecum*.

4. Out of respect for due process concerns and in an effort to attempt to resolve the matter of BIP's subpoena without litigation, but without waiving any objections as to whether BIP's subpoena sought documents relevant to the OAH proceeding, LAFLA agreed to produce all documents to or from the Bureau for Private Post-Secondary Vocational Education ("Bureau") from January 1, 2004 to the present, relating to the specific charges included within the Notice of Conditional Approval to Operate ("Notice") issued on July 11, 2005. By letter dated September 28, 2005, I informed BIP's counsel, Gregory A. Nylen, that these, and no other documents, would be produced. Attached hereto as Exhibit 3 is a true and correct copy of the letter from David Pettit, Esq. to Gregory A. Nylen, Esq. dated September 28, 2005.

5. In a telephone conversation on September 28, 2005, and by letter dated September 30, 2005, Mr. Nylen indicated that BIP would continue to demand production of documents relating to communications between LAFLA and media representatives or investment banks, as well as communications between LAFLA and Mark A. Kleiman, Esq. and/or Janet L. Spielberg, Esq. Attached hereto as Exhibit 4 is a true and correct copy of the letter from Gregory A. Nylen, Esq. to David Pettit, Esq., dated September 30, 2005.

6. On October 6, 2005, LAFLA produced 40 pages of documents to BIP. The documents produced constituted all of the documents in LAFLA's custody, possession, or control, that were documents to or from the Bureau relating to the charges in the Notice, with the exception of such e-mails that had been deleted and archived, if any. LAFLA did not search for or produce any e-mail that had been deleted from the LAFLA computer system and archived on backup tapes, due to the significant cost and time such a search would require. Attached hereto as Exhibit 5 is a true and correct copy of the letter from David Pettit, Esq. to Gregory A. Nylen, Esq., on October 6, 2005, that accompanied the documents produced.

7. In response to further telephonic meet and confer discussions, on October 7, 2005, I informed Mr. Nylen by letter that, without waiving any objection as to whether BIP's requests were relevant to the OAH proceeding, LAFLA did not have any documents relating to the investigation of BIP, or investigation of the Career Education Corporation, by the Bureau or the California Department of Consumer Affairs, other than what was produced to BIP on October 6, 2005. Attached hereto as Exhibit 6 is a true and correct copy of the letter written from David Pettit, Esq. to Gregory A. Nylen, Esq., on October 7, 2005.

8. Following further conversations with Mr. Nylen, on October 10, 2005, I informed Mr. Nylen by letter that LAFLA does not maintain fax logs, and that, without waiving any objection as to whether BIP's requests were relevant to the OAH proceeding, LAFLA did have some documents reflecting non-privileged communications with Mr. Kleiman or Ms. Spielberg relating to BIP or CEC. Attached hereto as Exhibit 7 is a true and correct copy of the letter from David Pettit, Esq. to Gregory A. Nylen, Esq., on October 10, 2005.

9. On October 18, 2005, Mr. Nylen informed me by telephone that BIP anticipated filing a motion to compel LAFLA's further compliance with BIP's subpoena *duces tecum*.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on 10-27-05, 2005 at Los Angeles, California.

DAVID PETTIT

EXHIBIT 1

Dennis L. Rockway 107771
Toby Rothschild 45860
Legal Aid Foundation of Los Angeles
1102 Crenshaw Boulevard
Los Angeles, California 90019
(323) 801-7928
(323) 801-7945 Fax

BEFORE THE

OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of: Bureau for Private Postsecondary and Vocational Education adv. Brooks Institute of Photography	Agency/Agency Case No. 06417 OAH No. 2005080993
	OBJECTION TO SUBPOENA DUCES TECUM

The Legal Aid Foundation of Los Angeles hereby objects to the Subpoena Duces Tecum propounded upon it by Respondent Brooks Institute of Photography.

The grounds upon which this objection is made are as follows:

1. The Subpoena is not accompanied by an affidavit which conforms with the provisions of Code of Civil Procedure Section 1985(b).
2. The Subpoena is an over broad and unreasonable demand.
3. The Subpoena seeks documents protected by the attorney-client privilege.
4. The Subpoena seeks documents protected by the attorney work product doctrine.
5. The Subpoena seeks documents which are neither relevant nor reasonably calculated to lead to the discovery of admissible evidence.

EXHIBIT 1

6. The Subpoena seeks documents which would be unduly burdensome and oppressive to produce.

LEGAL AID FOUNDATION OF LOS ANGELES

September 20, 2005

By: _____
Dennis L. Rockway

SERVICE LIST

Tiffany Mitchell, Esq.
Greenberg, Traurig, LLP
2450 Colorado Avenue
Suite 400E
Santa Monica, California 90404

Worldwide Network
1533 Wilshire Boulevard
Los Angeles, California 90017

Janet Lindner Spielberg, Esq.
Law Offices of Janet Lindner Spielberg
12400 Wilshire Boulevard
Suite 400
Los Angeles, California 90025

Barbara Ward, Chief
Bureau For Private Postsecondary and Vocational Education
P.O. Box 980818
West Sacramento, California 95798-0818

Greenberg Traurig

Gregory A. Nylen
Tel. 310.586.7733
Fax 310.586.0233
nyleng@gtlaw.com

September 22, 2005

VIA FACSIMILE & U.S. MAIL

Dennis L. Rockway, Esq.
Legal Aid Foundation of Los Angeles
1102 Crenshaw Boulevard
Los Angeles, California 90019

Re: *Bureau for Private Postsecondary and Vocational Education adv. Brooks Institute of Photography OAH No. L2005080993*

Dear Mr. Rockway:

Because I was unable to reach you by telephone today, I am sending this letter to meet and confer regarding the objections you served on behalf of the Legal Aid Foundation of Los Angeles ("Legal Aid") in response to the subpoena Brooks Institute of Photography ("BIP") served upon Legal Aid in the administrative proceeding before the Office of Administrative Hearings ("OAH") involving the Bureau for Private Postsecondary and Vocational Education (the "Bureau"). As discussed below, none of your objections has any merit, and BIP will move to compel responses to the Subpoena if Legal Aid does not produce responsive documents immediately.

Your first objection is that the Subpoena is not accompanied by an affidavit which confirms with the provisions of Code of Civil Procedure Section 1985(b). This objection has no merit because a "deposition subpoena that commands only the production of business records for copying need not be accompanied by an affidavit or declaration showing good cause for the production of the business records designated in it." Cal. Civ. Proc. Code §202.410(c). Because the deposition Subpoena BIP served on Legal Aid seeks only the production of business records, BIP was not required to serve an affidavit with the Subpoena. Regardless, BIP's counsel *did* complete and execute the affidavit included in the OAH subpoena form.

Your second objection is that the "Subpoena is an over broad [sic] and unreasonable demand." This boilerplate, general objection is without merit because it is not correlated to any particular document request. Moreover, the objection is without merit because the Subpoena seeks the production of only nine narrowly tailored categories of documents that are highly relevant to this proceeding. Please explain how each of these requests is in any way overbroad or unreasonable.

Your third objection is that the Subpoena seeks documents protected by the attorney-client privilege. The Subpoena seeks documents relating to communications between Legal Aid, on the one hand, and the Bureau, Mark A. Kleiman, Esq., Janet L. Spielberg, Esq., and/or the media companies and investment firms identified in the Subpoena, on the other hand. It is our understanding that Legal Aid has not acted as counsel for the Bureau or any of the media companies or investment firms referenced in the document requests attached to the Subpoena. Therefore, the attorney-client privilege does not apply to such communications. Even if the privilege did apply, Legal Aid must provide a privilege log immediately so that BIP can evaluate Legal Aid's claim that the privilege is applicable. With respect to communications between Legal Aid and Mark Kleiman and/or Janet Spielberg, BIP is prepared to limit Request No. 5 to "All documents relating to and/or constituting communications between you [*i.e.*, Legal Aid of Los Angeles and/or Elena H. Ackel, Esq.], on the one hand, and Mark A. Kleiman, Esq. and/or Janet L. Spielberg, Esq., on the other, relating in any manner to Career Education Corporation, BIP, and/or the Bureau's investigation of and/or proceedings with respect to BIP."

Your fourth objection is that the Subpoena seeks documents protected by the work product privilege. Please explain how documents in Legal Aid's possession, custody or control that are responsive to the subpoena were prepared in anticipation of or in connection with litigation, especially with regard to the individuals or entities that Legal Aid does not represent. Please also produce a privilege log identifying each document that Legal Aid contends is protected by the work product privilege so that BIP can evaluate whether the privilege applies.

Your fifth and final objection is that the Subpoena seeks documents not reasonably calculated to lead to the discovery of admissible evidence. This objection is entirely without merit because BIP is informed and believes that Elena Ackel may have played a role in the Bureau's investigation of BIP. BIP is entitled to discover the nature and extent of her involvement in that investigative process, any communications she may have had with the Bureau relating to the investigation, and how Ms. Ackel obtained information relating to the investigation. In addition, BIP requires the documents requested in the Subpoena in order to investigate whether Bureau employees improperly divulged information regarding its investigation of BIP to third parties. Moreover, the documents requested in the Subpoena are necessary to investigate the allegations set forth in the Bureau's July 11, 2005 Notice of Conditional Approval for BIP to Operate.

Please let me know as soon as possible when you are available to discuss the issues raised in this letter. If I do not hear from you by Monday, September 26, 2005, I will assume you have no interest in resolving those issues informally, and BIP will have not choice but to

file a motion to compel responses to the Subpoena on Friday, September 30, 2005, for hearing on October 14, 2005 at 10:30 a.m. at the Los Angeles offices of the OAH.

Sincerely,

Gregory A. Nylen

GAN/dap

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of: *Bureau for Private Postsecondary and Vocational Education adv. Brooks Institute of Photography*

Agency / Agency Case No. 06147

OAH No. 2005080993

☐ **SUBPOENA:** *Requesting Testimony* ☑ **SUBPOENA DUCES TECUM:** *Requesting the Production of Records or Thing*

THE PEOPLE OF THE STATE OF CALIFORNIA SEND GREETINGS TO: Custodian of Records

(name and address of person being subpoenaed) Los Angeles Legal Aid, East L.A. Office, 5228 Whittier Blvd., Los Angeles, CA 90022

1. At the request of ☐ Petitioner ☑ Respondent

(party name) Brooks Institute of Photography

(name, address and telephone number of contact person) Tiffany Mitchell, Greenberg Traurig, LLP, 2450 Colorado Ave., Ste. 400E, Santa Monica, CA 90404

2. **You are hereby commanded, business and excuses being set aside, to appear as a witness on:**

(date) _____, at *(time)* _____, and then and there to testify at: *(location)*

☐ OAH, 560 J Street, Suite 300, Sacramento CA 95814

☐ OAH, 1515 Clay Street, Suite 206, Oakland CA 94612

☐ OAH, 320 West Fourth Street, Room 630, Los Angeles CA 90013

☐ OAH, 1350 Front Street, Room 6022, San Diego CA 92101

☐ Other: _____, California.

☐ 3. You are not required to appear in person if you produce the records described in the accompanying affidavit and a completed declaration of custodian of records in compliance with Evidence Code sections 1560, 1561, 1562, and 1271. (1) Place a copy of the records in an envelope (or other wrapper). Enclose your original declaration with the records. Seal them. (2) Attach a copy of this subpoena to the envelope or write on the envelope the case name and number, your name and date, time, and place from item 2 (the box above). (3) Place this first envelope in an outer envelope, seal it, and mail it to the Office of Administrative Hearings at the address checked in item 2. (4) Mail a copy of your declaration to the attorney or party shown in item 1.

☑ 4. You are not required to appear in person if you produce the records described in the accompanying Attachment A and a completed declaration of custodian of records in compliance with Evidence Code section 1561. By September 21, 2005 *(date)*, send the records to: Worldwide Network, 1533 Wilshire Blvd., Los Angeles, CA 90017. **Do not release the requested record to the deposition officer prior to the time and date specified above.**

NOTE: This manner of production may not satisfy the requirements of Evidence Code section 1561 for admission at hearing.

☐ 5. You are ordered to appear in person and to produce the records described in the accompanying affidavit. The personal appearance of the custodian or other qualified witness and the production of the original records is required by this subpoena. The procedure authorized by subdivision (b) of section 1560, and sections 1561 and 1562 of the Evidence Code will not be deemed sufficient compliance by this subpoena.

6. **Disobedience to this subpoena will be punished as contempt of court in the manner prescribed by law.**

7. **Witness Fees:** Upon service of this subpoena, you are entitled to witness fees and mileage actually traveled both ways, as provided by law, if you so request. You may request them before your scheduled appearance from the person named in item 1. *See Government Code sections 11450.05, 11450.50, 68092.5-68093, and 68096.1-68097.10.*

8. **IF YOU HAVE ANY QUESTIONS ABOUT WITNESS FEES OR THE TIME OR DATE YOU ARE TO APPEAR, OR TO BE CERTAIN THAT YOUR PRESENCE IS REQUIRED ON THE DATE AND TIME SPECIFIED ABOVE, CONTACT THE PERSON REQUESTING THIS SUBPOENA, LISTED IN ITEM 1 ABOVE, BEFORE THE DATE LISTED IN ITEM 2 ABOVE.**

(Date Issued) 9/1/05 *(Signature of Authorizing Official)* Tiffany Mitchell

OAH-1 (Rev. 10/00)

(Printed Name) Tiffany Mitchell (Title) Attorney at Law

DECLARATION FOR SUBPOENA DUCES TECUM

(Any party issuing a subpoena for production of books and/or records must complete this section.)

The undersigned states that the books, papers, documents and/or other things named in attachment A hereto and requested by this subpoena are material to the proper presentation of this case, and good cause exists for their production by reason of the following facts:

Respondent Brooks Institute of Photography ("BIP") requires the documents described in Attachment A hereto to investigate whether Bureau for Private Postsecondary and Vocational Education ("BPPVE") employees improperly divulged information regarding its investigation of BIP to third parties. In addition, the documents are necessary to investigate the allegations set forth in BPPVE's July 11, 2005 Notice of Conditional Approval to Operate.

(Use additional pages, if necessary, and attach them to this subpoena.)

Executed September 1, 2005, at Santa Monica, California.
I declare under penalty of perjury that the foregoing is true and correct.

Tiffany Mitchell
(Signature of Declarant)

METHOD OF DELIVERY of this subpoena:

☐ **Personal Service** – In accordance with Code of Civil Procedure sections 1987 and 1988, delivery was effected by showing the original and delivering a true copy thereof personally to:

☐ **Messenger Service** – In accordance with Government Code section 11450.20, an acknowledgement of the receipt of this subpoena was obtained by the sender after it was delivered by messenger to:

☑ **Certified Mail, Return Receipt Requested** – I sent a true copy of this subpoena via certified mail, return receipt requested to:
(name and address of person)

Los Angeles Legal Aid, East L.A. Offices
5228 Whittier Blvd.
Los Angeles, CA 90022

at the hour of 4:30 p. m., on Sept. 1, 2005,
City of Santa Monica, State of California.

Tiffany Mitchell
(Signature of Declarant)

OAH-1 (Rev. 10/00) – REVERSE

ATTACHMENT A

Definitions

The term "Document(s)" shall have the same meaning as the term "Writing" set forth in *California Evidence Code § 250.*

The term "Relating to" shall mean directly or indirectly constituting, containing, embodying, concerning, evidencing, showing, comprising, reflecting, identifying, relating to, stating, referring to, dealing with, commenting on, responding to, describing, involving, mentioning, discussing, recording, supporting, negating, or in any way pertaining to the subject.

The term "Communications" shall mean any exchange or transmission of information of any kind to another person, whether accomplished by person to person, by telephone or through any other medium, including, but not limited to, discussions, conversations, negotiations, conferences, meetings, speeches, memoranda, letters, electronic mail, voice mail, notes, statements or questions.

Document Request

1. Any and all documents relating to any communications between any Los Angeles Legal Aid employees, including without limitation communications by and between Elena H. Ackel, Esq, and any employee of the Bureau for Private Postsecondary and Vocational Education ("BPPVE") relating to Brooks Institute of Photography ("BIP") and/or Career Education Corporation ("CEC").

2. All documents provided to you by any employee of the BPPVE relating to BIP and/or CEC.

3. Any and all documents relating to any communications between you and any television, print, radio or other media representatives (including without limitation Gretchen Morgenson of the New York Times, Morgan Green of the Santa Barbara News Press, any other journalists or reporters, and/or any employees of CBS) regarding BPPVE, BIP and/or CEC.

4. Any and all documents relating to any communications between you and any investment firms, banks, or agencies (including without limitation Warburg Pincus and/or UBS Investment Research) regarding BPPVE, BIP or CEC.

5. All documents relating to any communications between you and Mark A. Kleiman, Esq. and/or Janet L. Spielberg, Esq.

6. All documents relating to all communications between or among any persons regarding BPPVE, BIP and/or CEC not otherwise requested above

7. All telephone logs relating to any communications requested above.

8. All facsimile logs relating to any communications requested above.

9. All telephone bills relating to any communications requested above.

EXHIBIT 2

Greenberg Traurig

Gregory A. Nylan
Tel. 310.586.7733
Fax 310.586.0233
nylang@gtlaw.com

September 22, 2005

VIA FACSIMILE & U.S. MAIL

Dennis L. Rockway, Esq.
Legal Aid Foundation of Los Angeles
1102 Crenshaw Boulevard
Los Angeles, California 90019

Re: *Bureau for Private Postsecondary and Vocational Education adv. Brooks Institute of Photography OAH No. L2005080993*

Dear Mr. Rockway:

Because I was unable to reach you by telephone today, I am sending this letter to meet and confer regarding the objections you served on behalf of the Legal Aid Foundation of Los Angeles ("Legal Aid") in response to the subpoena Brooks Institute of Photography ("BIP") served upon Legal Aid in the administrative proceeding before the Office of Administrative Hearings ("OAH") involving the Bureau for Private Postsecondary and Vocational Education (the "Bureau"). As discussed below, none of your objections has any merit, and BIP will move to compel responses to the Subpoena if Legal Aid does not produce responsive documents immediately.

Your first objection is that the Subpoena is not accompanied by an affidavit which confirms with the provisions of Code of Civil Procedure Section 1985(b). This objection has no merit because a "deposition subpoena that commands only the production of business records for copying need not be accompanied by an affidavit or declaration showing good cause for the production of the business records designated in it." Cal. Civ. Proc. Code §202.410(c). Because the deposition Subpoena BIP served on Legal Aid seeks only the production of business records, BIP was not required to serve an affidavit with the Subpoena. Regardless, BIP's counsel *did* complete and execute the affidavit included in the OAH subpoena form.

Your second objection is that the "Subpoena is an over broad [sic] and unreasonable demand." This boilerplate, general objection is without merit because it is not correlated to any particular document request. Moreover, the objection is without merit because the Subpoena seeks the production of only nine narrowly tailored categories of documents that are highly relevant to this proceeding. Please explain how each of these requests is in any way overbroad or unreasonable.

EXHIBIT 2

Your third objection is that the Subpoena seeks documents protected by the attorney-client privilege. The Subpoena seeks documents relating to communications between Legal Aid, on the one hand, and the Bureau, Mark A. Kleiman, Esq., Janet L. Spielberg, Esq., and/or the media companies and investment firms identified in the Subpoena, on the other hand. It is our understanding that Legal Aid has not acted as counsel for the Bureau or any of the media companies or investment firms referenced in the document requests attached to the Subpoena. Therefore, the attorney-client privilege does not apply to such communications. Even if the privilege did apply, Legal Aid must provide a privilege log immediately so that BIP can evaluate Legal Aid's claim that the privilege is applicable. With respect to communications between Legal Aid and Mark Kleiman and/or Janet Spielberg, BIP is prepared to limit Request No. 5 to "All documents relating to and/or constituting communications between you [*i.e.*, Legal Aid of Los Angeles and/or Elena H. Ackel, Esq.], on the one hand, and Mark A. Kleiman, Esq. and/or Janet L. Spielberg, Esq., on the other, relating in any manner to Career Education Corporation, BIP, and/or the Bureau's investigation of and/or proceedings with respect to BIP."

Your fourth objection is that the Subpoena seeks documents protected by the work product privilege. Please explain how documents in Legal Aid's possession, custody or control that are responsive to the subpoena were prepared in anticipation of or in connection with litigation, especially with regard to the individuals or entities that Legal Aid does not represent. Please also produce a privilege log identifying each document that Legal Aid contends is protected by the work product privilege so that BIP can evaluate whether the privilege applies.

