



U.S. Department of Justice

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FAX COVER SHEET

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DATE: August 3, 2005
TO: David A. Kimberley
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CONTENTS: Response to Subpoena to FBI in case of *Hammontree, et al. v. Tom Williams Automotive*

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August 3, 2005

David A. Kimberley, Esq.
CUSIMANO, KEENER, ROBERTS,
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153 South Ninth Street
Gadsden, Alabama 35901

Re: Civil Subpoena in *Hannontree, et al. v. Tom Williams Automotive*
(Circuit Court of Jefferson County CV-2004-4724)

Dear Mr. Kimberley:

This is in response to your letters received by our office on June 14, 2005 and July 14, 2005, and the accompanying "Civil Subpoena For Production of Documents, etc Under Rule 45, ARCP," which directs Scott Balcom of the Federal Bureau of Investigation (FBI) to produce certain investigatory records.

Pursuant to 28 C.F.R. § 16.24 and in consideration of the factors specified in 28 C.F.R. § 16.26(b), we have determined that the FBI may not comply with your state subpoena. The scope of the records sought is broad and includes "any file contents of the investigation of a Craig T. Wurzbacher." Thus, the subpoena seeks records and items protected by the law enforcement privilege. 28 C.F.R. § 16.26 (a)(2). Additionally, the demanded disclosure would reveal investigatory records compiled for law enforcement purposes, and would interfere with enforcement proceedings or disclose investigative techniques and procedures the effectiveness of which would thereby be impaired. 28 C.F.R. § 16.26(b)(5). *

Even if the scope of the subpoena is limited to a notebook containing names, addresses, copies of driver's licenses, and credit cards, etc. of fraud victims, we have determined that the FBI may not comply with the state subpoena. See 28 C.F.R. § 16.26(b)(1). The demanded disclosure would violate the Privacy Act, 5 U.S.C. § 552a(b), which prohibits federal agencies from producing any material from its files concerning any individuals without those individuals' written consent or without a valid order of a court of "competent jurisdiction" authorizing the federal agency to disclose the material. 5 U.S.C. 552a(b)(11). A subpoena is not effective to authorize disclosure of such records under the Privacy Act. 5 U.S.C. § 552A(B)(11); Stiles v. *

David A. Kimberley, Esq.

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Atlanta Gas Light Co., 453 F.Supp. 798 (N.D. Ga. 1978). Furthermore, as the FBI is a non-party and has not waived its sovereign immunity, a state court order does not constitute a court of competent jurisdiction under the Privacy Act in this case. See Moore v. Armour Pharmaceutical Co., 129 F.R.D. 551 (11th Cir. 1990) (citing cases upholding quashing state court subpoenas of federal employees on grounds of sovereign immunity).

Mr. Balcom is hereby instructed, pursuant to 28 C.F.R. § § 16.22(a) and 16.24(b), not to comply with the subpoena. By regulation, the subpoenaed federal employee may not produce any of the requested materials without the United States Attorney's prior approval. 28 C.F.R. § 16.22(a). If any action is taken to compel the FBI employee's compliance with the subpoena, please serve a copy of any notice, motion or other process on this office and on the FBI. Please feel free to telephone the undersigned at (205)244-2109 with any further questions or concerns.

Sincerely,

ALICE H. MARTIN
United States Attorney


Edward Q. England
Assistant U.S. Attorney

cc: Ray Zicarelli, Esq.
Scott Balcom