

October 3, 2003

The Reporters Committee for Freedom of the Press
The American Society of Newspaper Editors
Society of Professional Journalists
National Press Club

Valerie Caproni
General Counsel
Federal Bureau of Investigation
Room 7427
935 Pennsylvania Avenue. NW
Washington, D.C. 20535

Re: FBI letters warning journalists of upcoming subpoenas

Dear Ms. Caproni:

We are writing to protest letters sent by the FBI field office in New York to several journalists directing them to preserve all records of communications with alleged computer hacker Adrian Lamo. The letters disregard the Department of Justice's own internal safeguards designed to protect the reporters' privilege to keep information confidential.

The organizations sending this letter are all associations of reporters and editors that defend the First Amendment rights and freedom of information interests of the news media. More information on each organization is attached to this letter.

The FBI letters state that pursuant to 18 USC § 2703(f), the journalists are required to preserve all records of communications with Mr. Lamo in anticipation of a future subpoena, and warns of possible obstruction of justice charges for any failure to comply with the request. There are two issues that arise from these letters that concern us.

First, as you know, the Department of Justice guidelines covering subpoenas to journalists require that "all reasonable attempts should be made to obtain information from alternative sources before considering issuing a subpoena to a member of the news media." 28 CFR 50.10(b). Section (c) requires that "negotiations with the media shall be pursued in all cases in which a subpoena to a member of the news media is contemplated." Section (f)(1) prohibits the use of subpoenas to obtain "peripheral, nonessential, or speculative information." We understand that the FBI has additional internal procedures to safeguard the First Amendment interests of the news media, in addition to the Justice Department guidelines.

This is a serious situation that requires close supervision to ensure that FBI agents are instructed to follow the FBI's internal procedures should the Justice Department contemplate actually subpoenaing the reporters. Frankly, we find it very hard to believe that there are no alternative sources of information available to the FBI in this case.

Second, we draw your attention to the statute cited in the letter, the Electronic Communication Transactional Records Act, 18 USC § 2703 (f). Section 2703 governs the “Required Disclosure of Customer Communications or Records.” Section (f)(1) states that “a provider of wire or electronic communication services or a remote computing service, upon the request of a governmental entity, shall take all necessary steps to preserve records or other evidence in its possession pending the issuance of a court order or other process.” It is clear that this statute applies to Internet Service Providers, not to journalists.

We ask that the letters requiring preservation of records be rescinded, that no subpoenas issue to journalists in this investigation without meeting the stringent standards of the guidelines, and hope that the FBI will deter future application of this statute to members of the news media.

Sincerely,

/s/

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cc: Patrick Kelly, Deputy General Counsel
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The organizations signing this letter are:

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee provides representation, guidance and research in First Amendment and Freedom of Information Act litigation.

The American Society of Newspaper Editors is a nonprofit organization founded in 1922. It has a nationwide membership of approximately 800 persons who hold positions as directing editors of daily newspapers throughout the United States, with members recently being added in Canada and other countries in the Americas. The purposes of the Society include assisting journalists and providing an unfettered and effective press in the service of the American people.

The **Society of Professional Journalists** is a voluntary nonprofit journalism organization representing every branch and rank of print and broadcast journalism. SPJ is the largest membership organization for journalists in the world, and for more than 90 years, SPJ has been dedicated to encouraging a climate in which journalism can be practiced freely, fully and in the public interest.

The **National Press Club**, established in 1908, is an organization of journalists and communicators in Washington, D.C., and around the world. It advocates on behalf of First Amendment, press freedom and press access issues, and works to advance the professional standards of journalists.