Your fifth and final objection is that the Subpoena seeks documents not reasonably calculated to lead to the discovery of admissible evidence. This objection is entirely without merit because BIP is informed and believes that Elena Ackel may have played a role in the Bureau's investigation of BIP. BIP is entitled to discover the nature and extent of her involvement in that investigative process, any communications she may have had with the Bureau relating to the investigation, and how Ms. Ackel obtained information relating to the investigation. In addition, BIP requires the documents requested in the Subpoena in order to investigate whether Bureau employees improperly divulged information regarding its investigation of BIP to third parties. Moreover, the documents requested in the Subpoena are necessary to investigate the allegations set forth in the Bureau's July 11, 2005 Notice of Conditional Approval for BIP to Operate.

Please let me know as soon as possible when you are available to discuss the issues raised in this letter. If I do not hear from you by Monday, September 26, 2005, I will assume you have no interest in resolving those issues informally, and BIP will have not choice but to

file a motion to compel responses to the Subpoena on Friday, September 30, 2005, for hearing on October 14, 2005 at 10:30 a.m. at the Los Angeles offices of the OAH.

Sincerely,

Gregory A. Nylen

GAN/dap

EXHIBIT 3

Caldwell Leslie

Caldwell, Leslie, Newcombe & Pettit, PC
1000 Wilshire Boulevard, Suite 600 Los Angeles, CA 90017-2463 Tel 213.629.9040 Fax 213.629.9022 www.caldwell-leslie.com

BY FACSIMILE AND
FIRST-CLASS MAIL

DAVID PETTIT
pettit@caldwell-leslie.com

September 28, 2005

Gregory A. Nylen
Greenberg Traurig, LLP
2450 Colorado Avenue
Suite 400E
Santa Monica, CA 90404

Re: *Brooks Institute matter*
Subpoena Duces Tecum to Legal Aid Foundation of Los Angeles

Dear Mr. Nylen:

I appreciate your courtesy in allowing me to try to get up to speed on this matter. I've now had a chance to review the July 11, 2005 Notice of Conditional Approval to Operate addressed to Brooks Institute of Photography (the "Notice") by the Bureau For Private Postsecondary And Vocational Education (the "Bureau"). In comparing the Notice to your Subpoena Duces Tecum to the Legal Aid Foundation of Los Angeles ("LAFLA"), it appears to me that the Subpoena goes far beyond the Notice in scope.

Accordingly, LAFLA's position with respect to the Subpoena is as follows: LAFLA will produce all documents to or from the Bureau relating to the specific charges included within the Notice. LAFLA will not produce any other documents. The basis for the distinction is that other documents are irrelevant to the charges in the Notice and not reasonably calculated to lead to the discovery of relevant information. In addition, some of the other documents are protected by the attorney-client and/or work product privileges: specifically, those involving individual LAFLA clients or prospective clients. Certain of the documents may also implicate the privacy rights of LAFLA clients or prospective clients.

I am still working with LAFLA on the logistics of producing the documents that we have agreed to produce. Trying to locate old emails may be a considerable burden, and we may need to discuss cost shifting in that connection. I'll have more information on this when Ms. Ackel returns from her vacation.

EXHIBIT 3

Please call me with any questions. If Brooks intends to file a motion to compel with respect to the LAFLA subpoena, this office will accept service for LAFLA.

Yours truly,

DAVID PETTIT

087-26\Nylen 2005-09-28 dp

Caldwell Leslie

Caldwell, Leslie, Newcombe & Pettit, PC
1000 Wilshire Boulevard, Suite 600 Los Angeles, CA 90017-2463 Tel 213.629.9040 Fax 213.629.9022 www.caldwell-leslie.com

Fax

To:	Phone Number:	Fax Number:
Gregory A. Nylen Greenberg Traurig, LLP	310-586-7700	310-586-7800

From:	DAVID PETTIT
Date:	September 28, 2005
RE:	Brooks Institute matter
Number of Pages: (including cover page)	3
Client Number:	087-26
Notes:	

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*** TX REPORT ***
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TRANSMISSION OK

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TIME USE	00'23
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RESULT	OK

Caldwell Leslie

Caldwell, Leslie, Newcombe & Pettit, PC
1000 Wilshire Boulevard, Suite 600 Los Angeles, CA 90017-2463 Tel 213.629.9040 Fax 213.629.9022 www.caldwell-leslie.com

Fax

To:	Phone Number:	Fax Number:
Gregory A. Nylen Greenberg Traurig, LLP	310-586-7700	310-586-7800

From:	**DAVID PETTIT**
Date:	September 28, 2005
RE:	Brooks Institute matter
Number of Pages: (including cover page)	3
Client Number:	087-26
Notes:	

EXHIBIT 4

Greenberg Traurig

Gregory A. Nylen
Tel. 310.586.7733
Fax 310.586.7800
nyleng@gtlaw.com

September 30, 2005

VIA FACSIMILE AND U.S. MAIL

David Pettit, Esq.
Caldwell Leslie
1000 Wilshire Boulevard
Suite 600
Los Angeles, California 90017-2463

Re: *Bureau for Private Postsecondary and Vocational Education adv. Brooks Institute of Photography*
OAH No. L2005080993

Dear Mr. Pettit:

I received your letter of September 28 regarding the subpoena *duces tecum* (the "Subpoena") served by Brooks Institute of Photography ("BIP") on the Legal Aid Foundation of Los Angeles ("LAFLA") in the administrative proceeding involving BIP and the Bureau of Private Postsecondary and Vocational Education (the "Bureau"). You indicated in our telephonic meet and confer on September 28 and in a second call we had today that you had already prepared a letter regarding the Subpoena, and that is why it does not reflect some of the items to which we agreed on our calls. To confirm, we agreed to the following:

1. In response to the Subpoena, LAFLA will produce documents relating to all communications between any LAFLA employee (including without limitation Elena Ackel, Esq.) and the Bureau regarding the Bureau's investigation of BIP, and/or any of the allegations or contentions in the July 11, 2005 Notice of Conditional Approval to Operate sent by the Bureau to BIP (the "Notice"), and/or the Notice itself. You also agreed to produce fax and telephone logs regarding such communications. You said LAFLA would produce the foregoing documents regardless of whether BIP files a motion to compel any other documents responsive to the Subpoena, and you said you would get back to me as soon as possible regarding when those documents will be produced. You also stated in our call today that an associate in your firm is going to LAFLA's offices early next week to review documents. I told you I would get back to you to confirm whether BIP still seeks the production of responsive telephone bills, which you represented would be time consuming and expensive for LAFLA to redact and produce.

EXHIBIT 4

LA-FS1\NYLENG\364093v01\86110.011100

2. With respect to documents relating to communications between LAFLA and media representatives or investment banks, you reiterated that you did not consider such documents to be relevant to the issues raised in the Notice. I told you that BIP considers those communications to be highly relevant, because BIP believes LAFLA may be acting as an agent for the Bureau in communicating confidential information concerning the Bureau's investigation of BIP to third parties, including the media and the investment community. BIP is entitled to discover whether third parties such as LAFLA are assisting or involved in the Bureau's investigation, and how LAFLA and other third parties obtained information relating to the investigation. BIP also is entitled to know if the Bureau improperly disclosed confidential information to LAFLA in connection with its investigation, as it relates directly to BIP's unclean hands defense and demonstrates the corruption of the investigative process.

To attempt to avoid a motion to compel the production of these documents, you said you would confirm with your client as to whether or not it had any responsive documents in its possession, custody or control in the first place, and let me know so that I could determine whether BIP needs to file a motion to compel production of this category of documents.

3. With respect to communications between LAFLA, on the one hand, and Mark A. Kleiman, Esq. and/or Janet L. Spielberg, Esq., on the other, relating in any manner to Career Education Corporation, BIP, and/or the Bureau's investigation of and/or proceedings with respect to BIP, you said you were not opposed to providing BIP with a privilege log concerning those communications, but needed to confirm with your client. Please let me know as soon as possible if and when you will provide such a log so that I may evaluate your claim of privilege regarding these documents.

4. With respect to responsive e-mails that LAFLA is willing to produce, you stated that you would let me know how difficult or expensive it may be for your client to gather and produce e-mails dating back to the beginning of 2004.

5. Finally, you also confirmed as you state in your letter of September 28 that you will accept service of any motion to compel production of documents by LAFLA.

Please let me know immediately if the foregoing does not accurately reflect your understanding of our discussion in any way. I look forward to hearing from you shortly regarding the outstanding issues we have yet to resolve regarding the Subpoena.

Sincerely,

Gregory A. Nylen

GAN/dap

LA-FS1\NYLENG\364093v01\86110.011100

EXHIBIT 5

Caldwell Leslie

Caldwell, Leslie, Newcombe & Pettit, PC
1000 Wilshire Boulevard, Suite 600 Los Angeles, CA 90017-2463 Tel 213.629.9040 Fax 213.629.9022 www.caldwell-leslie.com

BY MESSENGER

DAVID PETTIT
pettit@caldwell-leslie.com

October 6, 2005

Gregory A. Nylen
Greenberg Traurig, LLP
2450 Colorado Avenue
Suite 400E
Santa Monica, CA 90404

Re: *Brooks Institute of Photography matter*
OAH Case No. 2005080993
Subpoena Duces Tecum to Legal Aid Foundation of Los Angeles

Dear Mr. Nylen:

Enclosed with this letter are documents Bates stamped LA00001 to LA00040. These documents are being produced by the Legal Aid Foundation of Los Angeles ("LAFLA") in response to the Subpoena Duces Tecum served on LAFLA in this matter, dated September 1, 2005.

My office has reviewed LAFLA's records, including emails and telephone logs from 2004 to the present, in connection with Subpoena. The documents produced with this letter are all documents from 2004 to the present that are or refer to communications between Elena Ackel or her staff, and anyone at the Bureau for Private Postsecondary and Vocational Education (the "Bureau"), with respect to the allegations against Brooks Institute of Photography ("Brooks") contained in the Bureau's July 11, 2005 Notice of Conditional Approval to Operate addressed to Brooks. It is my understanding that it is extremely unlikely that any LAFLA employees other than Ms. Ackel or her staff had any communications with the Bureau with respect to Brooks (or CEC).

As I indicated in my September 28, 2005 letter to you and in our subsequent phone conversations, LAFLA will not produce any additional documents. In response to your request that I let you know whether there are documents that may be responsive to the Subpoena, it is my understanding that there are some documents that may fall within the scope of requests 1, 2, 3, 4, and 5 of the Subpoena.

EXHIBIT 5

Please call me with any questions. As I've mentioned earlier, if Brooks intends to file a motion to compel with respect to the LAFLA subpoena, this office will accept service for LAFLA.

Yours truly,

DAVID PETTIT

cc (w/encl): Dennis Rockway
Rashida Adams

EXHIBIT 6

Caldwell Leslie

Caldwell, Leslie, Newcombe & Pettit, PC
1000 Wilshire Boulevard, Suite 600 Los Angeles, CA 90017-2463 Tel 213.629.9040 Fax 213.629.9022 www.caldwell-leslie.com

BY TELECOPIER AND FIRST CLASS MAIL

DAVID PETTIT
pettit@caldwell-leslie.com

October 7, 2005

Gregory A. Nylen
Greenberg Traurig, LLP
2450 Colorado Avenue
Suite 400E
Santa Monica, CA 90404

Re: *Brooks Institute of Photography matter*
OAH Case No. 2005080993
Subpoena Duces Tecum to Legal Aid Foundation of Los Angeles

Dear Mr. Nylen:

In our telephone conversation this morning, you asked me whether LAFLA has any documents relating to any investigation of Brooks Institute of Photography, or of CEC, by the California Bureau for Private Postsecondary and Vocational Education, or by the California Department of Consumer Affairs, other than the documents that we produced to you yesterday. Without waiving any objection as to whether this request is relevant to the Bureau proceeding referenced above, I can say that my office has checked with LAFLA and LAFLA does not have any such documents.

I am still waiting for information as to LAFLA's fax logs, if any.

Please call me with any questions.

Yours truly,

DAVID PETTIT

cc: Dennis Rockway
Rashida Adams

EXHIBIT 6

Caldwell Leslie

Caldwell, Leslie, Newcombe & Pettit, PC
1000 Wilshire Boulevard, Suite 600 Los Angeles, CA 90017-2463 Tel 213.629.9040 Fax 213.629.9022 www.caldwell-leslie.com

Fax

To:	Phone Number:	Fax Number:
Gregory A. Nylen Greenberg Traurig, LLP	310-586-7700	310-586-7800

From: **DAVID PETTIT**

Date: October 7, 2005

RE: Brooks Institute matter

Number of Pages: 2
(including cover page)

Client Number: 087-26

Notes:

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*** TX REPORT ***
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TRANSMISSION OK

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Caldwell Leslie

Caldwell, Leslie, Newcombe & Pettit, PC
1000 Wilshire Boulevard, Suite 600 Los Angeles, CA 90017-2463 Tel 213.629.9040 Fax 213.629.9022 www.caldwell-leslie.com

Fax

To:	Phone Number:	Fax Number:
Gregory A. Nylen Greenberg Traurig, LLP	310-586-7700	310-586-7800

From:	**DAVID PETTIT**
Date:	October 7, 2005
RE:	Brooks Institute matter
Number of Pages: (including cover page)	2
Client Number:	087-26
Notes:	

EXHIBIT 7

Caldwell Leslie

Caldwell, Leslie, Newcombe & Pettit, PC
1000 Wilshire Boulevard, Suite 600 Los Angeles, CA 90017-2463 Tel 213.629.9040 Fax 213.629.9022 www.caldwell-leslie.com

BY TELECOPIER AND FIRST CLASS MAIL

DAVID PETTIT
pettit@caldwell-leslie.com

October 10, 2005

Gregory A. Nylen
Greenberg Traurig, LLP
2450 Colorado Avenue
Suite 400E
Santa Monica, CA 90404

Re: *Brooks Institute of Photography matter*
OAH Case No. 2005080993
Subpoena Duces Tecum to Legal Aid Foundation of Los Angeles

Dear Mr. Nylen:

I'm writing to close out the two open items with respect to Brooks' recent subpoena to LAFLA. I have learned that LAFLA does not keep fax logs. With respect to communications from Ms. Ackel to Spielberg or Kleiman, without waiving any objection as to whether this request is relevant to the Bureau proceeding referenced above, there are some non-privileged communications relating to Brooks or CEC.

Please call me with any questions.

Yours truly,

DAVID PETTIT

cc: Dennis Rockway
Rashida Adams

EXHIBIT 7

Caldwell Leslie

Caldwell, Leslie, Newcombe & Pettit, PC
1000 Wilshire Boulevard, Suite 600 Los Angeles, CA 90017-2463 Tel 213.629.9040 Fax 213.629.9022 www.caldwell-leslie.com

Fax

To:	Phone Number:	Fax Number:
Gregory A. Nylen Greenberg Traurig, LLP	310-586-7700	310-586-7800

From: **DAVID PETTIT**

Date: October 10, 2005

RE: Brooks Institute matter

Number of Pages: 2
(including cover page)

Client Number: 087-26

Notes:

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*** TX REPORT ***
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TRANSMISSION OK

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Caldwell Leslie

Caldwell, Leslie, Newcombe & Pettit, PC
1000 Wilshire Boulevard, Suite 600 Los Angeles, CA 90017-2463 Tel 213.629.9040 Fax 213.629.9022 www.caldwell-leslie.com

Fax

To:	Phone Number:	Fax Number:
Gregory A. Nylen Greenberg Traurig, LLP	310-586-7700	310-586-7800

From:	**DAVID PETTIT**
Date:	October 10, 2005
RE:	Brooks Institute matter
Number of Pages: (including cover page)	2
Client Number:	087-26
Notes:	

PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen and not a party to the within entitled action. My business address is 1055 W. 7th Street, Suite 250, Los Angeles, California 90017.

On **October 27, 2005**, I served the within document(s) described below as:

NOTICE OF MOTION AND MOTION FOR PROTECTIVE ORDER; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF; DECLARATION OF DAVID PETTIT IN SUPPORT THEREOF; EXHIBITS

on the parties to this action who are listed on the attached Service List.

(X) BY HAND (STATE COURT): By hand-delivering a true copy thereof in sealed envelopes to the offices of the parties listed on the attached Service List.

( ) BY HAND (FEDERAL COURT): By placing a true copy thereof in sealed envelopes and causing such envelopes to be hand-delivered to the offices of the parties listed on the attached Service List.

SEE ATTACHED SERVICE LIST

(X) STATE: I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct of my own personal knowledge, and that I executed this document on **October 27, 2005**, at Los Angeles, California.

( ) FEDERAL: I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct of my own personal knowledge, that I am employed in an office of a member of the Bar of this Court at whose direction this service was made, and that I executed this document on **October 27, 2005** at Los Angeles, California.

/s/ Apex

APEX MESSENGER

CALDWELL, LESLIE, NEWCOMBE & PETTIT

SERVICE LIST

Gregory A. Nylen
Greenberg Traurig, LLP
2450 Colorado Avenue
Suite 400E
Santa Monica, CA 90404

Janet Burns
Office of the Attorney General
300 N. Spring Street
Suite 900N
Los Angeles, CA 90013

CALDWELL, LESLIE, NEWCOMBE & PETTIT

Clarisa Herrera - Fwd: Brooks Institute Matter

From: Elena Ackel
To: Clarisa Herrera
Date: 11/7/2005 5:52 PM
Subject: Fwd: Brooks Institute Matter

put in the file as draft but do not send it out to anybody un til it is filed in court.

>>> "Rashida Adams" <adams@caldwell-leslie.com> 11/7/2005 5:42 PM >>>
PRIVILEGED AND CONFIDENTIAL

Please find attached our draft Opposition to Brooks Institute of Photography's Motion to Certify Facts Justifying Contempt Sanctions. The Brooks Motion and our opposition (as well as our Motion for Protective Order) will be heard next Monday, November 14th at 1:30 p.m. Our Opposition to the Brooks Motion is due this Thursday, November 10th. Once you have had a chance to review the attached draft, please contact me or David with your comments. We will look forward to hearing from you.

In the meantime, please do not hesitate to contact either of us with any questions.

Thank you,
Rashida Adams

Rashida Adams

Caldwell Leslie
Caldwell Leslie Newcombe & Pettit, PC
1000 Wilshire Boulevard, Suite 600
Los Angeles, CA 90017-2463
Tel 213.629.9040 Fax 213.629.9022
adams@caldwell-leslie.com

www.caldwell-leslie.com

CALDWELL, LESLIE, NEWCOMBE & PETTIT
A Professional Corporation
DAVID PETTIT, State Bar No. 067128
1000 Wilshire Blvd., Suite 600
Los Angeles, California 90017-2463
Telephone: (213) 629-9040
Facsimile: (213) 629-9022

Attorney for Non-Party Legal Aid Foundation of Los Angeles

OFFICE OF ADMINISTRATIVE HEARINGS
LOS ANGELES OFFICE

In the Matter of: Bureau for Private Postsecondary and Vocational Education adv. Brooks Institute of Photography	OAH No. L2005080993 **NONPARTY LEGAL AID FOUNDATION OF LOS ANGELES' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO RESPONDENT'S MOTION TO CERTIFY FACTS JUSTIFYING CONTEMPT SANCTIONS AND FOR MONETARY SACTIONS** **Date: November 14, 2005** **Time: 1:30 p.m.** **Place: Office of Administrative Hearings**

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Respondent Brooks Institute of Photography's ("BIP") Motion to Certify Facts Justifying Contempt Sanctions Against the Legal Aid Foundation of Los Angeles and for Monetary Sanctions ("BIP Motion") goes to great lengths to obscure one critical fact: the Legal Aid Foundation of Los Angeles ("LAFLA") is not a party to the proceeding between the Bureau for Private Postsecondary and Vocational Education ("Bureau") and BIP. As a result, BIP is not entitled to the discovery it seeks from LAFLA, and it is not entitled to sanctions against LAFLA.

BIP has ignored the relevant legal authorities which clearly define and limit the bounds of discovery in an OAH proceeding. Instead, BIP apparently seeks to turn the Bureau proceedings against it into a series of mini-trials on every possible issue other than the merits of the Bureau's action against it. Simply because one state agency took an adverse action against BIP does not grant the School license to embroil any person or entity it perceives to be its critic into the litigation. Further, BIP should not be allowed to cause LAFLA, a nonparty, the burden and oppression of responding to a subpoena that is founded on nothing more than baseless suspicions, and which attempts to run roughshod over the privacy rights of numerous nonparties to these proceedings. LAFLA has already sought protection from BIP's subpoena in its previously filed Motion for Protective Order, and for all of the reasons expressed therein, as well as those which follow, LAFLA requests that BIP's Motion be denied.

