

GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF THE ATTORNEY GENERAL



ATTORNEY GENERAL

February 24, 2009

The Honorable Phil Mendelson
Chairperson, Committee on Public Safety and the Judiciary
Council of the District of Columbia
John A. Wilson Building, Suite 108
1350 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Dear Chairperson Mendelson:

I write in response to your letter of February 13th regarding the issuance of subpoenas in criminal investigations. In your correspondence, you ask why the existing statutory authority for search warrants is insufficient to satisfy the criminal investigative role contemplated for subpoenas. You also suggest that use of the subpoena process is designed to evade judicial review and therefore challenge the appropriateness of its utilization.

As you know, criminal codes here and around the country explicitly recognize the distinct roles of subpoenas and warrants as used by prosecutors to conduct criminal investigations. Courts have repeatedly upheld the use of subpoenas, whether issued by a grand jury or a prosecutor's office, as broad investigatory tools to assist in criminal investigations. Such subpoenas are critical tools for prosecutors, particularly in the early stages of investigations. While such subpoenas are unbound by some of the requirements that would otherwise apply to subpoenas issued at trial, their reach is not unlimited. Prosecutors cannot use subpoenas to "engage in arbitrary fishing expeditions, nor may they select targets of investigation out of malice or an intent to harass." *United States v. R. Enterprises, Inc.*, 498 U.S. 292, 299 (U.S. 1991). Importantly, courts retain the authority to quash or modify subpoenas if compliance would be "unreasonable" or "oppressive."

As I discussed in my testimony on February 6th before your committee, subpoena authority in my Office is not unique to the District of Columbia. Other jurisdictions provide subpoena authority to legal officials that may be exercised without court involvement. For example, Delaware, Hawaii, Nebraska, Oregon and Puerto Rico have all given the Attorney General in those jurisdictions broad investigatory subpoena power. In addition, Maryland allows the State's Attorney to issue subpoenas for records for the purpose of furthering an ongoing criminal investigation.

The broad authorized use of subpoenas in criminal investigations stands in contrast to the more limited character of search warrants. Perhaps most obviously, under D.C. Official Code § 23-521(d), search warrants can only issue for one of four limited types of property.¹ Unlike the broad spectrum of information properly reachable through the use of a subpoena, a search warrant could only be issued if the property sought meets these rigid definitions. Given the universe of potential criminal circumstances and situations, it is not difficult to imagine a wide range of instances where such a narrow, statutorily-prescribed limitation would be inadequate to the immediate needs of investigators. One such obvious example would be a need for information regarding the victim of a crime. In a circumstance where police or prosecutors need access to records held by a third party for purposes of identifying a crime victim, the search warrant statute would provide no relief, as such information would lie outside the defined scope of property subject to seizure.

In addition to the limited scope of items subject to seizure, the evidentiary standard required for issuance of a warrant appropriately exceeds that necessary for issuance of a subpoena. Again, in recognition of the different roles these tools play in the criminal investigative process, warrants, which operate to deprive persons of their liberty or property, necessitate a high probable cause standard of proof. Subpoenas, which effect no such deprivation, need not reach that same evidentiary threshold and thus are evaluated against a standard of reasonableness. U.S. Supreme Court Justice O'Connor explained the differing evidentiary standards: "[T]he Government cannot be required to justify the issuance of a grand jury subpoena by presenting evidence sufficient to establish probable cause because the very purpose of requesting the information is to ascertain whether probable cause exists." *United States v. R. Enterprises, Inc.* 498 U.S. at 297 (citing *Hale v. Henkel*, 201 U.S. 43, 65 (1906)).

Finally, I disagree with your implication that pursuing a criminal investigation utilizing the subpoena process somehow eliminates the independent role of the judiciary in such investigations. A party served with a subpoena has every right to challenge its issuance and move that it be modified or quashed in its entirety. Similarly, in the event of non-compliance, prosecutors will have to decide whether or not to initiate enforcement proceedings. Such challenges and motions will not be decided by criminal prosecutors or judges in *ex parte* proceedings. Instead, those challenges will be the subject of on-the-record proceedings in open court. The subpoena process thereby preserves the role of an independent judiciary in the ultimate adjudication of these matters.

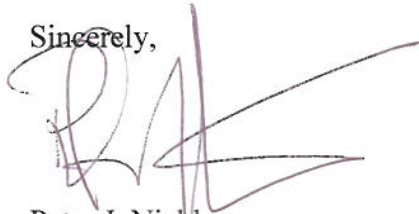
I hope you find this responsive to your request. I am confident that, upon consideration of this process, including the external safeguards afforded by the courts and the internal safeguards guaranteed by the detailed policy and procedures I have implemented, you and your colleagues

¹ D.C. Official Code § 23-521 states that a search warrant may direct the seizure of designated property or kinds of property if "(d) ... there is probable cause to believe that it -- (1) is stolen or embezzled; (2) is contraband or otherwise illegally possessed; (3) has been used or is possessed for the purpose of being used, or is designed or intended to be used, to commit or conceal the commission of a criminal offense; or (4) constitutes evidence of or tends to demonstrate the commission of an offense or the identity of a person participating in the commission of an offense."

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will recognize and support the Administration's effort to increase the efficiency of criminal investigations.

Sincerely,

A handwritten signature in purple ink, appearing to read 'P. Nickles', with a long horizontal flourish extending to the right.

Peter J. Nickles
Attorney General for the District of Columbia

PJN/rjh, sk
(AM-08-748(E))

cc: The Honorable Vincent Gray, Chairman
The Honorable Yvette Alexander
The Honorable Marion Barry
The Honorable Muriel Bowser
The Honorable Kwame Brown
The Honorable Michael Brown
The Honorable David Catania
The Honorable Mary Cheh
The Honorable Jack Evans
The Honorable Jim Graham
The Honorable Harry Thomas, Jr.
The Honorable Tommy Wells