

wife are protected by the spousal privilege, specifically excluded such communications from its requests.

On September 15, 2008—a week before trial—the government sent a subpoena to Mayer Brown seeking five broad categories of documents. Among many other things, the Subpoena calls for documents reflecting communications between Catherine Stevens and thirty-seven other individuals. *See* Exhibit A. It also requests certain broad categories of communications between Senator and Mrs. Stevens. The Subpoena does not request any specific individual communications, nor does it give any indication that the government knows of the existence of any particular documents within the Subpoena’s scope. It is a classic fishing expedition akin to a document request in a civil case.

Upon receiving the Subpoena, Mayer Brown conducted a search for responsive documents and collected several thousand documents on three disks. Mayer Brown forwarded the disks to defense counsel to review for documents protected by spousal privilege. Defense counsel reviewed the first approximately 100 emails and found no privileged communications, but also no relevant ones. Defense counsel communicated this to government counsel on October 3. *See* Exhibit B. Government counsel did not respond for a full week. After close of business yesterday, October 10, 2008—without acknowledging defense counsel’s position that the subpoena is unenforceable—government counsel again insisted that Mayer Brown produce all responsive documents. *See* Exhibit C.

The defense therefore must file this Motion to Quash the Government’s obviously improper Subpoena.¹

¹ We understand that Mayer Brown is submitting the three disks in camera for the Court’s information.

LEGAL FRAMEWORK

Federal Rule of Criminal Procedure 17(c)(2) provides that a court may quash a subpoena “if compliance would be unreasonable or oppressive.” Fed. R. Crim. P. 17(c)(2); *see United States v. Nixon*, 418 U.S. 683, 698 (1974). The party issuing the subpoena has the burden of showing that production would not be unreasonable or oppressive. “The Supreme Court in *Nixon* concluded that to compel production of documents under Rule 17(c), the party seeking production ‘must clear three hurdles: (1) relevancy; (2) admissibility; and (3) specificity.’” *United States v. Libby*, 432 F. Supp. 2d 26, 31 (D.D.C. 2006) (quoting *Nixon*, 418 U.S. at 700).

The first prong—relevancy—requires the Court to assess whether the documents sought have “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Fed. R. Evid. 401; *see Nixon*, 418 U.S. at 701; *Libby*, 432 F. Supp. 2d at 31. If the documents are deemed relevant, the court must consider whether the requested documents are admissible. *See, e.g.*, Fed. R. Evid. 401–415, 801–807; *see also Libby*, 432 F. Supp. 2d at 31 (collecting cases). The third prong—specificity—is an exacting standard.

While “exquisite specificity” is not required, courts will not approve a subpoena for documents based upon requests for disclosure from broad categories of documents. In fact, if the moving party cannot reasonably specify the information contained or believed to be contained in the documents sought but merely hopes that something useful will turn up, this is a sure sign that the subpoena is being misused. The specificity requirement ensures that a Rule 17(c) subpoena will not be used as a “fishing expedition to see what may turn up.” It is important to remember that one of the major purposes of the specificity requirement is to provide the subpoenaed party or other party having standing with enough knowledge about what documents are being requested so as to lodge any objections on relevancy or admissibility.

Libby, 432 F. Supp. 2d at 31–32 (quotations and citations omitted) (emphasis added). Finally, when “a recognized privilege provides legitimate ground for refusing to comply” with a

subpoena, the court should intervene to protect the privilege. *United States v. Under Seal (In re Grand Jury Proceedings #5)*, 401 F.3d 247, 250 (4th Cir. 2005) (citing *In re Sealed Case*, 676 F.2d 793, 806 (D.C. Cir. 1982)).

This Subpoena blatantly fails the *Nixon* test and seeks communications subject to the marital privilege. It should be quashed in its entirety.

ARGUMENT

A. The Subpoena Lacks the Degree of Specificity Required by Rule 17.

On September 24, 2008, the Court heard argument on CH2M HILL's motion to quash portions of subpoenas served on it by counsel for Senator Stevens. The defense subpoena sought "[a]ny document demonstrating any communications" between specified individuals or entities regarding particular subject matter. *See* Ex. A to Dkt. No. 79, request nos. 2–3. The Court granted CH2M HILL's motion to quash on the ground that the requests did not meet the specificity requirement of Fed. R. Crim. P. 17(c).

The government's September 15, 2008 Subpoena is broader than the defense subpoena that the Court previously quashed. It identifies no specific documents, and instead embarks on an impermissible "fishing expedition." *United States v. King*, 164 F.R.D. 542, 546 (D. Kan. 1996) ("Rule 17 was not intended to provide the defendant a mechanism by which to troll the waters of the sea's otherwise undiscoverable material in the small hope that something beneficial might rise to the surface.").