II. BIP IS NOT ENTITLED TO THE DISCOVERY IT SEEKS FROM LAFLA

A. BIP is Not Entitled to Broad Pre-Hearing Discovery of Nonparties.

BIP acknowledges in its Motion that Section 94975(d)(1) provides the exclusive means of prehearing discovery in proceedings initiated under the statute. However, BIP ignores the confines of the discovery Section 94975(d)(1) allows, most notably that Section 94975(d) does not authorize prehearing discovery of nonparties. The statute specifically states:

> *Any party, including the bureau*, may submit a written request *to any other party* before the hearing to obtain the names and addresses of any person who has personal knowledge, or who the

> party receiving the request claims to have personal knowledge . . . of any of the transactions . . . or other matters that are the basis of the administrative action. In addition, the requesting party shall have the right to inspect and copy any written statement made by that person and any writing, as defined by Section 250 of the Evidence Code, or thing *that is in the custody, or under the control, of the party receiving the request*, and that is relevant and not privileged. *This subdivision shall constitute the exclusive method for prehearing discovery.*

Cal. Education Code § 94975(d)(1) (emphasis added). This provision does not apply to nonparties.[1] BIP ignores this fact and attempts to apply this provision, as well as the Government Code corollary, to its subpoena to LAFLA. However, subpoenas are governed by an entirely different statutory provision: Section 11450.05 *et seq.*, which authorizes the issuance of a subpoena *duces tecum* to allow parties to secure documents for use at the hearing, not for unlimited prehearing discovery. *See* LAFLA Motion for Protective Order (October 27, 2005), at 4-5, for further discussion.

The limited caselaw addressing prehearing discovery in Office of Administrative Hearings ("OAH") proceedings does not lead to a different conclusion. BIP cites *Shively v. Stewart*, 65 Cal.2d 475, 421 P.2d 65 (1969), for the proposition that an administrative law judge may look to general standards for discovery under California law when evaluating a state agency's subpoena power. BIP Motion, at 8. However, not only was *Shively* decided before a 1968 amendment specifically added Section 11507.6 to the Government Code, which mirrors Section 94975(d) of the Education Code and provides explicit guidelines for prehearing discovery, the case only considers discovery of *parties* to the proceeding, not of non-parties. In

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[1] Section 11405.60 of the Government Code defines party: "'Party' includes the agency that is taking action, the person to which the agency action is directed, and any other person named as a party or allowed to appear or intervene in the proceeding." LAFLA is not named as a party, and has made no attempt to appear or intervene in the proceeding between the Bureau and BIP.

Shively, the respondent served a subpoena *duces tecum* on the agency, not on a non-party. Further, the *Shively* court did not sanction the wholesale adoption of statutory civil discovery standards, but instead used a "criminal law analogy" to come to its decision. *See Pacific Lighting Leasing Co. v. Superior Court,* 60 Cal.App. 3d 552, 566, 131 Cal.Rptr. 559, 568 (1976) (holding that accused "not entitled to inspect material as a matter of right without regard to the adverse effects of disclosure and without a prior showing of good cause," and upholding order that documents be produced in court for *in camera* review rather than to defendant). Finally, in *Shively,* the court's decision related only to the production of materials in the possession of the agency, and with respect to even those documents stated that, "in the absence of some additional showing of need and specificity, petitioners are not entitled to discovery of all of the reports and documents gathered by investigators and employees of the board." *Id.* at 482. Thus *Shively* neither provides for prehearing discovery of non-parties, nor adopts the broad discovery standards afforded by statute in civil cases.

BIP cites no other authority to support its arguments that it is entitled to prehearing discovery of a nonparty in this proceeding. And, indeed, the caselaw in this arena does not support BIP's assertion that it may secure such discovery, or that the broad standards of relevance that apply in civil cases are appropriate here, with respect to a non-party. *See Stevenson v. State Bd. of Med. Exam'rs,* 10 Cal. App. 3d 433, 439, 88 Cal.Rptr. 815, 819 (1970) (disallowing prehearing depositions of nonparty witnesses and noting that California Supreme Court in *Shively v. Stewart,* 65 Cal.2d 475, 55 Cal.Rptr. 217 (1966), allowed only limited pre-hearing discovery and did not approve general discovery in administrative proceedings); *Everett v. Gordon,* 266 Cal.App.2d 667, 674, 72 Cal.Rptr. 379, 383 (1968) (holding that licensed real estate brokers were not entitled to take depositions of material witnesses for general discovery purposes in administrative proceeding); *see also Gilbert v. Superior Court,* 193 Cal.App.3d 161, 166, 238 Cal.Rptr. 220, 222 (1987) (holding that former Section 11510 could not be used to compel documents 21 days before hearing).

BIP explicitly attempts to both turn the OAH proceeding into a civil matter, and to confer party status on LAFLA, neither of which is appropriate. In order to bolster its arguments, BIP

makes reference to cases and standards decided under the Civil Discovery Act, however this Act does not apply in administrative proceedings. *See Romero v. California State Labor Comm'r*, 276 Cal.App. 2d 787, 790, 81 Cal.Rptr. 281, 284 (1969) (holding that "except for disciplinary proceedings before the State Bar . . . the Civil Discovery Act does not apply to administrative adjudication.").

Moreover, even under Civil Discovery Act standards, BIP does not have free reign to conduct a fishing expedition in the records of third parties for materials that are not reasonably calculated to lead to the discovery of admissible evidence. *See Monarch Healthcare v. Superior Court*, 78 Cal.App. 4th 1282, 1290, 93 Cal.Rptr. 2d 619, 625 (2000) (noting that "'the distinction between parties and nonparties reflects the notion that, by engaging in litigation, the parties should be subject to the fully panoply of discovery devices, *while nonparty witnesses should be somewhat protected from the burdensome demands of litigation.*'") (italics in original) (*citing* 1 Cal. Civil Discovery Practice Cont.Ed.Bar 1999 § 2.14, at 55); *Los Angeles Transit Lines v. Superior Court*, 119 Cal.App. 2d 465, 467-468, 259 P.2d 1004, 1005-1006 (1953) (holding that witness has right to be free from unreasonable searches and seizures, thus "defendant must first show the materiality of the desired evidence and cannot obtain permission to search through all of plaintiff's papers and records merely in the hope or expectation that the investigation will disclose favorable information.")(*citing McClatchy Newspapers v. Superior Court*, 26 Cal.2d 386, 159 P.2d 944, 950 (1945)).

Thus, nonparty LAFLA has acted with "substantial justification" in resisting full compliance with BIP's impermissible subpoena. *See* Cal. Gov't Code § 11455.10(e) (authorizing sanctions for failure or refusal, *without substantial justification,* to comply with a subpoena). As such, LAFLA is not properly subject to contempt, and further, a protective order is warranted to excuse LAFLA from any further compliance with BIP's unreasonable requests for prehearing discovery that is not relevant to these proceedings.

B. *BIP's Subpoena Requests are Not Calculated to Lead to the Discovery of Admissible Evidence, and Burden Constitutionally Protected Privacy Rights.*

1. BIP Must Demonstrate a Compelling Need for Documents that Implicate Constitutionally-Protected Privacy Rights.

Nonparty LAFLA has requested a protective order regarding BIP's subpoena, and, in its Motion for Protective Order, argued that BIP's requests were overbroad, called for completely irrelevant documents, and impermissibly burdened the privacy rights of LAFLA employees and other nonparties, which are protected by Article I, Section 1 of the California Constitution. The relevance of the documents sought is therefore of primary importance, and indeed, in order to compel disclosure of these documents, BIP must even meet a higher standard than relevance. According to the court in *Save Open Space Santa Monica Mountains v. Superior Court,* 84 Cal.App. 4th 235, 252, 100 Cal.Rptr. 2d 725, 737 (2000), when associational privacy rights are implicated by a discovery request, "the party seeking discovery of private matters must do more than satisfy the relevancy standard . . . . He is required to demonstrate a 'compelling need' for the discovery, and that 'compelling need must be so strong as to outweigh the privacy right when these two compelling interests are carefully balanced.'" (*citing Lantz v. Superior Court*, 28 Cal.App. 4th 1839, 1853, 34 Cal.Rptr. 2d 358 (1994). *See also Planned Parenthood Golden Gate v. Superior Court*, 83 Cal.App. 4th 347, 99 Cal.Rptr. 2d 627 (2000) (finding discovery order too broad where rights of non-parties to freely and privately associate with party to litigation was implicated); *ETSI Pipeline Project v. Burlington Northern, Inc.*, 674 F. Supp. 1489, 1490 (D.D.C. 1987) (granting motion to quash where subpoena was directed at nonparty public interest organization's contacts with other nonparties, and record did not demonstrate that information sought went to heart of suit, or that alternative sources of information had been exhausted).

BIP's Motion fails to adequately explain how the documents it seeks from LAFLA are relevant to the core issues before the OAH. Instead, BIP spins out theories of a conspiracy against it, and apparently seeks to conduct a series of mini-trials in order to litigate a whole range

of issues that are only peripherally related to the Bureau's adverse decision. However, even with respect to BIP's possible defenses in the hearing, only the Bureau's communications with LAFLA regarding the investigation of BIP, which culminated in the Notice, are at all relevant. *See e.g. California Satellite Sys., Inc. v. Nichols*, 170 Cal.App.3d 56, 70, 216 Cal.Rptr. 180, 188 (1985) (noting that doctrine of unclean hands applies "only if the inequitable conduct occurred in a transaction directly related to the matter before the court and affects the equitable relationship between the litigants."). LAFLA agreed to, and did, produce all of the documents in its possession, custody, and control related to this issue.[2]

2. BIP's Subpoena *Duces Tecum* is Designed to Target Nonparties Rather than to Secure Documents for the OAH Proceeding.

BIP's Motion clearly illustrates that the School is not interested in procuring documents for use at the hearing. Instead BIP seeks to engage in prehearing discovery targeted at the School's perceived critics. The School's Motion states that "BIP is investigating a potential conspiracy between the Bureau, the class action lawyers, Wall Street firms and others (including [LAFLA employee] Ms. Ackel) to trade on bad news about CEC stock arising from publicity following the Bureau's leaded investigation results regarding BIP to Ms. Ackel, Mr. Kleiman and the investment community." BIP Motion, 12:7-10. BIP's "investigation" is certainly outside the scope of this OAH proceeding, which relates only to the Notice issued to BIP. Further, BIP's Motion also states that it is "entitled to discover the nature of Ms. Ackel's communications to the media outlets that carried stories relating to the investigation of BIP, including the story . . . featuring Ms. Ackel's baseless and defamatory comments regarding the school." BIP Motion, 12:11-13. This statement, combined with the overly broad nature of BIP's subpoena requests,

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[2] BIP references three documents that LAFLA produced, but it neglected to mention that LAFLA had (and produced) only two other documents that reflected communications between the Bureau and LAFLA regarding the BIP investigation. Notably, these two documents, both e-mails, directly contradict BIP's theories. As reflected in the documents, on July 20, 2005, Ms. Ackel wrote an e-mail to Barbara Ward, Bureau Chief, which begins: "I was encouraged by the action you [sic] agency took against Brooks. I really admire that the agency has finally taken the appropriate action." Attached hereto as Exhibit A. This e-mail does not suggest that Ms. Ackel, or any other LAFLA employee, was assisting the Bureau with the investigation or had a hand in the outcome. If anything, it suggests the contrary.

strongly suggest that BIP's primary interest is not in securing documents for use at the hearing regarding the Bureau's Notice, but rather to garner evidence in order to develop claims of its own against nonparties. Thus, for example, BIP seeks documents related to CEC, BIP's parent company, even though CEC is not implicated in these proceedings.[3] The most liberal interpretation of the possible breadth of an OAH subpoena *duces tecum* would not authorize a respondent to use a subpoena for its own investigate purposes relating to other potential matters.

Given the minimal, if any, evidentiary value and relevance of the materials BIP has requested by means of its subpoena *duces tecum*, it is clear that the privacy interests of LAFLA employees and other nonparties outweigh BIP's need for the documents as a party to the OAH proceeding.

III. BIP'S REQUEST FOR MONETARY SANCTIONS IS ENTIRELY MERITLESS

BIP invokes Section 11455.30 of the Government Code to support its request for monetary sanctions against LAFLA. However, Section 11455.30 only authorizes the OAH presiding officer to order *a party* to pay the reasonable expenses of *another party* to the proceedings. As discussed, *supra,* LAFLA is not a party to the proceedings between the Bureau and BIP. *Compare* Cal. Gov't Code § 11455.30(a) *and* Cal. Gov't Code § 11455.10 (use of term "person" as opposed to "party").

Further, even if Section 11455.30(a) applied to nonparties, LAFLA has engaged in no "bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay," and BIP makes only a general assertion to the contrary.[4] Resisting an overly broad nonparty subpoena which was designed to secure impermissible prehearing discovery from a nonparty, and which impinges on the constitutionally-protected rights of nonparties, is far from frivolous, and is specifically authorized by the Government Code. *See* Cal. Gov't Code § 11450.30. In addition,

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[3] BIP's renewed request for telephone bills, in addition to being overbroad and unduly burdensome, further suggests that the School's primary motivation is something other than discovering what information was disseminated by the Bureau.

[4] BIP's entire argument for sanctions is a vague reference to "the reasons set forth above," and an allegation that LAFLA's "intransigence also was unnecessary because the LAFLA [sic] knew that these issues would be squarely raised in this Motion." BIP Motion at 15:12-14. These weak statements merely illustrate that BIP's request for sanctions completely lacks merit.

LAFLA's efforts to reach a compromise with BIP, as well as its production of documents, demonstrate that nonparty LAFLA has acted with nothing but good faith in the face of BIP's unreasonable requests.

IV. CONCLUSION

For the foregoing reasons, BIP's Motion to Certify Facts Justifying Contempt Sanctions Against the Legal Aid Foundation of Los Angeles and for Monetary Sanctions, should be denied.

DATED: November 8, 2005

Respectfully submitted,

CALDWELL, LESLIE, NEWCOMBE & PETTIT
A Professional Corporation

By _____
DAVID PETTIT
Attorneys for Legal Aid Foundation of Los Angeles

Clarisa Herrera - Fwd: RE: Brooks Institute matter

From: Elena Ackel
To: Clarisa Herrera
Date: 11/7/2005 4:19 PM
Subject: Fwd: RE: Brooks Institute matter

Put these documents in the file. More documents will arrive in the mail. Put in the file and give me a set right away to read and lose.
>>> "Rashida Adams" <adams@caldwell-leslie.com> 11/7/2005 3:43 PM >>>
Elena-

Attached to this e-mail are the three attachments to BIP's Motion that David mentioned in his e-mail last week. I am also sending a complete set of the attachments to your offices by regular mail.

Please do not hesitate to contact me if you have any questions.

Thank you,
Rashida Adams

Rashida Adams

Caldwell Leslie
Caldwell Leslie Newcombe & Pettit, PC
1000 Wilshire Boulevard, Suite 600
Los Angeles, CA 90017-2463
Tel 213.629.9040 Fax 213.629.9022
adams@caldwell-leslie.com

www.caldwell-leslie.com

-----Original Message-----
From: Elena Ackel [mailto:EAckel@lafla.org]
Sent: Monday, November 07, 2005 3:18 PM
To: David Pettit
Cc: Rashida Adams
Subject: RE: Brooks Institute matter
Importance: High

** High Priority **

I cannot find the documents you are referring to in my email and the search function is very slow. You mentioned that these documents were attached to their motion but I do have declarations attached to the sanction motion but I do not see the documents you mentioned. Please advise. I will be here this afternoon. I am going to call you. could you email me these documents because I cannot find them in my email Also my fax number is 213-640-3911.

>>> "David Pettit" <pettit@caldwell-leslie.com> 11/2/2005 3:36 PM >>>
Thanks. David
From: Elena Ackel [mailto:EAckel@lafla.org]
Sent: Wednesday, November 02, 2005 3:15 PM
To: David Pettit; Elena Ackel
Subject: Re: Brooks Institute matter
Dear David,

FYI: This is Clarisa, just writing to let you know that Elena is in Minneapolis at a Consumer Law conference. She will be back in the office on Monday, and won't get your message until then. Thanks.

= Clarisa =

>>> "David Pettit" <pettit@caldwell-leslie.com> 10/31/2005 1:18:40 PM >>>
Elena: I have a couple of questions about documents that Brooks attached to its discovery motion. First, there is a 12-14-2004 email from Kelly Flynn at UBS Research that appears to be a cover letter for the December, 2004 Bureau report on Brooks. It is sent to a third party (i.e. not LAFLA or Brooks). Did you have any contact with anyone from UBS about this? Do you know how UBS got a copy of the December, 2004 report? Second, who are Martina Fernandez-Rosario and Marcia Trott. Are they staff of the Bureau? Sheila Hawkins forwarded to you on 12/4/04 an 11/04/04 email from Fernandez-Rosario to Trott. Why did Sheila do this? Last, it looks like Sheila Hawkins sent you an email on December 9, 2004 containing the December 1, 2004 Bureau report. Why did she send this? Thanks. David

From: Elena Ackel
To: Clarisa Herrera
Date: Tue, Dec 14, 2004 11:46 AM
Subject: Fwd: Brooks Institute of Photography

>>> <Sheila_Hawkins@dca.ca.gov> 12/9/2004 12:05:50 PM >>>
Attached is a copy of a December 1, 2004 Renewal Application and Compliance Visit report on Brooks Institute of Photography. If you have questions about the findings, contact Marcia Trott, Senior Education Specialist, (916) 445-3427, ext. 3014 or by email.

(See attached file: Brooks Institute of Photography Renewal-Compliance Visit Nov 2004.doc)

Sheila M. Hawkins
Education Administrator
Degree Program
(916) 445-3428, ext. 3112
(916) 323-6571 fax

REDACTED

-----Original Message-----
From:
Sent: Tuesday, December 14, 2004 10:53 AM
To: Tracy Lorenz
Subject: IMPORTANT: Regulatory Issues at Brooks

Tracy,

Thanks again for taking the time to stop by today. It was great to see you as always.

I have attached a new document that is circulating. It is a very critical evaluation of Brooks Institute of Photography by the Bureau for Private Postsecondary and Vocational Education in the state of California.

Even if you cannot read it today, I would forward it to someone in your organization that can read it immediately.

Please note that it was dated December 1, and you have until December 31 to reply. APOL and COCO have made a huge deal about how these kinds of documents have to remain confidential until you have a chance to reply.

Let's discuss when you have a minute.

-----Original Message-----
From: Kelly.Flynn@ubs.com [mailto:Kelly.Flynn@ubs.com]
Sent: Tuesday, December 14, 2004 11:27 AM
To:

i was able to get this in pdf today...check it out

Kelly Flynn, CFA
Business & Professional Services Analyst
UBS Investment Research
ph: 212-713-1037
fax: 212-969-7740

From: <Sheila_Hawkins@dca.ca.gov>
To: <EAckel@lafla.org>
Date: Thu, Nov 4, 2004 9:34 AM
Subject: Brooks Institute of Photography

Sheila M. Hawkins
Education Administrator
Degree Program
(916) 445-3428, ext. 3112
(916) 323-6571 fax

----- Forwarded by Sheila Hawkins/BPPVE/DCANotes on 11/04/2004 09:33 AM -----

Marcia Trott
11/04/2004 09:25 AM

To: Sheila Hawkins/BPPVE/DCANotes@DCANotes, Lynnelle Case/BPPVE/DCANotes@DCANotes, Steve Baker/BPPVE/DCANotes@DCANotes, Pamela Martin/BPPVE/DCANotes@DCANotes
cc:
Subject: Brooks Institute of Photography

----- Forwarded by Marcia Trott/BPPVE/DCANotes on 11/04/2004 09:25 AM -----

"Fernandez-Rosario, Martina" <Martina.Fernandez-Rosario@ed.gov>
11/01/2004 04:56 PM

To: <Marcia_Trott@dca.ca.gov>
cc:
Subject: Brooks Institute of Photography

Hello Marcia,

Dale forwarded your message to me about the upcoming visit to Brooks Institute of Photography. About 8 months ago, this school became the center of attention for some of the regulatory agencies. The former registrar/Dean filed a complaint with the accrediting agency. The letter was also forwarded to the local newspaper. The allegations made were related to changing of academic grades by faculty, overstatement of enrolment numbers to make the company look better, giving students passing grades eventhough they should have failed, etc.

The accrediting agency put a team of people together and conducted an unannounced visit to the school. They looked at the issues raised by the former employee, but were not able to find any evidence of wrongdoing on

the part of the school. The accrediting agency asked the employee for more specific information regarding the allegations, but nothing was ever provided by the former employee or her attorney. Since the accrediting agency closed the complaint after finding nothing of concern at the school, we determined that no further action was needed on our part.

The only other issue with this school is that they have had problems with late refunds and Federal Work Study timesheets in the past. The most recent audit showed some improvements in both areas.

Please let us know if you identify any areas of concern during your visit.

Thank you.

Martina
(415)556-4294

Clarisa Herrera - documents re: 1st Amendment and US PIRG

From: "Deepak Gupta" <dgupta@citizen.org>
To: <VolunteerELA@lafla.org>
Date: 11/8/2005 2:32 PM
Subject: documents re: 1st Amendment and US PIRG
CC: <cherrera@lafla.org>, <eackel@lafla.org>

Jeanne,
I faxed a series of documents relating to our representation of U.S. PIRG, NACA, and TLPJ in subpoena matters. Please let me know if you don't receive the fax.

Deepak

Deepak Gupta
Public Citizen Litigation Group
1600 20th Street, NW
Washington, DC 20009
202.588.7739 (phone)
202.588.7795 (fax)

http://www.citizen.org/litigation

>>> "Volunteer East LA" <VolunteerELA@lafla.org> 11/8/2005 4:20 PM >>>
Dear Mr. Gupta:

Thank you for taking the time to look and then forwarding the documents to LAFLA. I would greatly appreciate it if you could also CC Elena Ackel and Clarisa Herrera when forwarding those documents to us.

Elena Ackel's email is: eackel@lafla.org
Ms. Ackel's phone # is (213) 640-3927

Clarisa Herrera's email is: cherrera@lafla.org
her # is: (213) 640-3926.

Thank you!

Jeanne Kuo

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF WYOMING, *Plaintiff,* v. UNITED STATES DEPARTMENT OF AGRICULTURE, *et al.*, *Defendants,* and WYOMING OUTDOOR COUNCIL, *et al.*, *Intervenors.*	No. 1:02MS00252 (RMU)

CROSS-MOTION OF UNITED STATES PUBLIC INTEREST RESEARCH GROUP, INC., FOR A PROTECTIVE ORDER AND TO QUASH SUBPOENAS

United States Public Interest Research Group, Inc. ("U.S. PIRG"), hereby moves pursuant to Federal Rules of Civil Procedure 26(c) and 45(c)(3) for an order protecting it from and quashing subpoenas issued from this court pursuant to Federal Rule of Civil Procedure 45 by the State of Wyoming in connection with an action in the United States District Court for the District of Wyoming captioned *State of Wyoming v. United States Department of Agriculture, et al.*, No. 01CV-086B. The subpoenas, copies of which are attached as Exhibit E to Wyoming's Motion to Compel in this miscellaneous action, seek both documents and a Rule 30(b)(6) deposition of U.S. PIRG, which is not a party to the underlying action in Wyoming. U.S. PIRG requests that the subpoenas be quashed or limited because their enforcement would infringe and chill the exercise of rights protected by the First Amendment to the United States Constitution, and because they would impose undue burden and expense on U.S. PIRG.

As required by Local Rule 7.1(m), counsel for USPIRG conferred with counsel for the State of Wyoming concerning this motion. The parties were unable to resolve or narrow their disagreement, and Wyoming will oppose this motion.

The grounds for this motion are set forth in more detail in the accompanying Memorandum of Points and Authorities (which also serves as U.S. PIRG's opposition to Wyoming's Motion to Compel).

Respectfully submitted,

Of Counsel:

Molly Cochran
General Counsel
Tracey Bolotnick
Assistant General Counsel
U.S. PIRG
29 Temple Place
Boston MA 02116
(617) 747-4305
(617) 292-8057 (fax)

Dated: June 14, 2002

Scott L. Nelson
D.C. Bar No. 413548
Public Citizen Litigation Group
1600 20th Street, N.W.
Washington D.C. 20009-1001
(202) 588-7724
(202) 588-7795 (fax)

Attorney for U.S. PIRG

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF WYOMING, *Plaintiff.* v. UNITED STATES DEPARTMENT OF AGRICULTURE, *et al.*, *Defendants.* and WYOMING OUTDOOR COUNCIL, *et al.*, *Intervenors.*	No. 1:02MS00252 (RMU)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF U.S. PIRG'S CROSS-MOTION FOR A PROTECTIVE ORDER AND TO QUASH SUBPOENAS, AND IN OPPOSITION TO THE STATE OF WYOMING'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS PURSUANT TO FED. R. CIV. P. 45 AGAINST NON-PARTY WITNESSES

INTRODUCTION

This case presents important questions arising under the First Amendment to the United States Constitution. The non-party subpoenas at issue, served on the United States Public Interest Research Group, Inc. ("U.S. PIRG"), by the State of Wyoming in connection with litigation pending in the District of Wyoming, seek access to documents and information at the core of U.S. PIRG's First Amendment-protected activities and communications. To make matters worse, the information sought is unnecessary and irrelevant to the resolution of the underlying matter. The subpoenas thus do not survive even the garden-variety balancing of relevance, need and burden required to justify enforcement of any subpoena against a non-party, let alone the heightened showing necessary where First Amendment interests are at stake.

Accordingly, the Court should grant U.S. PIRG a protective order, quash the subpoenas, and deny Wyoming's Motion to Compel.

THE UNDERLYING ACTION

The underlying action, *State of Wyoming v. United States Department of Agriculture, et al.*, No. 01CV-086B (D. Wyo.), is a lawsuit brought against the United States Department of Agriculture and other federal agencies and officers (the "federal defendants") by the State of Wyoming challenging four major sets of regulations and policies promulgated by the United States Forest Service during the Clinton Administration (collectively referred to as the "Roadless Initiative"). The regulations under attack by Wyoming would prevent the destruction of several million acres of forest land by prohibiting the building of new roads.

U.S. PIRG is not a party to the underlying action. Its only connection with the case is that Wyoming has alleged that the federal defendants established a *de facto* "advisory committee" within the definition of the Federal Advisory Committee Act, 5 U.S.C. App. 2, §§ 1 *et seq.* ("FACA"), comprising U.S. PIRG and several other nonprofit environmental advocacy groups, and that this committee "advised" the federal defendants about the Roadless Initiative. Wyoming claims that the federal defendants failed to follow FACA standards and procedures in creating and operating the alleged committee, and that the alleged FACA violations somehow infect the legality of the rules subsequently promulgated by the federal defendants.

Several environmental organizations (not including U.S. PIRG) intervened as defendants in the underlying action in support of the federal defendants and the Roadless Initiative. Both the federal defendants and the intervenors denied that a FACA-governed advisory committee was established, and moved for judgment on the pleadings on Wyoming's FACA claim. Their motions pointed out that to be an "advisory committee" under FACA, a group must be

"established or utilized" by one or more federal agencies. 5 U.S.C. App. 2, § 3(2)(C). "[A]n advisory panel is 'established' by an agency only if it is actually formed by the agency," *Byrd v. U.S. Environmental Protection Agency*, 174 F.3d 239, 245 (D.C. Cir. 1999), and it is "utilized" by an agency only if it is "so 'closely tied' to an agency as to be amenable to 'strict management by agency officials.'" *Food Chemical News v. Young*, 900 F.2d 328, 333 (D.C. Cir. 1990) (quoting *Public Citizen v. United States Department of Justice*, 491 U.S. 440, 461, 457-58 (1989)). The federal defendants and intervenors argued that the facts alleged in Wyoming's complaint were facially inadequate to state a claim of federal establishment of or strict control over an advisory committee.

The Wyoming district court agreed that the defendants and intervenors were "correct in stating that the term 'established' under FACA indicates that the advisory group must be formed or created by the Government, with the term 'utilized' meaning a group that is so closely tied to an agency as to be amenable to strict management by government officials." *Wyoming v. Department of Agriculture*, 2002 WL 959405, at *6 (D. Wyo. May 9, 2002). The court also stressed that "FACA is not intended to cover all groups that the President or Agency seeks advice from." *Id.* Nonetheless, the Court held that Wyoming's allegations that the federal defendants had "established" and "utilized" a committee were sufficient to state a claim, and that discovery could proceed on whether the federal defendants had in fact created a FACA committee. *Id.* at *7.

THE SUBPOENAS AT ISSUE HERE

Wyoming responded by issuing broad discovery requests to the federal defendants and the intervenors and by noticing the depositions of numerous current and former federal officials. But Wyoming did not stop there. In addition, it has issued a number of extremely broad

subpoenas for documents and depositions to non-party environmental organizations.[1] The subpoenas to U.S. PIRG range well beyond the narrow FACA issue on which the Wyoming court in the underlying action has said it would permit discovery. Indeed, the subpoenas appear to be part of a nationwide initiative to delve into the most confidential and sensitive of First Amendment-protected information about communications within and among the nation's environmental advocacy organizations. Thus, the subpoenas to U.S. PIRG seek the following broad categories of documents:

> 1. ... all daytimers, calendars, and/or diaries for the period of time between January 1999 and January 2001 *that relate in any way to scheduling of the witness' activities* undertaken on behalf of U.S. PIRG;
>
> 2. ... *any and all documents that relate to the [Roadless Initiative].*
>
> 3. ... *any and all documents that relate to the Roadless Initiative* ... that were *received from or provided to* any member, employee or agent of [the federal defendants], the [President's] Council on Environmental Quality, the Heritage Forests Campaign, the Wilderness Society, the Natural Resources Defense Council, the United States Public Interest Research Group, Earthjustice Legal Defense Fund, Audubon Society, Sierra Club, the Coalition on the Environment and Jewish Life, the Wyoming Outdoor Council, Biodiversity Associates, Pacific Rivers Council, Defenders of Wildlife, *and/or any conservation or environmental group not identified above.*
>
> 4. ... any and all documents of any kind ... *that relate to any meetings or conversations held with any member, employee or agent of any of the groups identified in request No. 3* above with regard to the Roadless Initiative.
>
> 5. ... any and all documents of any kind ... *that relate in any way to any of the groups identified in request No. 3* above regarding the Roadless Initiative.

[1] In addition to U.S. PIRG, Wyoming issued subpoenas from this Court to the Earthjustice Legal Defense Fund and the Heritage Forests Campaign. Wyoming also issued a subpoena from the Southern District of New York to the Coalition on the Environment and Jewish Life, and one from the District of Oregon to Mr. Ken A. Rait, an individual formerly associated with the Heritage Forests Campaign.

(Emphasis added.) In addition, the subpoenas seek to compel U.S. PIRG to provide testimony at a Rule 30(b)(6) deposition regarding:

> 1. *[a]ll contacts, conversations, meetings, or information exchanged* ... [with any] representatives, employees or members of [any of the groups identified in document request No. 3 above] related to any aspect of the [Roadless Initiative].
>
> 2. *[a]ll activities undertaken by [U.S. PIRG]* with regard to any aspect of the Roadless Initiative.
>
> 3. [U.S. PIRG's] *knowledge or information regarding any aspect of the Roadless Initiative.*

(Emphasis added.)

U.S. PIRG served Wyoming with a timely written objection to the document subpoenas, which elicited Wyoming's Motion to Compel.[2] U.S. PIRG now cross-moves for a protective order and an order quashing the document subpoenas and the Rule 30(b)(6) deposition notice and subpoena.

ARGUMENT

The subpoenas served on U.S. PIRG are inappropriate because (1) enforcing them would infringe U.S. PIRG's First Amendment rights, and (2) all the evidence necessary to prove or disprove Wyoming's FACA claim—under which it must show the existence of a committee either established directly by the government or subject to strict management by federal officials—can be obtained from the federal defendants. It is improper and an abuse of discovery for Wyoming to conduct a burdensome and invasive fishing expedition in non-party waters that

[2] Wyoming's Motion to Compel states that Wyoming offered to "narrow" the subpoenas to exclude materials that are already publicly available. Even as so "narrowed" the subpoenas still seek all U.S. PIRG's internal materials and all of its communications with other groups regarding advocacy efforts related to the Roadless Initiative. Thus, the subpoenas still broadly seek materials going to the heart of U.S. PIRG's First Amendment-protected interests.

can turn up nothing but unnecessary, cumulative and duplicative information and can only serve to penalize and chill the exercise of fundamental First Amendment rights.

I.
THE SUBPOENAS INFRINGE U.S. PIRG'S FIRST AMENDMENT RIGHTS.

A. The Material Sought by the Subpoenas Includes Information Protected by the First Amendment.

The information sought by Wyoming's subpoenas goes to the heart of U.S. PIRG's participation in First Amendment-protected activities—namely, its association with other groups to develop positions on controversial issues and to plan and carry out advocacy of those positions. As an advocacy group, U.S. PIRG must have the ability to keep its deliberations on sensitive and controversial political issues private. Requiring U.S. PIRG to divulge the details of its internal strategic planning would likely result in self-censorship and a hesitancy to raise important issues rather than have its private thoughts and ideas turned over to the courts, political opponents or the public. Compelling U.S. PIRG to reveal communications with other advocacy groups in furtherance of efforts to influence the formulation of government policy would have a substantial chilling effect on its willingness and ability to exercise its right to petition the government for redress of grievances. Moreover, U.S. PIRG's associational rights would be compromised as other advocacy groups would be reluctant to associate with it after losing confidence in its ability to keep the details of its meetings and interactions private, and U.S. PIRG's communications with such groups would be inhibited by concerns about public exposure of private matters.

That the interests in unfettered freedom to associate with others and to petition the government for the adoption of favored policies lie at the core of the First Amendment has been recognized for many decades. *See, e.g., NAACP v. Alabama*, 357 U.S. 449 (1958); *FEC v.*

Machinists Non-Partisan Political League, 655 F.2d 380 (D.C. Cir. 1981); *International Action Center v. United States*, 2002 WL 753908 (D.D.C. April 15, 2002). In *NAACP v. Alabama*, the Supreme Court, in refusing to permit the State of Alabama to compel the NAACP to provide information concerning its associational activities, stated:

> Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized . . . It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of ... freedom of speech.
>
> * * *
>
> This Court has recognized the vital relationship between freedom to associate and privacy in one's associations.

357 U.S. at 460-62. These concerns have led courts to provide the strongest First Amendment protection to the right of groups with common interests to associate together for the purpose of petitioning all branches of the government. *See, e.g., NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982); *Healy v. James*, 408 U.S. 169 (1972); *California Motor Transport v. Trucking Unlimited*, 404 U.S. 508, 510-11 (1972); *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539 (1963); *Sweezy v. State of New Hampshire*, 354 U.S. 234 (1957); *Boorda v. Subversive Activities Control Board*, 421 F.2d 1142 (D.C. Cir. 1969).

B. When Material Implicating Associational Rights Is Sought in Discovery, This Court Applies a Strict First Amendment Balancing Test.

As *NAACP v. Alabama* shows, the courts have long recognized that one way in which First Amendment freedoms may be burdened is through government-enforced disclosure of private associational and political activities. Civil discovery, like other forms of forced disclosure, has the potential to chill First Amendment-protected activities by compelling burdensome and unwanted disclosures. Thus, when First Amendment concerns such as the ones here are at stake in a discovery dispute, a court must weigh the possibility of infringement

against the need for disclosure. *See Black Panther Party v. Smith*, 661 F.2d 1243, 1264-70 (D.C. Cir. 1981).[3] In *Black Panther Party*, the D.C. Circuit stated:

> In our view, a balancing inquiry should be conducted to determine whether a claim of privilege should be upheld. Before granting a motion to compel discovery and forcing a plaintiff to choose between disclosure and sanctions, the plaintiff's First Amendment claim should be measured against the defendant's need for the information sought. If the former outweighs the latter, then the claim of privilege should be upheld. In this way the interests of both parties can be protected.

661 F.2d at 1266.

Because this balancing test deals with potential abridgement of an important constitutional right, the interests weighing in on the side of disclosure must be exceptionally strong. Indeed, the Supreme Court has stated that where the material sought in discovery would abridge a party's freedom of association, discovery would be appropriate only if the state could demonstrate a compelling interest in disclosure. *NAACP v. Alabama, supra*, 357 U.S. at 463. Likewise, in *Buckley v. Valeo*, 424 U.S. 1, 64 (1976), the Supreme Court stated:

> We have long recognized that significant encroachments on First Amendment rights of the sort that compelled disclosure imposes cannot be justified by a mere showing of some legitimate governmental interest. Since *NAACP v. Alabama* we have required that the subordinating interests of the State must survive exacting scrutiny. We have also insisted that there be a "relevant correlation" or "substantial relation" between the governmental interests and the information required to be disclosed.

The need for strict scrutiny to justify compelled disclosure of First Amendment-protected information carries with it the requirement that the Court conduct its balancing with a thumb on

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[3] Although as Wyoming points out in its Motion to Compel, the *Black Panther Party* decision was later vacated as moot, *Smith v. Black Panther Party*, 458 U.S. 1118 (1982), this Court reaffirmed its precedential value in *International Action Center v. United States*, 2002 WL 753908 (D.D.C. 2002), by stating that "there is no suggestion in later case law in this Circuit that its reasoning or analysis has been rejected or abandoned by our Court of Appeals" and noting that it has been cited repeatedly since. *Id.* at n.6.

the scales against enforcement of discovery requests that impinge on First Amendment interests. As the D.C. Circuit put it in *FEC v. Machinists*, "before a [government] body can compel disclosure of information which would trespass upon first amendment freedoms, a 'subordinating interest of the State' must be proffered, and it must be 'compelling.'" 655 F.2d at 389 (citations omitted). *See also Black Panther Party*, 661 F.2d at 1267 (determining "whether discovery should be ordered requires a detailed and painstaking analysis").

A party seeking protection from disclosure need not show conclusively that its rights would be impaired before this balancing test is employed. It must simply allege, as U.S. PIRG does herein, that such a result is probable. *Black Panther Party*, 661 F.2d at 1267-68 ("the litigant seeking protection need not prove to a certainty that its First Amendment rights will be chilled by disclosure. It need only show that there is some probability that disclosure will lead to reprisal or harassment"). *Accord Snedigar v. Hoddersen*, 786 P.2d 781, 783 (Wash. 1990) (holding that simple allegations of harm to First Amendment rights are enough to trigger a court's obligation to employ the balancing test).

C. A Protective Order Should Issue Absent a Compelling Showing of Need.

In applying the balancing test, a court must carefully measure the need for the disclosure. "Mere speculation that information might be useful will not suffice; litigants seeking to compel discovery [that traverses First Amendment rights] must describe the information they hope to obtain and its importance to their case with a reasonable degree of specificity." *Black Panther Party*, 661 F.2d at 1268. Furthermore, Wyoming must show (1) that the information sought is not just relevant to a claim but *crucial* to it, and (2) that the information is not available from any other source. *Id.* ("The interest in disclosure will be relatively weak unless the information 'goes to the heart of the matter,' that is, unless it is crucial to the party's case ... [and] courts must

determine whether the litigants seeking disclosure have pursued alternative sources."). *See also Federal Election Comm'n v. The Larouche Campaign*, 817 F.2d 233, 234 (2d Cir. 1987) ("[W]here the disclosure sought will compromise the privacy of individual political associations, and hence risks a chilling of unencumbered associational choices, the [plaintiff] must make some showing of need for the material sought *beyond its mere relevance* ....") (emphasis added). And "even when the information sought is crucial to a litigant's case, disclosure should be compelled only after the litigant has shown that he has exhausted every reasonable alternative source of information." *Black Panther Party*, 661 F.2d at 1268. As the *Black Panther Party* court pointed out, the importance of protecting First Amendment rights dictates that "compelled disclosure ... [is] normally the end, and not the beginning, of the inquiry." *Id.* (citation omitted).

Only a few weeks ago this Court followed the *Black Panther Party* balancing test and issued a protective order barring discovery of First Amendment-protected information in *International Action Center v. United States*, 2002 WL 753908 (D.D.C. April 15, 2002) (Kessler, J.). *International Action* involved a group that acquired a permit to demonstrate against President Bush on Inauguration Day 2001, but after being blocked from doing so filed suit against the United States and the Inauguration Committee. The government sought broad discovery against the group, including information about past political activities of the plaintiffs. *See id.* at *1-*2. This Court observed that it was "considering the essence of First Amendment freedoms — the freedom to ... organize ... and associate with other like-minded persons." *Id.* at *2. Applying the *Black Panther Party* test, this Court entered a protective order barring discovery as to past political activities and other matters. *Id.* at *3. The Court found that the parties seeking discovery had "failed to show that the information they [sought went] to 'the heart of the matter' and that they ha[d] pursued alternative sources." *Id.*

D. Wyoming Cannot Show a Need for the Material Sought.

Here, Wyoming cannot establish a compelling need for the information it seeks because that information, far from being "crucial" to its claim and unavailable from other sources, cannot meaningfully advance resolution of the FACA issue in the underlying case and would add nothing to the information that is necessarily available from the federal defendants. Indeed, information concerning U.S. PIRG's associational and political activities has virtually no bearing on the central FACA issue: whether the *federal government* created an advisory committee.

As defined in FACA, an "advisory committee" is a group that is "established or utilized by one or more agencies, in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government." 5 U.S.C. App. 2, § 3(2)(B)-(C). Wyoming alleges that the federal defendants "established an 'advisory committee' representing ... national environmental organizations" including U.S. PIRG. Complaint at 50. Whether such a committee was in fact established depends entirely on actions of the federal government. FACA is not aimed at constraining the manner in which private citizens and organizations exercise their First Amendment rights to join together and advocate policies they favor. *See Public Citizen v. Department of Justice*, 491 U.S. at 453 ("It was unmistakably *not* Congress' intention to intrude on a political party's freedom to conduct its affairs as it chooses."). Rather, as its language indicates, it applies only to committees that are "established or utilized" by federal agencies or the President to obtain advice or recommendations. To avoid both separation of powers and First Amendment issues that might be posed by a broad construction of FACA that would limit the manner in which outside groups could organize themselves and communicate their views to executive branch decision-makers, the courts have imposed clear limits on its scope, emphasizing that FACA was not "intended to cover every formal and

informal consultation between the President or an Executive agency and a group rendering advice." *Id.*

Rather, an entity is a FACA committee only if it is actually established by the government—that is, if it is formed *by* and *for* an agency itself, *see Byrd v. EPA*, 174 F.3d at 246-47; *California Forestry Assn. v. U.S. Forest Service*, 102 F.3d 609, 611 (D.C. Cir. 1996); *Aluminum Company of America v. NMFS*, 92 F.3d 902, 905-06 (9th Cir. 1996)—or if a government agency "utilizes" the committee by exercising "strict management" and "control" over its activities, *see Washington Legal Foundation v. U.S. Sentencing Commission*, 17 F.3d 1446, 1450-51 (D.C. Cir. 1994); *Food Chemical News v. Young*, 900 F.2d at 332-33. Absent actual establishment or management of a committee by the government, an agency's mere use of or reliance on the work of an outside group does not make the group an advisory committee. *See Public Citizen*, 491 U.S. at 452; *Sofamor Danek Group, Inc. v. Gaus*, 61 F.3d 929, 933 (D.C. Cir. 1995).

Accordingly, that U.S. PIRG and others may have come together to develop views on the Roadless Initiative and offer them to the federal government in the hope that they would be adopted as government policy does not in itself invoke FACA. Nothing that U.S. PIRG and other like-minded nonprofit organizations did among themselves could constitute them as an advisory committee. Nor could the government's adoption of policies similar to those advocated by U.S. PIRG render U.S. PIRG part of an advisory committee. Only if the government itself acted to form a committee for the purpose of advising it, or if it strictly managed the activities of a committee for that purpose, could a FACA committee have been created. Hence, if there were evidence that such a committee had been established, it would necessarily be in the hands of the federal defendants.

Therefore, as Wyoming freely admits in its Motion to Compel, information about U.S. PIRG's wholly internal activities is entirely irrelevant to its FACA claim. Mem. in Support of Motion to Compel at 14 (stating that "*internal* associational relationships ... are not implicated here") (emphasis in original). Similarly, the information sought about U.S. PIRG's interactions with other private non-governmental groups will not be probative of whether the federal defendants formed or managed an alleged committee and will thus be irrelevant to Wyoming's FACA claim. The information sought from U.S. PIRG about its interactions with the federal defendants is, at best, minimally relevant to the claim and is certainly not crucial to it. If such information is relevant at all, Wyoming has made no showing that it is not available from other sources. In fact, such information is necessarily available from the federal defendants, also targets of Wyoming's discovery. Wyoming cannot, therefore, make the requisite showing of need for the information to counterbalance the potential harm to U.S. PIRG's First Amendment rights from compliance with the subpoenas.

In addition, because the subpoenas cast such a wide net, if U.S. PIRG were forced to comply it could potentially be compelled to answer questions having no relevance whatsoever to the very narrow question of whether the federal government formed a FACA committee. It could be forced to reveal private information about its internal operations, how it makes political decisions, how it deals with other organizations, how it formulates strategy and a host of other confidential matters. Questions about irrelevant matters such as these also implicate First Amendment concerns. *See Ealy v. Littlejohn*, 569 F.2d 219, 228 (5th Cir. 1978) (questions that broadly probe whom a group associates with, its meetings and matters discussed at such meetings, etc., abridge associational and free speech rights if irrelevant to the action); *Britt v.*

Superior Court, 574 P.2d 766, 774 (Cal. 1978) (overturning an order compelling discovery about an organizations' meetings).

As noted by the *Britt* court, "in some respects, the threat to First Amendment rights may be more severe in a discovery context, since the party directing the inquiry is a litigation adversary who may well attempt to harass his opponent and gain strategic advantage by probing deeply into areas which an individual may prefer to keep confidential." 574 P.2d at 774. The First Amendment concerns in this case are particularly sensitive as Wyoming is not only in a contentious posture as a litigant but is a government, precisely the type of entity against which the First Amendment was drafted to protect.

E. Wyoming's Claim that the Discovery It Seeks Does Not Implicate the First Amendment Is Unfounded.

Wyoming contends that First Amendment protection against discovery extends only to "membership lists" and does not encompass the substance of a group's exercise of its associational freedoms and right to petition the government. While it is true that many of the cases raising First Amendment concerns have involved membership lists, it is by no means true that the protection ends there. Indeed, such a limitation would defy logic, for First Amendment protection attaches not only to *who* may associate together, but also to the *substance* of what persons and groups may advocate once they come together for that purpose. *See, e.g., Sweezy v. New Hampshire*, 354 U.S. at 250 ("Merely to summon a witness and compel him, against his will, to disclose *the nature of his past expressions and associations* is a measure of governmental interference in these matters.") (emphasis added).

This Court's decisions therefore recognize a much broader scope of First Amendment protection than Wyoming is willing to acknowledge. In the very recent *International Action Center* case, for example, this Court extended protection not only against discovery aimed at

names of members of groups, but also against discovery of the details of the *political activities* of the plaintiffs. Similarly, in *ETSI Pipeline Project v. Arkansas Power & Light Co.*, 674 F. Supp. 1489 (D.D.C. 1987) (Richey, J.), the court granted a motion to quash and for a protective order against subpoenas that sought to compel production of documents and a deposition concerning the target nonprofit organization's contacts with other groups regarding policies on coal slurry pipelines and its involvement in legislative, judicial, or administrative proceedings concerning those issues. The court granted the order even though it acknowledged that the information sought might be "crucial" to the claims in the underlying lawsuit, because the party seeking discovery had not shown that alternative sources of relevant information were unavailable. And in *Australia/Eastern U.S.A. Shipping Conf. v. United States*, 537 F. Supp. 807 (D.D.C. 1982) (Joyce Hens Green, J.), the court quashed a subpoena seeking information about the target organization's efforts to influence legislation and administrative agencies on the ground that enforcement would have a chilling effect on First Amendment activities. Clearly, then, this Court has not subscribed to Wyoming's narrow view of First Amendment protection.

Citing a Sierra Club press release stating that the activities of an advisory committee must be subject to public scrutiny and that the members of an advisory committee have no reasonable expectation that their committee activities will be private, Wyoming further argues that U.S. PIRG had no reasonable expectation of privacy in its associational and political activities. U.S. PIRG fully agrees that the activities of a FACA committee must be, as the law requires, open to the public. But Wyoming's argument assumes what has not been established—that there was a FACA committee here in the first place. If there were a committee, Wyoming should be able to prove it using information obtainable from its party opponent, the federal government. But if Wyoming cannot do that, it has no basis for asserting that it is free to rummage through U.S.

PIRG's files simply because, as an alleged member of the supposed committee, U.S. PIRG lacks privacy expectations in its First Amendment activities. Accepting Wyoming's argument would produce the anomalous result that merely by *alleging* the existence of a FACA committee, a party could obtain the full access to records that the law would require only if the committee actually existed.

II.
THE SUBPOENAS BURDEN NON-PARTY U.S. PIRG WITH REQUESTS FOR INFORMATION THAT IS IRRELEVANT, CUMULATIVE, DUPLICATIVE AND OBTAINABLE FROM THE FEDERAL DEFENDANTS.

Even aside from First Amendment considerations, Wyoming's broad discovery requests of a non-party fail to satisfy the requirements for discovery under the federal rules. Federal Rule of Civil Procedure 26(b)(2) provides that discovery should be limited by a court if it determines that

> (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account . . . the importance of the proposed discovery in resolving the issues.

In making this determination, a court should take into consideration the non-party status of the person or entity from whom discovery is sought. *E.g.*, *Katz v. Batavia Marine & Sporting Supplies, Inc.*, 984 F.2d 422, 424 (Fed. Cir. 1993) ("Although Rule 26(b) applies equally to discovery of nonparties, the fact of nonparty status may be considered by the court in weighing the burdens imposed in the circumstances.") (citing *American Standard Inc. v. Pfizer Inc.*, 828 F.2d 734, 738 (Fed. Cir. 1987) (affirming district court's restriction of discovery where non-party status "weigh[ed] against disclosure")); *Solarex Corp. v. Arco Solar, Inc.*, 121 F.R.D. 163, 179 (E.D.N.Y. 1988), *aff'd*, 870 F.2d 642 (Fed. Cir. 1989) (non-party status is a significant factor

in determining whether discovery is unduly burdensome); *Echostar Communications Corp. v. News Corp.*, 180 F.R.D. 391, 394 (D. Colo. 1998) ("the status of a person or entity as a non-party is a factor which weighs against disclosure"); *Richards of Rockford, Inc. v. Pacific Gas & Electric Co.*, 71 F.R.D. 388, 390 (N.D. Cal. 1976) (deponent's non-party status considered in denying motion to compel testimony).

In particular, a court should not allow discovery from a non-party where the same information is sought and available from parties to the action, and, if produced by the parties, would make the non-party's contribution unnecessary. *Harris v. Wells*, 1990 WL 150445, *4-*5 (D. Conn. 1990) (granting protective orders where requests served on non-parties sought the same information as requests served on parties).

Here, the only potentially relevant information sought from U.S. PIRG is also being sought and is available from the federal defendants. U.S. PIRG should not have to bear the burden and expense of discovery, therefore, unless it is determined that the information sought cannot be produced by the federal defendants. Because the federal defendants can produce the information sought, U.S. PIRG's testimony would be cumulative, duplicative and entirely unnecessary.

As explained above, Wyoming's FACA claim depends entirely on federal government action establishing a committee or subjecting it to strict management and control. The veracity of this claim can and should be substantiated by information in the possession of the federal defendants. As support for its allegation that a FACA committee was established, Wyoming alleges only that: the federal defendants held meetings with the groups Wyoming claims comprised the committee; the federal defendants received memoranda and research data prepared by these groups; the federal defendants were provided with advice and

recommendations by these groups; and the federal defendants' reliance on these groups "for the purpose of obtaining advice or recommendations is a *de facto* advisory committee." Complaint at 50-51. Even if these allegations were sufficient to establish the existence of a FACA committee, each of them could be proved or disproved solely by reference to information in the custody of the federal defendants.

If the federal government's information fails to support the existence of an advisory committee, Wyoming will be unable to maintain its FACA claim, and no fishing expedition in the files and testimony of other groups will remedy the deficiency.[4] If, on the other hand, discovery from the federal government does yield enough information to make the requisite showing, any evidence produced by the intervenors or non-parties will be superfluous in that it will only be additional proof of matters already settled. In either case, discovery from U.S. PIRG would be unnecessary and a waste of time.

There is, moreover, no reason to believe that Wyoming will not be afforded the full scope of discovery from the federal government that is necessary to determine whether its claim is sustainable. Wyoming is seeking deposition testimony and documentation from the Department of Agriculture, the United States Forest Service, and the President's Council on Environmental Quality. Its task is somewhat simplified in that nearly all of the information sought will be in the public record. Indeed, Wyoming's claim will undoubtedly rise or fall based on the documentary record produced by the federal defendants. Nonetheless, Wyoming has also noticed approximately 17 depositions to address the FACA issue. The testimony and materials collected at each of these depositions will undoubtedly be cumulative and duplicative of that produced at

[4] Wyoming would need to resort to other groups only in the event the federal agencies had been engaged in document destruction; there is no allegation that such occurred here.

the others. With so many discovery requests issued on the same point, it is extremely unlikely that Wyoming would discover something new, relevant or useful from U.S. PIRG. Moreover, even if Wyoming could somehow prove actions on the part of the federal government by looking at information held by non-governmental groups, there is no imaginable reason for it to seek information about U.S. PIRG's internal activities or its meetings and exchanges with other non-governmental groups.[5] Such information is not even arguably relevant. As a non-party to the proceeding, U.S. PIRG should not be subjected to the burdens and impositions involved with production of cumulative evidence certain to be of marginal relevance and limited utility at best.

CONCLUSION

The burden on U.S. PIRG in complying with the subpoenas, including time, expense and a chilling of its First Amendment rights, outweighs Wyoming's dubious need for evidence. Because U.S. PIRG is entitled to enhanced protection from discovery both as a non-party to this proceeding and as an advocacy group whose First Amendment rights would be infringed, Wyoming would have to present an exceptionally strong need for its testimony to justify compelling discovery. No such need exists here. The evidence sought is neither relevant nor unique. It is likely to be immaterial, duplicative and cumulative. The legal point Wyoming seeks to support will be addressed efficiently and thoroughly by discovery from the federal defendants. On the other side of the scale, compliance with the subpoenas would impair U.S. PIRG's constitutional rights to associate with other political groups and to petition the government. U.S. PIRG would also face the possibility of having to reveal private and

[5] If this Court declines to quash the subpoenas altogether, U.S. PIRG respectfully requests that it issue a protective order strictly limiting the subject matter of the subpoenas and the 30(b)(6) deposition to foreclose any inquiries about U.S. PIRG's internal meetings, strategies or procedures or its meetings and interactions with other political groups.

confidential information about its internal workings, to say nothing of the time and expense of participating in a deposition. For all of the foregoing reasons, both the First Amendment balancing test and Rule 26(b)(2) favor limiting discovery, and the Court should deny Wyoming's Motion to Compel and grant U.S. PIRG's Cross-Motion for a Protective Order and to Quash the Subpoenas.

Respectfully submitted,

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Dated: June 14, 2002

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF WYOMING, *Plaintiff,* v. UNITED STATES DEPARTMENT OF AGRICULTURE, *et al.*, *Defendants,* and WYOMING OUTDOOR COUNCIL, *et al.*, *Intervenors.*	No. 1:02MS00252 (RMU)

ORDER

Upon consideration of the Cross-Motion of United States Public Interest Research Group, Inc., for a Protective Order and to Quash Subpoenas, the opposition thereto, and the entire record herein, it is hereby ORDERED, that the motion is GRANTED; and it is further

ORDERED, that the subpoenas served on U.S. PIRG by the State of Wyoming in connection with *State of Wyoming v. Department of Agriculture, et al.*, No. 01CV-086B (D. Wyo.) are quashed; and it is further

ORDERED, that U.S. PIRG shall not be required to produce the documents requested in the attachments to the subpoenas nor to appear for the Rule 30(b)(6) deposition noticed by the State of Wyoming.

_____
UNITED STATES DISTRICT JUDGE

Dated: _____

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF WYOMING, *Plaintiff,* v. UNITED STATES DEPARTMENT OF AGRICULTURE, *et al.*, *Defendants,* and WYOMING OUTDOOR COUNCIL, *et al.*, *Intervenors.*	No. 1:02MS00252 (RMU)

REPLY MEMORANDUM IN SUPPORT OF U.S. PIRG'S CROSS-MOTION FOR A PROTECTIVE ORDER AND TO QUASH SUBPOENAS

In its opposition to U.S. PIRG's cross-motion for a protective order and to quash Wyoming's subpoenas, Wyoming does not deny that the subpoenas broadly seek intrusive information concerning the details of U.S. PIRG's exercise of First Amendment-protected rights to associate with others and to petition the government. Nor does Wyoming take issue with our showing that the FACA claim it uses to justify its discovery requests is supportable only if Wyoming can show that the *federal government* either itself formed an advisory committee or exercised strict management and control over its activities. Wyoming also does not bother attempting to refute our argument that all the evidence it would need to sustain such a claim — assuming that it could be sustained — would necessarily be obtainable from the federal government. And Wyoming simply ignores the case law cited in our opening memorandum establishing that even leaving First Amendment concerns to one side, non-parties should not be

troubled with burdensome requests for information that, even if relevant, can be obtained elsewhere.

Instead of taking issue with these critical points, Wyoming offers three principal reasons why, in its view, U.S. PIRG's objections to its subpoenas are unfounded. First, citing a single district court case from the Central District of California (and ignoring applicable decisions of *this* Court), Wyoming claims that the protection of the First Amendment is strictly limited to membership information. Second, using an inapposite analogy to the attorney-client privilege, Wyoming asserts that any protection against discovery of U.S. PIRG's associational and petitioning activities was "waived" when U.S. PIRG communicated about those activities with "third parties" (*i.e.*, the other groups with whom U.S. PIRG associated). And third, Wyoming contends that U.S. PIRG's argument that the information Wyoming seeks is irrelevant and/or obtainable elsewhere is merely an attack on the Wyoming district court's decision that Wyoming has stated a FACA claim — even though our argument is in fact expressly premised on the Wyoming court's own description of what Wyoming would have to prove to sustain such a claim. None of Wyoming's arguments can withstand scrutiny.

ARGUMENT

I. THE FIRST AMENDMENT PROTECTS MORE THAN MEMBERSHIP LISTS.

Wyoming's principal argument is that the First Amendment protection against discovery that burdens the rights to associate and petition the government is strictly limited to membership lists. Wyoming points out that some of the cases on which U.S. PIRG relied in its opening papers, such as *NAACP v. Alabama*, 357 U.S. 449 (1958), and *Black Panther Party v. Smith*, 661 F.2d 1243 (D.C. Cir. 1981), *vacated as moot*, 458 U.S. 1118 (1982), concerned membership

information, which is certainly true as far as it goes. But nothing in those decisions *limits* First Amendment protection to such information.

For that leap, Wyoming relies solely on a decision of the U.S. District Court for the Central District of California, *Wilkinson v. FBI*, 111 F.R.D. 432 (C.D. Cal. 1986). In its abbreviated discussion of the First Amendment,[1] the court in *Wilkinson* did say that the First Amendment's protection extended only to membership and contributor lists. *Id.* at 437. The court's analysis on this point, however, was limited to the observation that in "no case cited" to the court had First Amendment protection been extended beyond such lists. *Id.*

Here, by contrast, U.S. PIRG *has* cited precedents, including three decisions *of this Court*, that grant First Amendment protection to the types of associational and petitioning activities at issue here. Most recently, in *International Action Center v. United States*, 207 F.R.D. 1, 3 (D.D.C. 2002), Judge Kessler held that First Amendment protection extended not only to membership information, but also to information about "political activities of plaintiffs and of those persons with whom they have been affiliated." Ironically, although Wyoming quotes this exact language, it fails to recognize that it is completely at odds with the *Wilkinson* holding on which Wyoming relies and that information about "political activities" is precisely what Wyoming seeks. Similarly, in both *ETSI Pipeline Project v. Arkansas Power & Light Co.*, 674 F. Supp. 1489 (D.D.C. 1987), and *Australia/Eastern U.S.A. Shipping Conf. v. United States*, 537 F. Supp. 807 (D.D.C. 1982), this Court gave First Amendment protection not just to membership lists, but also to associational and petitioning activities similar to those at issue here. Wyoming cannot distinguish these decisions, so it simply declines to address them. Nor does

[1] Most of the opinion concerned claims of an "archival privilege" and a "researcher's privilege," neither of which is at issue here. *See id.* at 437-44.

Wyoming mention *Ealy v. Littlejohn*, 569 F.2d 219, 228 (5th Cir. 1978), or *Britt v. Superior Court*, 574 P.2d 766, 774 (Cal. 1978), which held that First Amendment protection applied to information about the substance of an organization's political meetings. Wyoming's solitary reliance on *Wilkinson* places it out of step with decisions of this Court and others that have recognized that the First Amendment is about more than just membership lists.

Also missing from Wyoming's papers (and from the *Wilkinson* opinion on which they so heavily rely), is any explanation of *why* the First Amendment's protection should be restricted to membership lists and not to other sensitive information whose revelation (especially to powerful political adversaries and government bodies such as the State of Wyoming) could chill protected activities. As the Supreme Court stated in *Sweezy v. State of New Hampshire*, 354 U.S. 234 (1957) — another case not mentioned by Wyoming — requests that would require revelation of the substance of a person's political and associational activities raise the same First Amendment concerns as requests for membership lists: "Merely to summon a witness and compel him, against his will, to disclose *the nature of his past expressions and associations* is a measure of governmental interference in these matters." *Id.* at 250 (emphasis added). The Supreme Court only this week again emphasized that the First Amendment rights at issue here are "the most precious of the liberties safeguarded by the Bill of Rights." *BE&K Constr. Co. v. NLRB*, No. 01-518, slip op. at 6 (U.S. June 24, 2002) (citation omitted). Wyoming nowhere explains why such precious liberties should receive only the minimal protection it advocates.

II.
WYOMING'S WAIVER ARGUMENT IS FUNDAMENTALLY FLAWED.

Wyoming further argues that, because the attorney-client privilege is waived when confidential attorney-client communications are disclosed to third parties, the First Amendment protection U.S. PIRG claims is similarly "waived" to the extent that U.S. PIRG seeks it for

communications and activities engaged in with other organizations. Wyoming cites no authorities applying this principle to a First Amendment claim, and the analogy it draws to the attorney-client privilege is completely illogical.

Because the attorney-client privilege is designed to protect confidential communications between attorney and client, it makes perfect sense to hold that the protection is waived when the client's own actions have breached that confidentiality and exposed the communications to others. The First Amendment protection sought here, however, is intended to shield the rights of individuals and organizations to associate (and necessarily to communicate) with others to advance their political goals. Holding that that protection is waived when U.S. PIRG in fact does associate with other groups would be the height of *illogic*: it would mean that U.S. PIRG had waived the First Amendment's protections by engaging in *the very activities the First Amendment is intended to protect*. Wyoming supplies neither reason nor authority for the creation of such a self-defeating doctrine of waiver.

III.
THE WYOMING COURT'S DECISION THAT THE COMPLAINT STATED A FACA CLAIM DOES NOT JUSTIFY THE DISCOVERY SOUGHT HERE.

Although Wyoming incorrectly contends that First Amendment interests are not implicated here, it does not contest that if it is wrong in this regard it should be allowed the discovery it seeks only if the information sought is both "crucial" to its claim and not likely to be obtainable elsewhere. *International Action Center*, 207 F.R.D. at 4. Nor does Wyoming contest that even where First Amendment concerns are absent, a non-party should not be burdened with discovery where the information sought can be obtained from a party or where its relevance is marginal. Fed. R. Civ. P. 26(b)(2) & 45(c)(1); *see also* cases cited at pp. 16-17 of U.S. PIRG's opening memorandum. Wyoming's fundamental problem is that it cannot meet either standard

because its FACA claim is entirely dependent on evidence showing that the federal government itself either created or exercised control over the activities of an advisory committee — information necessarily obtainable (if it existed) from the federal defendants.

Wyoming seeks to brush this point aside by contending that U.S. PIRG's arguments are nothing more than collateral attacks on the Wyoming district court's ruling that Wyoming has stated a FACA claim and may engage in discovery in an effort to support it. But even accepting the Wyoming court's decision as a given, the discovery Wyoming seeks cannot be justified. In holding that Wyoming had stated a claim, the Wyoming district court acknowledged that under the body of case law interpreting FACA, including both the Supreme Court's opinion in *Public Citizen v. United States Department of Justice*, 491 U.S. 440 (1989), and a long line of decisions of the D.C. Circuit, Wyoming's claim would require it to prove either that an advisory committee had been "formed or created by the Government," or that it was "so closely tied to an agency as to be amenable to strict management by government officials." *Wyoming v. Department of Agriculture*, 2002 WL 959405, at *6 (D. Wyo. May 9, 2002). The court indicated that it would allow discovery as to whether such a committee had been "created," *id.* at *7, but it was not called upon to, and did not, suggest that such discovery would include non-party discovery at all, let alone discovery of the scope sought by Wyoming here.

It is Wyoming, not U.S. PIRG, that ignores the substance of the Wyoming court's ruling. Nowhere does Wyoming even acknowledge that the issue it must prove is whether the federal government itself formed or controlled the activities of an advisory committee. Nor does it explain why the discovery it seeks from the federal government is not adequate to determine that issue or how the discovery it seeks from non-parties will advance the ball.

Instead, Wyoming asserts that environmental groups launched a public relations campaign to support the Forest Service's roadless regulations, that they discussed their efforts with federal employees, and that they "were actively involved with the federal defendants for the specific purpose of formulating a national policy that had far-reaching implications" (Wyoming Opp. at 16). Maybe so. But what does any of this have to do with FACA? Environmental groups have an absolute right to stage public relations campaigns in support of policies they favor, to discuss their efforts with federal employees, and to be "actively involved" in advocating their views on "formulating a national policy," no matter how "far-reaching" its "implications."[2]

Such activities do not implicate FACA absent action by the federal government to create or control an advisory committee. They do not support the contention that the federal government took such action, nor do they, as Wyoming claims, "contradict" U.S. PIRG's arguments that the discovery Wyoming seeks from it is superfluous. *See* Wyoming Opp. at 15-16. Whether U.S. PIRG and others engaged in advocacy efforts is simply beside the point. The dispositive issue under FACA is what the federal government did, and Wyoming never explains why that cannot be determined through discovery from the federal defendants.

Wyoming's explanation of why it needs discovery from U.S. PIRG is not only unconvincing, but fundamentally disturbing in its implications. Referring to the advocacy efforts of U.S. PIRG and other environmental groups, Wyoming says it needs to find out "why such activities took place." Wyoming Opp. at 16. But the motivations of environmental groups are

[2] And, contrary to Wyoming's suggestion (Wyoming Opp. at 15), they even have a right to invoke Smokey the Bear to support their efforts. *See Lighthawk v. Robertson*, 812 F. Supp. 1095 (W.D. Wash. 1993). *Lighthawk* held that 16 U.S.C. § 580p-4 and 36 C.F.R. § 271, which purport to limit use of Smokey the Bear to the Forest Service, could not constitutionally bar an environmental group from using Smokey the Bear in advertisements criticizing the Forest Service.

not relevant to a FACA claim, and Wyoming is not otherwise entitled to exact information from organizations about why they engaged in political efforts or advocated particular policies. Wyoming also contends that it is entitled to question groups and individuals "to find out whether they participated in, supported, or furthered any efforts to avoid FACA." *Id.* To the extent a group "avoid[ed] FACA" by not being a part of an advisory committee at all, whether or why it did so is irrelevant. On the other hand, if the federal defendants did create a FACA committee but sidestepped FACA's requirements, that could be proved with information from the federal government, and whether any outside individual "supported" those efforts would still be irrelevant. Wyoming's statements make clear that what it really wants is to subject the motives and activities of private groups to an inquisition in no way justified by the holding of the Wyoming court that Wyoming's complaint states a FACA claim.

IV.
WYOMING'S REQUEST FOR SANCTIONS IS UNFOUNDED.

Wyoming concludes its opposition with a request for sanctions. Even assuming such a request were properly included in a memorandum rather than a motion, Wyoming's request is not supported by citation of any rule under which it seeks sanctions or any authority supporting the appropriateness of the sanctions it seeks. In particular, Wyoming does not address the standards governing the imposition of sanctions under Rule 37(a)(4), which among other things forecloses sanctions when the position of the party resisting discovery was substantially justified.

To the extent Wyoming's contentions relate to U.S. PIRG, they boil down to no more than a complaint that U.S. PIRG served objections to Wyoming's document subpoenas within 14 days but did not at that time object to the deposition notice and subpoena. However, Rule 45(c)(2)(B), which sets forth the written objection procedure, applies only to document subpoenas. Motions to quash deposition subpoenas and/or motions for protective order are not

subject to this procedure or its 14-day deadline. In any event, it is hard to see how Wyoming would have been better off had it received objections to the deposition notice and subpoena at the same time as the objections to the document subpoenas. Its motion to compel, and U.S. PIRG's combined opposition and cross-motion, would have looked the same, and the timing would have been unaffected. Moreover, Wyoming's assertion that it had no reason to believe that U.S. PIRG, having objected to the production of documents, would also oppose a deposition, is, at best, unconvincing. And, regardless of whether Wyoming was surprised to face a contest over the deposition as well as the document request, inconvenience to a party when its overly ambitious discovery schedule must be modified to allow for the resolution of good-faith disputes about the discovery sought is not a ground for sanctions. *See* Fed. R. Civ. P. 37(a)(4), Advisory Committee Notes, 1970 Amendment.

CONCLUSION

For the foregoing reasons, as well as those set forth in our opening memorandum, U.S. PIRG's cross-motion for a protective order and to quash the subpoenas served by the State of Wyoming should be granted.

Respectfully submitted,

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Dated: June 26, 2002

CERTIFICATE OF SERVICE

I hereby certify that, this 26th day of June, 2002, I served one copy of the foregoing REPLY MEMORANDUM IN SUPPORT OF U.S. PIRG'S CROSS-MOTION FOR A PROTECTIVE ORDER AND TO QUASH SUBPOENAS as indicated below upon:

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208 F.R.D. 449

208 F.R.D. 449

(Cite as: 208 F.R.D. 449)

Motions, Pleadings and Filings

United States District Court,
District of Columbia.
State of **WYOMING**, Plaintiff,
v.
UNITED STATES **DEPARTMENT OF AGRICULTURE** et al., Defendants,
and
Wyoming Outdoor Council et al., Intervenors.
Misc. No. 02-0252 (RMU).

July 9, 2002.

State brought action against Department of Agriculture (USDA) and Forest Service, challenging forest management actions known as "roadless regulations," and asserting violation of the Federal Advisory Committee Act (FACA). State moved to compel production of documents against non-party witnesses. The District Court, Urbina, J., held that: (1) information sought by state was not relevant to state's claim against government; (2) discovery sought was unduly burdensome; and (3) documents were protected from discovery by First Amendment.

Motions denied in part and granted in part.

West Headnotes

[1] Federal Civil Procedure ⇨1272.1
170Ak1272.1 Most Cited Cases
Generally, courts construe the scope of discovery liberally in order to ensure that litigation proceeds with the fullest possible knowledge of the issues and facts before trial. Fed.Rules Civ.Proc.Rule 26(b)(1), 28 U.S.C.A.

[2] Federal Civil Procedure ⇨1272.1
170Ak1272.1 Most Cited Cases

[2] Federal Civil Procedure ⇨1558.1
170Ak1558.1 Most Cited Cases
Courts can limit discovery to that which is proper and warranted in the circumstances of the case; courts should balance the need for discovery against the burden imposed on the person ordered to produce documents. Fed.Rules Civ.Proc.Rule 26(b)(2), 28 U.S.C.A.

[3] Federal Civil Procedure ⇨1269.1
170Ak1269.1 Most Cited Cases
Non-party status is one of the factors the court uses in weighing the burden of imposing discovery. Fed.Rules Civ.Proc.Rule 26(b)(2), 28 U.S.C.A.

[4] Federal Civil Procedure ⇨1559
170Ak1559 Most Cited Cases
In context of motion to compel production of documents, an undue burden is identified by looking at factors such as relevance, the need for the documents, the breadth of the document request, the time period covered by such request, the particularity with which the documents are described, and the
burden imposed. Fed.Rules Civ.Proc.Rule 26(b)(2), 28 U.S.C.A.

[5] Federal Civil Procedure ⇨1272.1
170Ak1272.1 Most Cited Cases
Information sought by state, in motion to compel discovery against non-party witnesses in action against Department of Agriculture (USDA) and Forest Service challenging "roadless regulations," was not relevant to state's claim that government violated FACA in process of promulgating regulations; government alone could establish an advisory committee governed by FACA, and non-party witnesses were not groups under strict management or control of government agency. Federal Advisory Committee Act, § 1 et seq., 5

U.S.C.A.App. 2; Fed.Rules Civ.Proc.Rule 26(b)(1), 28 U.S.C.A.

[6] United States ⇐29
393k29 Most Cited Cases
Congress intended the FACA to cover situations in which the federal government itself establishes an advisory committee. Federal Advisory Committee Act, § 1 et seq., 5 U.S.C.A.App. 2.

[7] United States ⇐29
393k29 Most Cited Cases
To determine if a committee not established by a government agency is "utilized," in context of determining applicability of FACA, the district court examines whether the federal agency has actual management or control of the advisory committee. Federal Advisory Committee Act, § 1 et seq., 5 U.S.C.A. App.2.

[8] Federal Civil Procedure ⇐1272.1
170Ak1272.1 Most Cited Cases
Discovery sought by state of non-party witnesses in state's action against government, claiming Department of Agriculture (USDA) and Forest Service violated FACA in promulgating "roadless regulations," was unduly burdensome; discovery was available from another source, the government, that was more convenient, less burdensome, and less expensive. Federal Advisory Committee Act, § 1 et seq., 5 U.S.C.A.App. 2; Fed.Rules Civ.Proc.Rule 26(b)(2), 28 U.S.C.A.

[9] Constitutional Law ⇐91
92k91 Most Cited Cases
First Amendment's protection of an organization from compelled discovery extends not only to the organization itself, but also to its staff, members, contributors, and others who affiliate with it. U.S.C.A. Const.Amend. 1;
Fed.Rules Civ.Proc.Rule 26(b), 28 U.S.C.A.

[10] Constitutional Law ⇐91
92k91 Most Cited Cases
Before compelling discovery in cases involving implication of First Amendment rights to free association and to petition in discovery context, the district court must assess (1) whether the information goes to the heart of the lawsuit, (2) whether the party seeking the discovery sought the information through alternative sources, and (3) whether the party seeking disclosure made reasonable attempts to obtain the information elsewhere. U.S.C.A. Const.Amend. 1; Fed.Rules Civ.Proc.Rule 26(b), 28 U.S.C.A.

[11] Constitutional Law ⇐91
92k91 Most Cited Cases

[11] Federal Civil Procedure ⇐1600(1)
170Ak1600(1) Most Cited Cases
Documents possessed by environmental advocacy groups, which were non-party witnesses in state's action against government alleging violation of FACA in promulgation of "roadless regulations," were protected from discovery by First Amendment rights to free association and to petition; state sought documents involving regulations, calendars, and meeting reports related to other nonparty witnesses, the information did not go to heart of suit and was available through alternative sources, and state had failed to attempt to obtain information elsewhere. Federal Advisory Committee Act, § 1 et seq., 5 U.S.C.A.App. 2; Fed.Rules Civ.Proc.Rule 26(b), 28 U.S.C.A.

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MEMORANDUM OPINION

URBINA, District Judge.

DENYING THE PLAINTIFF'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS; GRANTING THE NON-PARTY WITNESSES' MOTIONS TO QUASH THE PLAINTIFF'S SUBPOENAS

I. INTRODUCTION

This motion arises from pending litigation in the United States District Court for the District of Wyoming ("the Wyoming proceeding"). In that case, the **State** of **Wyoming** ("the plaintiff" or "Wyoming") filed suit against the United States **Department** of **Agriculture** ("USDA") and its subdivision, the United States Forest Service ("Forest Service") (collectively, "the defendants"), challenging the forest-management actions known collectively as the "Roadless Regulations." In the underlying suit, Wyoming claims that the USDA violated the Federal Advisory Committee Act ("FACA"), 5 U.S.C.App. 2 § 1 *et seq.*, in issuing the Roadless Regulations and seeks to block their implementation.

The matter comes before this court on Wyoming's motion to compel production of documents pursuant to Federal Rule of Civil Procedure 45 against non-party witnesses United States Public Interest Research Group ("USPIRG"), Heritage Forest Campaign ("HFC"), and Earthjustice Legal Defense Fund ("Earthjustice") (collectively, "non-party witnesses"). Wyoming seeks these documents because it believes the documents will help it prove that the USDA violated the FACA. The non-party witnesses object to the subpoenas, contending that: (1) the discovery requests are overbroad, unduly burdensome, and unduly invasive of their privacy rights; (2) the information sought is neither relevant nor likely to lead to evidence relevant to the Wyoming proceeding; (3) the documents are cumulative and duplicative of those available from the parties in the Wyoming proceeding; and (4) compliance would result in infringement of the non-party witnesses' First Amendment rights to free association and to petition the government.

The court agrees with the non-party witnesses' arguments. Accordingly, the court denies the plaintiff's motion to compel the production of documents and grants the non-party witnesses' motions to quash the subpoenas.

II. BACKGROUND

In May 2001, Wyoming filed suit in the United States District Court for the District of Wyoming (Dkt. No. 01cv0086-B) challenging the Roadless Regulations, a group of interrelated roadless and forest-management actions issued by the USDA during the last year of the Clinton Administration. [FN1] Pl.'s Mot. to Compel at 2. For example, one of the challenged regulations, the Road Management Rule, shifts the Forest Service's emphasis away from development and construction of new roads within the National Forest System to maintaining needed roads and decommissioning unneeded ones. 36 C.F.R. § 312 *et seq.* Wyoming challenges these regulations based on the belief that they impair forest health, deny access to large parts of the National Forest System, deny access to lands owned by the State of Wyoming, deny access to privately owned land, and violate numerous laws and regulations. Pl.'s Mot. to Compel at 3.

> FN1. The Roadless Regulations include the Roadless Area Conservation Final Rule, 36 C.F.R. § 294 *et seq.*, revisions to the National Forest Management Act Planning Regulations, 36 C.F.R. § 219 *et seq.*, the Forest Transportation System Final Administrative Policy, Forest Service Manual § 7712.16, and the National Forest System Road Management Rule, 36 C.F.R. § 212 *et seq.*

In its complaint in the Wyoming proceeding, the plaintiff alleges that the USDA conceived, developed, and adopted the Roadless Regulations in violation of the FACA. Pl.'s Mot. to Compel at 4. Specifically, in Count VI, Wyoming claims that the USDA established an "advisory committee"--which represented only the interests of the national environmental organizations, including the non-party witnesses--to assist the defendants in formulating the Roadless Regulations. *Id.* at 4. Wyoming alleges that the USDA violated the FACA by failing to (1) file a formal charter, (2) publish notice of *452 meetings in the Federal

Register, (3) ensure the meetings were open to the public, (4) keep minutes of each meeting, (5) designate a federal officer to be present at each meeting, and (6) ensure that membership of the committee represented a cross-section of groups interested in the subject. *Id.* at 5. Furthermore, Wyoming charges that the non-party witnesses subject to this motion provided critical research data, legal memoranda, advice, and recommendations to the USDA regarding the development of the Roadless Regulations. *Id.*

In its discovery request, Wyoming seeks a broad range of documents from each of the non-party witnesses. Pl.'s Mot. to Compel Ex. G. The requested information includes copies of all documents the non-party witnesses possess involving the Roadless Regulations; all documents the non-party witnesses sent or received about the Roadless Regulations to or from any member of the USDA, the Forest Service, the Council on Environmental Quality, the HFC, the Wilderness Society, the Natural Resources Defense Council, USPIRG, Earthjustice, the Audubon Society, the Sierra Club, the Coalition on the Environment and Jewish Life, the Wyoming Outdoor Council, Biodiversity Associates, the Pacific Rivers Council, the Defenders of Wildlife, and/or any other conservation or environmental group; all documents related to meetings or conversations held with a member or agent of any of these groups with regard to the Roadless Regulations; reports, documents, notes, memoranda, or letters that relate in any way to any of these groups; and all "daytimers," calendars, and/or diaries from January 1999 to January 2001 that relate to the non-party witnesses' activities undertaken on behalf of the USDA. *Id.*

On May 15, 2002, the plaintiff served subpoenas on the non-party witnesses. *Id.* at 9. The non-party witnesses refused to produce the requested documents. *Id.* at 10-12. On June 3, 2002, Wyoming filed a motion to compel the non-party witnesses' production of documents in this court pursuant to Federal Rule of Civil Procedure 45. [FN2] The court now turns to that motion.

FN2. The plaintiff properly filed this miscellaneous action in this court since Federal Rule of Civil Procedure 45 allows parties to serve subpoenas at any place within 100 miles of a non-party's place of business. Fed. R. Civ. P. 45(b)(2), 45(c)(3)(A). USPIRG, HFC, and Earthjustice all have offices in Washington, D.C.

III. DISCUSSION

A. Legal Standard on Scope of Discovery

[1] Generally, courts construe the scope of discovery liberally in order to ensure that litigation proceeds with "the fullest possible knowledge of the issues and facts before trial." *Hickman v. Taylor*, 329 U.S. 495, 501, 67 S.Ct. 385, 91 L.Ed. 451 (1947). Federal Rule of Civil Procedure 26(b)(1) states that parties may obtain discovery "regarding any matter, not privileged, that is relevant to the claim or defense of any party" and "the court may order discovery of any matter relevant to the subject matter involved in the action." Fed. R. Civ. P. 26(b)(1). Courts may limit discovery, however, if

> (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.

Fed. R. Civ. P. 26(b)(2).

[2][3][4] Courts can limit discovery to "that which is proper and warranted in the circumstances of the case." *Katz v. Batavia Marine & Sporting Supplies, Inc.*, 984 F.2d 422, 424 (Fed.Cir.1993). Courts should balance the need for discovery against the burden imposed on the person ordered to produce documents. *Id.* Non-party status is one of the factors the court uses in weighing the burden of imposing discovery. *Id.* An undue *453 burden is

identified by looking at factors such as relevance, the need for the documents, the breadth of the document request, the time period covered by such request, the particularity with which the documents are described, and the burden imposed. *Flatow v. Islamic Republic of Iran,* 196 F.R.D. 203, 206-07 (D.D.C.2000).

B. The Court Denies the Plaintiff's Motion to Compel the Production of Documents

In this case, the plaintiff believes the non-party witnesses possess information that is crucial to proving its claim that the USDA violated the FACA in creating and implementing the Roadless Regulations. Pl.'s Mot. to Compel at 19. The plaintiff argues that the requested items would show that a federal agency formed an illegal group, including the non-party witnesses in this case, for the specific purpose of obtaining advice and recommendations about the Roadless Regulations. *Id.* The plaintiff also submits that the documents would demonstrate that this alleged group was so closely tied to the federal agency that it was subject to its strict management. *Id.* Moreover, anticipating the non-party witnesses' First Amendment objection to the production of documents, the plaintiff argues that the Constitution does not endow the non-party witnesses "with a blanket privilege that insulates them from being required to fully and fairly respond to their discovery." *Id.* at 21.

Labeling the subpoenas as an "invasive fishing expedition," USPIRG counters by arguing that (1) Wyoming's requests are overbroad and unduly burdensome, (2) Wyoming's requests seek discovery of information that is irrelevant to the Wyoming proceeding; (3) Wyoming's requests call for the production of documents that Wyoming can obtain from the federal defendants; and (4) compliance with Wyoming's requests would result in infringement of USPIRG's First Amendment right of association and right to petition the government. USPIRG's Cross-Mot. for a Protective Order and to Quash Subpoenas ("USPIRG's Opp'n") at 5-6. Earthjustice objects on the same grounds and on the grounds of the attorney-client privilege and the work-product privilege. Earthjustice's Opp'n to Pl.'s Mot. to Compel ("Earthjustice's Opp'n") at 10. HFC echoes USPIRG's objections, characterizing the discovery requests as an "intrusive, ideologically motivated attempt by a state fighting environmental regulations to intrude into the strategy and policy ideas of environmental groups." HFC Opp'n to Mot. to Compel and Mot. to Quash ("HFC's Opp'n") at 2. HFC notes that any discovery documents relevant to the issue of whether the United States "established or utilized" an "advisory committee" would lie in the hands of the USDA or the Forest Service, the defendants in the underlying case. *Id.* at 6.

For the reasons that follow, the court denies the plaintiff's motion to compel the production of documents and grants the non-party witnesses' motions to quash the subpoenas.

1. The Federal Advisory Committee Act

[5] The threshold issue before the court is whether the information Wyoming seeks is relevant to its claim that the defendants violated the terms of the FACA in the process of promulgating the Roadless Regulations. The court concludes that it is not.

[6][7] Under the FACA, the term "advisory committee" is defined as a "committee, board, commission, ... or other similar group ... which is--(A) established by statute or reorganization plan, or (B) established or utilized by the President, or (C) established or utilized by one or more agencies." 5 U.S.C.App. 2 § 3. In determining whether a group advising the government fits within the statutory framework of the FACA, the Supreme Court has cautioned that the terms "established" and "utilized" must be clarified. *Public Citizen v. U.S. Dep't of Justice,* 491 U.S. 440, 452, 109 S.Ct. 2558, 105 L.Ed.2d 377 (1989). The D.C. Circuit has interpreted the Supreme Court's decision in *Public Citizen* to limit the FACA to "groups organized by or closely tied to the Federal Government ...." *Food Chemical News v. Young,* 900 F.2d 328, 332 (D.C.Cir.1990) (quoting *Public Citizen,* 491 U.S. at 461, 109 S.Ct. 2558). In other words, in terms of 5 U.S.C.App. 2 § 3's "established" option, Congress intended the *454 FACA to cover situations in which the federal government itself establishes an

advisory committee. *Public Citizen*, 491 U.S. at 462, 109 S.Ct. 2558. To determine if a committee not established by a government agency is "utilized," the D.C. Circuit examines whether the federal agency has "actual management or control of the advisory committee." *Byrd v. EPA*, 174 F.3d 239, 246 (D.C.Cir.1999); *see also People for the Ethical Treatment of Animals v. Barshefsky*, 925 F.Supp. 844, 848 (D.D.C.1996).

In its motion to quash the subpoenas, HFC persuasively contends that, to the extent there may be evidence of the formation or control of an "official" committee to advise the USDA on the Roadless Regulations, all relevant documents would be in the hands of the federal defendants, and thus intrusion into the activities of the non-party witnesses is unwarranted and unnecessarily burdensome. HFC's Opp'n at 2-3. The non-party witnesses also point out that Wyoming's requests go beyond seeking information about the non-party witnesses' contacts with the government since they seek internal communications and strategic communications on policy issues with other environmental advocacy groups. HFC's Opp'n at 3; Earthjustice's Opp'n at 7; USPIRG's Opp'n at 4. The court agrees.

[8] As explained previously, the D.C. Circuit has instructed that the government alone can establish an advisory committee under 5 U.S.C.App. 2 § 3 and defines "utilized" so narrowly as to admit only those groups into the FACA statutory scheme that are under strict management or control of the government agency. *Public Citizen*, 491 U.S. at 462, 109 S.Ct. 2558; *Byrd*, 174 F.3d at 239. Thus, the non-party witnesses correctly point out that the requested documents fall outside the scope of discovery needed for Wyoming to prove its claim that the *government* violated the FACA. *Byrd*, 174 F.3d at 246. In short, the documents are irrelevant to the plaintiff's claim. In addition, the discovery sought is obtainable from another source that is more convenient, less burdensome, and less expensive. Fed. R. Civ. P. 26(b)(2). Moreover, the discovery is "unduly burdensome" considering the non-party status of the witnesses. *Id.; see also Katz*, 984 F.2d at 424.

2. The Non-Party Witnesses' First Amendment Claims

In rejecting a request for an organization's membership lists, the Supreme Court has addressed the protection the First Amendment provides parties against compelled disclosure of discovery. *NAACP v. Alabama*, 357 U.S. 449, 460-61, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958). "[I]t is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." *Id.* In addition, courts have held that the threat to First Amendment rights may be more severe in discovery than in other areas because a party may try to gain advantage by probing into areas an individual or a group wants to keep confidential. *Britt v. Superior Court of San Diego County*, 20 Cal.3d 844, 143 Cal.Rptr. 695, 574 P.2d 766, 774 (1978).

[9] Membership lists are not the only information afforded First Amendment protection. In blocking the government's discovery request of political action groups, this court recently stated, "it is crucial to remember that we are considering the essence of First Amendment freedoms--the freedom to protest policies to which one is opposed, and the freedom to organize, raise money, and associate with other like-minded persons so as to effectively convey the message of the protest." *Int'l Action Ctr. v. United States*, 207 F.R.D. 1, 2 (D.D.C.2002) (Kessler, J.). The First Amendment's protection "extends not only to the organization itself, but also to its staff, members, contributors, and others who affiliate with it." *Int'l Union v. Nat'l Right to Work Legal Defense and Ed. Found., Inc.*, 590 F.2d 1139, 1147 (D.C.Cir.1978). In a case involving requests for internal communications and communications among various groups, the D.C. Circuit ruled that releasing the information would have a potential "for chilling the free exercise of political speech and association guarded by the First Amendment." **455Fed. Election Comm'n v. Machinists Non-Partisan Political League*, 655 F.2d 380, 388 (D.C.Cir.1981).

[10] The D.C. Circuit has set out principles to

guide a trial court's decision in cases involving the implication of a First Amendment right in the discovery context. *Int'l Union,* 590 F.2d at 1152. Before compelling discovery, this court must assess (1) whether the information goes to the "heart of the lawsuit," (2) whether the party seeking the discovery sought the information through alternative sources, and (3) whether the party seeking disclosure made reasonable attempts to obtain the information elsewhere. *Id.*

[11] The plaintiff loses on all three points. As noted earlier, the information sought from the non-party witnesses is irrelevant to the plaintiff's FACA claim and thus does not go to the heart of the lawsuit. *Id.*; Fed. R. Civ. P. 26(b)(2). In addition, the plaintiff can obtain the information needed to proceed on its FACA claim from the federal defendants and it has not shown that it has made reasonable attempts to obtain the information elsewhere before asking for this extraordinarily broad discovery request of the non-party witnesses. *Id.*

IV. CONCLUSION

For all these reasons, the court denies the plaintiff's motion to compel the production of documents and grants the non-party witnesses' motions to quash the subpoenas. An order directing the parties in a manner consistent with this Memorandum Opinion is separately and contemporaneously issued this _____ day of July, 2002.

208 F.R.D. 449

Motions, Pleadings and Filings (Back to top)

- 1:02mc00252 (Docket)
  (Jun. 03, 2002)

END OF DOCUMENT

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August 30, 2005

Jonathan M. Jacobson
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Re: Document Subpoena to National Association of Consumer Advocates in *Ross v. American Express Co.*, No. 04 CV 05273 (WHP) (S.D.N.Y.)

Dear Mr. Jacobson and Ms. Berger:

As you know, we have been retained by National Association of Consumer Advocates (NACA) to represent it in connection with a subpoena issued from the United States District Court for the District of Columbia and served by you on NACA, seeking production of documents in relation to litigation in the United States District Court for the Southern District of New York, captioned *Ross v. American Express Co.*, No. 04 CV 05723. By previous agreement, the time for responding to the subpoena was extended to August 30, 2005. This letter constitutes NACA's written objections to production of the documents designated in the subpoena, as authorized by Federal Rule of Civil Procedure 45(c)(2)(B).

NACA objects to the production of the documents described in Exhibit B to the subpoena on the following grounds, which are applicable to each of the six numbered requests:

1. Compliance with the subpoena would impose an unreasonable burden on NACA because of its sweeping overbreadth. The subpoena seeks documents relating to meetings and communications (broadly defined) during which a number of topics that are themselves extremely broadly defined were discussed over an eight-year period. Compliance with the subpoena would require NACA to identify potentially hundreds or thousands of meetings and communications and conduct an extensive search of its files for documents "sufficient to show" such meetings and communications. The subpoena's use of the term "sufficient to show" is itself vague, but whatever it means, it clearly does not significantly limit the burden that the subpoena seeks to impose, because the document requests go on to state that documents "sufficient to show" meetings and communications must include, but not be limited to, "*all* meeting notes,

agendas, presentations, summaries and/or minutes, including *all* supporting materials referenced in such documents" (emphasis added). An attempt to search for and produce the documents called for by the subpoena would require weeks of effort by NACA's tiny staff, impose substantial expense on NACA, and significantly if not entirely divert it from its ongoing activities during that time. This undue burden and expense would in no way be justified by any genuine need for the materials by the parties to the *Ross* litigation.

2. The subpoena seeks documents that are not even tangentially relevant to the *Ross* litigation. As explained to us both by Ms. Berger and by counsel for the plaintiffs, the *Ross* action involves claims that credit card providers engaged in an antitrust conspiracy with respect to the terms under which they would offer their products — specifically, with respect to the inclusion of arbitration clauses in cardholder agreements. The subpoena to NACA does not seek information bearing on whether such a conspiracy occurred or whether, if it did, it would constitute an antitrust violation, nor does it seek any information that relates to the underlying issue in the *Ross* case concerning an alleged conspiracy to impose foreign transaction fees upon attorneys. Rather, according to Ms. Berger, the defendants in the *Ross* action contend that the plaintiffs' claims are based only on meetings among attorneys at which general legal issues were discussed, and the subpoena to NACA seeks to discover information establishing that plaintiffs' attorneys also meet to discuss issues such as arbitration and class actions. That both plaintiffs' and defense attorneys regularly discuss legal issues that arise in their practices, however, is neither subject to reasonable dispute nor probative of whether the particular transactions challenged by the plaintiffs in the *Ross* action did or did not involve a conspiracy among competitors to agree upon the terms of credit card agreements. And, certainly, discovery of the particulars of all meetings on the broadly defined topics covered by the subpoena is not remotely necessary to establish that plaintiffs' lawyers discuss legal issues among themselves, even if that proposition were relevant to the claims in the *Ross* action.[1] In short, the defendants' need for the evidence sought by the subpoena falls far short of justifying the overwhelming burden that the subpoena would impose upon NACA.

3. NACA is a non-profit membership organization, and it engages in advocacy efforts that are protected by the First Amendment to the United States Constitution. The requests seek information about the details of the protected advocacy of NACA and its members. Compliance would infringe and burden the First Amendment rights of NACA, its members, and others to freedom of association, to freedom of speech, and to petition the government insofar as the document requests are specifically targeted at compelling the production of information concerning NACA's participation, together with other persons and groups, in activities aimed at advocating particular positions in the courts and promoting legal reform and government

[1] The need for production of documents is further obviated by the fact that NACA will be appearing for deposition on oral examination through its designated representative on September 1, 2005.

protection of the rights of citizens and consumers. *See Wyoming v. U.S. Department of Agriculture*, 208 F.R.D. 449 (D.D.C. 2002).

4. NACA also objects to each of the requests to the extent it seeks attorney-client privileged material and/or protected work product.[2] Moreover, the great burden that would be imposed on NACA by an item-by-item privilege review and preparation of a privilege log, reinforces the conclusion that the subpoena as a whole is unreasonably burdensome in relation to the defendants' need for the material sought, which is, at best, minimal.

In light of the foregoing objections, which, as previously noted, apply to each of the documents requests separately as well as all of them together, NACA will not produce documents in response to the subpoena unless compelled to do so. *See* Fed. R. Civ. P. 45(c)(2)(B). We note, in addition, that general information about NACA's activities in most of the areas covered by the subpoena can be readily obtained through its website, www.naca.net.

In addition to the foregoing objections, NACA also specifically objects to the following aspects of the particular definitions, instructions, statement of relevant time period, and requests for production of documents set forth in Exhibit B to the subpoena. (The numbers used in the following objections correspond to those in the relevant portions of Exhibit B.)

Definitions:

1. NACA objects to the definitions of "and" and "or" as being unintelligible and rendering it impossible to place a coherent construction on the requests.

2. NACA objects to the definition of "communication," and in particular to its inclusion of all "documents" as well as other terms not normally encompassed within the concept of "communication," as vague and overbroad. The expansive definition adds significantly to the burden that complying with the subpoena would entail.

3. NACA objects to the definition of "meeting" to include any passing, direct or indirect encounter in which any "communication" took place, as overbroad, and as imposing an undue burden on NACA to identify "meetings" that are subject to the document requests.

6. NACA objects to the definitions of "you" and "your" to include persons and organizations other than NACA, including former officers, employees, and "associates" and

[2] We note that the subpoena does not request that a privilege log be provided until the first date on which documents are produced and, hence, that the defendants have not sought to require the production of a privilege log simultaneously with the serving of these objections. In any event, it would be unduly burdensome to require NACA to review the vast universe of documents potentially responsive to the subpoena and produce a privilege log for all attorney-client privileged materials and all work product within the time allowed for responding to the subpoena.

other persons that are not subject to NACA's control. Combined with the instruction to produce all documents within "your" possession, custody and control, the definition of "your" has the effect of instructing NACA to produce documents that are not within its own possession, custody and control. NACA objects to the subpoena as improper under Rule 45 to the extent it seeks documents that are beyond its possession, custody, and control. In addition, NACA objects to the definition insofar as it would contribute to overbreadth and unreasonably burdensome nature of the subpoena by purporting to require NACA to produce documents concerning meetings and communication to which it was not actually a party.

7. NACA objects to the definition of singular and plural words as including one another, on the ground that it is unintelligible and renders it impossible to give the terms of the subpoena a coherent meaning.

Instructions.

1 and 3. NACA objects to the instruction to produce original documents in original folders as being unreasonably burdensome and disruptive to NACA's operations, and unnecessary.

2. NACA objects to the instruction to produce all documents in "Your" possession, custody and control because if its incorporation of the term "Your" as defined to include persons other than NACA and outside of its control.

4. NACA objects to the instructions concerning the preparation of a privilege log to the extent that it requires the provision of information exceeding that required by Fed. R. Civ. P. 45(d)(2), which provides only that sufficient information must be provided to permit assessment of the claim of privilege. (The excessive information purportedly required by the instruction includes, for example, "precise" statements of fact, multiple dates including dates when events occurred of which NACA may have no knowledge, statements about whom various people "purported" to represent, and descriptions of places where documents were kept). NACA also objects to this instruction to the extent it does not allow sufficient time for the preparation of a privilege log in light of the extreme breadth of the requests.)

5. NACA objects to the instruction that documents be produced in such fashion as to identify various items of information about their custodians as being beyond the scope of Fed. R. Civ. P. 45.

6. NACA objects to the instruction 6, concerning redaction of documents, on the ground that the "particularity" requirement it would impose exceeds the requirements of Rule 45.

7. NACA objects to instruction 7, which purports to require NACA to provide a wealth of information about documents not in its possession, custody or control, on the ground that it would transform a Rule 45 subpoena into an interrogatory. The Federal Rules of Civil Procedure do not permit interrogatories to be posed to non-parties. A non-party cannot be compelled to answer questions about its past activities in the guise of a Rule 45 subpoena for documents.

8. NACA objects to instruction 8, which states that the subpoena's requests shall be "deemed" to be continuing and purports to require NACA to produce documents it may acquire in the future. The Federal Rules of Civil Procedure do not permit "continuing" requests to be imposed upon a non-party through a Rule 45 subpoena.

9. NACA objects to instruction 9, which states: "No document request shall be construed to include individual transactional documents, unless otherwise specified." This instruction is unintelligible and meaningless.

Relevant Time Period

NACA objects to the over-eight-year time period covered by the subpoena as overly broad and unduly burdensome. NACA also objects to the purported requirement that where it "indicate the date or dates to which [its] responses relate." A Rule 45 subpoena cannot require the recipient of the subpoena to answer questions about documents produced in response to the subpoena.

Requests for the Production of Documents.

1. Request No. 1 seeks: "Documents sufficient to show any Meeting between You and any other attorney(s) or law firm(s) during which anything relating to (1) the prosecution of class action lawsuits, (ii) legislation affecting class actions, or (iii) the impact of judicial decisions affecting class actions, was discussed, including but not limited to all meeting notes, agendas, presentations, summaries and/or minutes, including all supporting materials referenced in such documents; provided, however, that there need be no production of documents relating to any Meeting regarding a pending litigation in which both You and the other attorney(s) or law firm(s) had previously been retained."

NACA objects to Request No. 1 based on the overbreadth and unreasonable burden, relevance, First Amendment, and attorney-client/work product privilege grounds set forth on pp. 1-4 above. The request for documents "sufficient" to show all meetings where anything was said that related in any way to class actions, class action legislation, and judicial decisions on class actions (including *all* meeting notes and other documents) would require review of an overwhelming number of meetings and documents, and impose a tremendous burden and

expense on NACA and its staff. NACA's meetings regarding class action issues, moreover, are entirely unrelated to the issues regarding arbitration and foreign transaction fees at issue in this litigation. Moreover, such meetings lie at the heart of NACA's First Amendment advocacy efforts, and production of the requested information would threaten to chill those efforts.

2. Request No. 2 seeks: "Documents sufficient to show any Meeting between You and any other attorney(s) or law firm(s) during which arbitration clauses in consumer agreements were discussed, reviewed, or referenced, including but not limited to all meeting notes, agendas, presentations, summaries and/or minutes, including all supporting materials referenced in such documents; provided, however, that there need be no production of documents relating to any Meeting regarding a pending litigation in which both You and the other attorney(s) or law firm(s) had previously been retained."

NACA objects to Request No. 2 based on the overbreadth and unreasonable burden, relevance, First Amendment, and attorney-client/work product privilege grounds set forth on pp. 1-4 above. The request for documents "sufficient" to show all meetings involving discussion of consumer arbitration clauses (including *all* meeting notes and other documents) would require review of an overwhelming number of meetings and documents, and impose a tremendous burden and expense on NACA and its staff. NACA's meetings regarding arbitration issues, moreover, have no bearing on whether the defendants' conduct with respect to the arbitration and foreign transaction fees at issue in this litigation was lawful. Moreover, such meetings lie at the heart of NACA's First Amendment advocacy efforts, and production of the requested information would threaten to chill those efforts.

3. Request No. 3 seeks: "Documents sufficient to show communications between You and any other attorney(s) or law firm(s) concerning the sharing of costs among attorneys in any class action litigation or litigations generally."

NACA objects to Request No. 3 based on the overbreadth and unreasonable burden, relevance, First Amendment, and attorney-client/work product privilege grounds set forth on pp. 1-4 above. Imposing on NACA the burden of searching for information on this subject is particularly unwarranted given that the plaintiffs in the *Ross* action do not appear to be challenging litigation cost-sharing, nor does cost-sharing among plaintiffs' attorneys (let alone NACA's communications on the subject) otherwise appear to be relevant to any issue in the case. The request appears to be no more than a fishing expedition on a subject far afield from that of the *Ross* case.

4. Request No. 4 seeks: "Documents sufficient to show communications between You and any other attorney(s) or law firm(s) concerning the financing of class action lawsuits generally, or in particular cases."

NACA objects to Request No. 4 based on the overbreadth and unreasonable burden, relevance, First Amendment, and attorney-client/work product privilege grounds set forth on pp. 1-4 above. Imposing on NACA the burden of searching for information on this subject is particularly unwarranted because the financing of class action litigation (let alone NACA's communications on the subject) is unrelated to the subjects on which the *Ross* plaintiffs allege the defendants conspired and doe not otherwise appear to be relevant to any issue in the case. Again, the request appears to be no more than a fishing expedition on a subject far afield from that of the *Ross* case.

5. Request No. 5 seeks: "Documents sufficient to show communications between You and any other attorney(s) or law firm(s) concerning the actual or considered drafting and/or filing of any amicus brief in any class action case."

NACA objects to Request No. 5 based on the overbreadth and unreasonable burden, relevance, First Amendment, and attorney-client/work product privilege grounds set forth on pp. 1-4 above. Producing all (or even "sufficient," whatever that means) documents relating to communications concerning the actual or possible drafting of amicus briefs would be particularly burdensome because of the large number of potentially responsive documents. NACA's consideration of what positions to take in amicus briefs is also central to its First Amendment advocacy efforts, and all or nearly all responsive documents would be subject to work product protection and/or attorney-client privilege. Moreover, the details of NACA's consideration of whether to file amicus briefs and of the drafting process regarding such briefs have no relation to the issues that are the subject of the *Ross* litigation, and even if they had any tangential relevance, the defendants' asserted need for them would not come close to outweighing the practical burden of producing them (or preparing a privilege log covering them), the effect such production would have on NACA's First Amendment interests, or the burden production would impose on the attorney-client privilege and work-product protection.

6. Request No. 6 seeks: "Documents sufficient to show communications between You and any other attorney(s) or law firm(s) relating to legislation concerning class action litigations."

Request No. 6 appears to be subsumed within Request No. 1; even if its scope may be slightly different, NACA objects to it for the same reasons that it objects to Request No. 1. NACA's First Amendment objection is particularly pertinent to a request concerning communications involving proposed legislation. Moreover, such communications are particularly far afield from the subject matter of this litigation, which is credit card companies' imposition of arbitration clauses and foreign transaction charges, not their legislative advocacy concerning class actions. (Defendants, of course, would be entitled to *Noerr-Pennington* protection for any genuine legislative advocacy efforts, but they have no need to obtain documents relating to NACA's advocacy if they can establish that their own conduct falls within

the scope of that doctrine. Whether defendants have a valid *Noerr-Pennington* defense will in no way turn on information about *NACA*'s legislative advocacy.)

Based on its substantial objections to the subpoena as set forth above, NACA will not produce documents in response to it. Please feel free to contact me if you have any questions about NACA's position or if there are issues you would like to discuss.

Sincerely yours,

Scott L. Nelson

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August 30, 2005

Jonathan M. Jacobson
Jamie L. Berger
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590 Madison Avenue
New York, NY 10022-2524

Re: Document Subpoena to Trial Lawyers for Public Justice in *Ross v. American Express Co.*, No. 04 CV 05273 (WHP) (S.D.N.Y.)

Dear Mr. Jacobson and Ms. Berger:

As you know, we have been retained by Trial Lawyers for Public Justice (TLPJ) to represent it in connection with a subpoena issued from the United States District Court for the District of Columbia and served by you on TLPJ, seeking production of documents in relation to litigation in the United States District Court for the Southern District of New York, captioned *Ross v. American Express Co.*, No. 04 CV 05723. By previous agreement, the time for responding to the subpoena was extended to August 30, 2005. This letter constitutes TLPJ's written objections to production of the documents designated in the subpoena, as authorized by Federal Rule of Civil Procedure 45(c)(2)(B).

TLPJ objects to the production of the documents described in Exhibit B to the subpoena on the following grounds, which are applicable to each of the six numbered requests:

1. Compliance with the subpoena would impose an unreasonable burden on TLPJ because of its sweeping overbreadth. The subpoena seeks documents relating to meetings and communications (broadly defined) during which a number of topics that are themselves extremely broadly defined were discussed over an eight-year period. Compliance with the subpoena would require TLPJ to identify potentially hundreds or thousands of meetings and communications and conduct an extensive search of its files for documents "sufficient to show" such meetings and communications. The subpoena's use of the term "sufficient to show" is itself vague, but whatever it means, it clearly does not significantly limit the burden that the subpoena seeks to impose, because the document requests go on to state that documents "sufficient to show" meetings and communications must include, but not be limited to, "*all* meeting notes,

agendas, presentations, summaries and/or minutes, including *all* supporting materials referenced in such documents" (emphasis added). An attempt to search for and produce the documents called for by the subpoena would require weeks of effort by TLPJ's small staff, impose substantial expense on TLPJ, and significantly if not entirely divert it from its ongoing activities during that time. This undue burden and expense would in no way be justified by any genuine need for the materials by the parties to the *Ross* litigation.

2. The subpoena seeks documents that are not even tangentially relevant to the *Ross* litigation. As explained to us both by Ms. Berger and by counsel for the plaintiffs, the *Ross* action involves claims that credit card providers engaged in an antitrust conspiracy with respect to the terms under which they would offer their products — specifically, with respect to the inclusion of arbitration clauses in cardholder agreements. The subpoena to TLPJ does not seek information bearing on whether such a conspiracy occurred or whether, if it did, it would constitute an antitrust violation, nor does it seek any information that relates to the underlying issue in the *Ross* case concerning an alleged conspiracy to impose foreign transaction fees upon attorneys. Rather, according to Ms. Berger, the defendants in the *Ross* action contend that the plaintiffs' claims are based only on meetings among attorneys at which general legal issues were discussed, and the subpoena to TLPJ seeks to discover information establishing that plaintiffs' attorneys also meet to discuss issues such as arbitration and class actions. That both plaintiffs' and defense attorneys regularly discuss legal issues that arise in their practices, however, is neither subject to reasonable dispute nor probative of whether the particular transactions challenged by the plaintiffs in the *Ross* action did or did not involve a conspiracy among competitors to agree upon the terms of credit card agreements. And, certainly, discovery of the particulars of all meetings on the broadly defined topics covered by the subpoena is not remotely necessary to establish that plaintiffs' lawyers discuss legal issues among themselves, even if that proposition were relevant to the claims in the *Ross* action.[1] In short, the defendants' need for the evidence sought by the subpoena falls far short of justifying the overwhelming burden that the subpoena would impose upon TLPJ.

3. TLPJ is a project of the TLPJ Foundation, a not-for-profit membership organization, and it engages in advocacy efforts that are protected by the First Amendment to the United States Constitution. The requests seek information about the details of the protected advocacy of TLPJ and its members. Compliance would infringe and burden the First Amendment rights of TLPJ, its members, and others to freedom of association, to freedom of speech, and to petition the government insofar as the document requests are specifically targeted at compelling the production of information concerning TLPJ's participation, together with other persons and groups, in activities aimed at advocating particular positions in the courts and

[1] The need for production of documents is further obviated by the fact that TLPJ will be appearing for deposition on oral examination through its designated representative on September 1, 2005.

promoting legal reform and protection of the rights of citizens and consumers. *See Wyoming v. U.S. Department of Agriculture*, 208 F.R.D. 449 (D.D.C. 2002).

4. Much of the information sought by the subpoena would relate to matters in which TLPJ employees were acting as attorneys on behalf of clients or potential clients, and matters in which litigation was reasonably contemplated. A great many responsive documents would be subject to the attorney-client privilege and/or the protection afforded work product by Federal Rule of Civil Procedure 26. TLPJ objects to each of the requests to the extent it seeks attorney-client privileged material and/or protected work product.[2] Moreover, the fact that much of the information sought by the subpoena is privileged, together with the great burden that would be entailed by an item-by-item assertion of privilege, reinforces the conclusion that the subpoena as a whole is unreasonably burdensome in relation to the defendants' need for the material sought, which is, at best, minimal.

In light of the foregoing objections, which, as previously noted, apply to each of the documents requests separately as well as all of them together, TLPJ will not produce documents in response to the subpoena unless compelled to do so. *See* Fed. R. Civ. P. 45(c)(2)(B). We note, in addition, that general information about TLPJ's activities in most of the areas covered by the subpoena can be readily obtained through its website, www.tlpj.org.

In addition to the foregoing objections, TLPJ also specifically objects to the following aspects of the particular definitions, instructions, statement of relevant time period, and requests for production of documents set forth in Exhibit B to the subpoena. (The numbers used in the following objections correspond to those in the relevant portions of Exhibit B.)

Definitions:

1. TLPJ objects to the definitions of "and" and "or" as being unintelligible and rendering it impossible to place a coherent construction on the requests.

2. TLPJ objects to the definition of "communication," and in particular to its inclusion of all "documents" as well as other terms not normally encompassed within the concept of "communication," as vague and overbroad. The expansive definition adds significantly to the burden that complying with the subpoena would entail.

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[2] We note that the subpoena does not request that a privilege log be provided until the first date on which documents are produced and, hence, that the defendants have not sought to require the production of a privilege log simultaneously with the serving of these objections. In any event, it would be unduly burdensome to require TLPJ to review the vast universe of documents potentially responsive to the subpoena and produce a privilege log for all attorney-client privileged materials and all work product within the time allowed for responding to the subpoena.

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3. TLPJ objects to the definition of "meeting" to include any passing, direct or indirect encounter in which any "communication" took place, as overbroad, and as imposing an undue burden on TLPJ to identify "meetings" that are subject to the document requests.

6. TLPJ objects to the definitions of "you" and "your" to include persons and organizations other than TLPJ, including former officers, employees, and "associates" and other persons that are not subject to TLPJ's control. Combined with the instruction to produce all documents within "your" possession, custody and control, the definition of "your" has the effect of instructing TLPJ to produce documents that are not within its own possession, custody and control. TLPJ objects to the subpoena as improper under Rule 45 to the extent it seeks documents that are beyond its possession, custody, and control. In addition, TLPJ objects to the definition insofar as it would contribute to overbreadth and unreasonably burdensome nature of the subpoena by purporting to require TLPJ to produce documents concerning meetings and communication to which it was not actually a party.

7. TLPJ objects to the definition of singular and plural words as including one another, on the ground that it is unintelligible and renders it impossible to give the terms of the subpoena a coherent meaning.

Instructions.

1 and 3. TLPJ objects to the instruction to produce original documents in original folders as being unreasonably burdensome and disruptive to TLPJ's operations, and unnecessary.

2. TLPJ objects to the instruction to produce all documents in "Your" possession, custody and control because if its incorporation of the term "Your" as defined to include persons other than TLPJ and outside of its control.

4. TLPJ objects to the instructions concerning the preparation of a privilege log to the extent that it requires the provision of information exceeding that required by Fed. R. Civ. P. 45(d)(2), which provides only that sufficient information must be provided to permit assessment of the claim of privilege. (The excessive information purportedly required by the instruction includes, for example, "precise" statements of fact, multiple dates including dates when events occurred of which TLPJ may have no knowledge, statements about whom various people "purported" to represent, and descriptions of places where documents were kept). TLPJ also objects to this instruction to the extent it does not allow sufficient time for the preparation of a privilege log in light of the extreme breadth of the requests.

5. TLPJ objects to the instruction that documents be produced in such fashion as to identify various items of information about their custodians as being beyond the scope of Fed. R. Civ. P. 45.

6. TLPJ objects to instruction 6, concerning redaction of documents, on the ground that the "particularity" requirement it would impose exceeds the requirements of Rule 45.

7. TLPJ objects to instruction 7, which purports to require TLPJ to provide a wealth of information about documents not in its possession, custody or control, on the ground that it would transform a Rule 45 subpoena into an interrogatory. The Federal Rules of Civil Procedure do not permit interrogatories to be posed to non-parties. A non-party cannot be compelled to answer questions about its past activities in the guise of a Rule 45 subpoena for documents.

8. TLPJ objects to instruction 8, which states that the subpoena's requests shall be "deemed" to be continuing and purports to require TLPJ to produce documents it may acquire in the future. The Federal Rules of Civil Procedure do not permit "continuing" requests to be imposed upon a non-party through a Rule 45 subpoena.

9. TLPJ objects to instruction 9, which states: "No document request shall be construed to include individual transactional documents, unless otherwise specified." This instruction is unintelligible and meaningless.

Relevant Time Period

TLPJ objects to the over-eight-year time period covered by the subpoena as overly broad and unduly burdensome. TLPJ also objects to the purported requirement that it "indicate the date or dates to which [its] responses relate." A Rule 45 subpoena cannot require the recipient of the subpoena to answer questions about documents produced in response to the subpoena.

Requests for the Production of Documents.

1. Request No. 1 seeks: "Documents sufficient to show any Meeting between You and any other attorney(s) or law firm(s) during which anything relating to (1) the prosecution of class action lawsuits, (ii) legislation affecting class actions, or (iii) the impact of judicial decisions affecting class actions, was discussed, including but not limited to all meeting notes, agendas, presentations, summaries and/or minutes, including all supporting materials referenced in such documents; provided, however, that there need be no production of documents relating to any Meeting regarding a pending litigation in which both You and the other attorney(s) or law firm(s) had previously been retained."

TLPJ objects to Request No. 1 based on the overbreadth and unreasonable burden, relevance, First Amendment, and attorney-client/work product privilege grounds set forth on pp. 1-4 above. The request for documents "sufficient" to show all meetings where anything was said that related in any way to class actions, class action legislation, and judicial decisions on class

actions (including *all* meeting notes and other documents) would require review of an overwhelming number of meetings and documents, and impose a tremendous burden and expense on TLPJ and its staff. TLPJ's meetings regarding class action issues, moreover, are entirely unrelated to the issues regarding arbitration and foreign transaction fees at issue in this litigation. Moreover, such meetings lie at the heart of TLPJ's First Amendment advocacy efforts, and a great many of such meetings would involve attorney-client privileged materials and/or protected work product. (The exclusion from the request of meetings involving *pending* litigation in which TLPJ and the other participating attorneys had *previously* been retained does not address the privilege issue, because communications preceding the initiation of litigation or the formal creation of an attorney-client relationship remain subject to both work product protection and attorney-client privilege.)

2. Request No. 2 seeks: "Documents sufficient to show any Meeting between You and any other attorney(s) or law firm(s) during which arbitration clauses in consumer agreements were discussed, reviewed, or referenced, including but not limited to all meeting notes, agendas, presentations, summaries and/or minutes, including all supporting materials referenced in such documents; provided, however, that there need be no production of documents relating to any Meeting regarding a pending litigation in which both You and the other attorney(s) or law firm(s) had previously been retained."

TLPJ objects to Request No. 2 based on the overbreadth and unreasonable burden, relevance, First Amendment, and attorney-client/work product privilege grounds set forth on pp. 1-4 above. The request for documents "sufficient" to show all meetings involving discussion of consumer arbitration clauses (including *all* meeting notes and other documents) would require review of an overwhelming number of meetings and documents, and impose a tremendous burden and expense on TLPJ and its staff. TLPJ's meetings regarding arbitration issues, moreover, have no bearing on whether the defendants' conduct with respect to the arbitration and foreign transaction fees at issue in this litigation was lawful. Moreover, such meetings lie at the heart of TLPJ's First Amendment advocacy efforts, and a great many of such meetings would involve attorney-client privileged materials and/or protected work product. (The exclusion from the request of meetings involving *pending* litigation in which TLPJ and the other participating attorneys had *previously* been retained does not address the privilege issue, because communications preceding the initiation of litigation or the formal creation of an attorney-client relationship remain subject to both work product protection and attorney-client privilege.)

3. Request No. 3 seeks: "Documents sufficient to show communications between You and any other attorney(s) or law firm(s) concerning the sharing of costs among attorneys in any class action litigation or litigations generally."

TLPJ objects to Request No. 3 based on the overbreadth and unreasonable burden, relevance, First Amendment, and attorney-client/work product privilege grounds set forth on pp.

1-4 above. Imposing on TLPJ the burden of searching for information on this subject is particularly unwarranted given that the plaintiffs in the *Ross* action do not appear to be challenging litigation cost-sharing, nor does cost-sharing among plaintiffs' attorneys (let alone TLPJ's communications on the subject) otherwise appear to be relevant to any issue in the case. In addition, the request raises serious issues of privilege and work product because of its failure to exclude cost-sharing arrangements in cases in which TLPJ is acting as counsel. The request appears to be no more than a fishing expedition on a subject far afield from that of the *Ross* case.

4. Request No. 4 seeks: "Documents sufficient to show communications between You and any other attorney(s) or law firm(s) concerning the financing of class action lawsuits generally, or in particular cases."

TLPJ objects to Request No. 4 based on the overbreadth and unreasonable burden, relevance, First Amendment, and attorney-client/work product privilege grounds set forth on pp. 1-4 above. Imposing on TLPJ the burden of searching for information on this subject is particularly unwarranted because the financing of class action litigation (let alone TLPJ's communications on the subject) is unrelated to the subjects on which the *Ross* plaintiffs allege the defendants conspired and doe not otherwise appear to be relevant to any issue in the case. In addition, the request raises serious issues of privilege and work product because of its failure to exclude cost-sharing arrangements in cases in which TLPJ is acting as counsel. Again, the request appears to be no more than a fishing expedition on a subject far afield from that of the *Ross* case.

5. Request No. 5 seeks: "Documents sufficient to show communications between You and any other attorney(s) or law firm(s) concerning the actual or considered drafting and/or filing of any amicus brief in any class action case."

TLPJ objects to Request No. 5 based on the overbreadth and unreasonable burden, relevance, First Amendment, and attorney-client/work product privilege grounds set forth on pp. 1-4 above. Producing all (or even "sufficient," whatever that means) documents relating to communications concerning the actual or possible drafting of amicus briefs would be particularly burdensome because of the large number of potentially responsive documents. TLPJ's consideration of what positions to take in amicus briefs is also central to its First Amendment advocacy efforts, and all or nearly all responsive documents would be subject to work product protection and/or attorney-client privilege. Moreover, the details of TLPJ's consideration of whether to file amicus briefs and of the drafting process regarding such briefs have no relation to the issues that are the subject of the *Ross* litigation, and even if they had any tangential relevance, the defendants' asserted need for them would not come close to outweighing the practical burden of producing them (or preparing a privilege log covering them), the effect such production would have on TLPJ's First Amendment interests, or the burden production would impose on the attorney-client privilege and work-product protection.

6. Request No. 6 seeks: "Documents sufficient to show communications between You and any other attorney(s) or law firm(s) relating to legislation concerning class action litigations."

Request No. 6 appears to be subsumed within Request No. 1; even if its scope may be slightly different, TLPJ objects to it for the same reasons that it objects to Request No. 1. TLPJ's First Amendment objection is particularly pertinent to a request concerning communications involving proposed legislation. Moreover, such communications are particularly far afield from the subject matter of this litigation, which is credit card companies' imposition of arbitration clauses and foreign transaction charges, not their legislative advocacy concerning class actions. (Defendants, of course, would be entitled to *Noerr-Pennington* protection for any genuine legislative advocacy efforts, but they have no need to obtain documents relating to TLPJ's advocacy if they can establish that their own conduct falls within the scope of that doctrine. Whether defendants have a valid *Noerr-Pennington* defense will in no way turn on information about *TLPJ*'s legislative advocacy.)

Based on its substantial objections to the subpoena as set forth above, TLPJ will not produce documents in response to it. Please feel free to contact me if you have any questions about TLPJ's position or if there are issues you would like to discuss.

Sincerely yours,

Scott L. Nelson