Request 1 seeks “[a]ny and all documents^[2] relating to^[3] the residence and/or real property owned by Catherine A. Stevens and Senator Theodore F. Stevens in Girdwood, Alaska . . . including but not limited to any correspondence or other communications between Catherine Stevens and Senator Stevens.” Ex. A at 2 (emphasis in original). Request 2 seeks “[a]ny and all documents relating to any communication, correspondence, contact, or other relationship between Catherine A. Stevens (including any Firm staff who performed tasks at the direction of Catherine A. Stevens) and any of” a list of thirty-seven individuals and companies. Ex. A at 2–3. Request 3 seeks “[a]ny and all documents relating to any financial disclosure requirement, form, or filing” by Senator Stevens. Ex. A at 3. Request 4 seeks “[a]ny and all documents relating to any electronic communications between Catherine A. Stevens and any email address bearing the trunk “senate.gov”, including any electronic communication exclusively between Catherine A. Stevens and Theodore F. Stevens.” Ex. A at 3 (emphasis in original). And Request 5 seeks “[a]ny and all documents relating to any thing of value given to or provided to” the Senator, his wife, or his daughter, excluding only Mrs. Stevens’s work-related compensation.

A more oppressive, non-specific subpoena could hardly be imagined. A “test for enforcement [of a Rule 17(c) subpoena] is whether the subpoena constitutes a good faith effort to obtain identified evidence rather than a general ‘fishing expedition’ that attempts to use the rule

² Courts have found that the term “any and all”—as used in each request of the government’s subpoena—is indicative of an impermissibly non-specific request. *See United States v. Jackson*, 155 F.R.D. 664, 668 (D. Kan. 1994) (“The subpoenas employ such terms as ‘any and all documents’ or ‘including, but not limited to’; these are indicia of a fishing expedition.”); *see also Khouj v. Darui*, 248 F.R.D. 729, 732 n.6 (D.D.C. 2008) (finding “grossly broad” subpoena requests containing phrases “all documents relating to any account” and “including, but not limited to”).

³ The government’s subpoena defines “relating to” as meaning “any document or communication that constitutes, contains, embodies, comprises, reflects, identifies, describes, analyzes, or is in any way pertinent to that subject, including without limitation, documents concerning the presentation of other documents.” Ex. A. at 1.

as a discovery device.” *United States v. Cuthbertson*, 630 F.2d 139, 144 (3d Cir. 1980); *see also United States v. Weissman*, No. 01 CR 529, 2002 WL 31875410, at *1 (S.D.N.Y. Dec. 26, 2002) (“Rule 17(c) is not a means of discovery in a criminal trial.”). For a subpoena to be valid, the government must identify with substantial specificity precisely what documents it seeks. *United States v. Hang*, 75 F.3d 1275, 1283 (8th Cir. 1996) (specificity element requires “more than the title of a document and conjecture as to its contents” (*quoting United States v. Arditti*, 955 F.2d 331, 345 (5th Cir. 1992))).

The government’s Subpoena to Mayer Brown is clearly impermissible—as the government should know, having heard this Court’s ruling quashing the defense’s more specific subpoena to CH2M HILL. The Subpoena’s broad language makes clear that the government simply hopes to see “what may turn up.” *See Libby*, 432 F. Supp. 2d at 32.

B. The Subpoena Seeks Irrelevant Material.

The breadth of the Subpoena’s requests, as described above, obviously extends well beyond the realm of relevant documents. Request 2, for example, seeks all communications between Catherine Stevens and any of” a list of thirty-seven individuals and companies, regardless of their subject matter. Ex. A at 2–3. Request 4 seeks “[a]ny and all documents relating to any electronic communications between Catherine A. Stevens and any email address bearing the trunk “senate.gov”, including any electronic communication exclusively between Catherine A. Stevens and Theodore F. Stevens”—again, regardless of their subject matter. Ex. A at 3 (emphasis in original). Request 5 seeks “[a]ny and all documents relating to any thing of value given or provided to Senator Theodore F. Stevens, Catherine A. Stevens, or Lily Stevens, including without limitation, any documents relating to diamond earrings,” excluding only Mrs. Stevens’s work-related compensation. Ex. A. at 3.

These requests are blatantly overbroad and unquestionably seek documents irrelevant “to the charges contained within the Indictment.” *United States v. Salvango*, 267 F. Supp. 2d 249, 253 (N.D.N.Y. 2003).⁴ In addition to being irrelevant, the documents are inadmissible in court. *See Libby*, 432 F. Supp. 2d at 31 (collecting cases). *See United States v. Marchisio*, 344 F.2d 653, 669 (2d Cir. 1965) (“Unlike the rule in civil actions, a subpoena *duces tecum* in a criminal action is not intended for the purpose of discovery; the document sought must at that time meet the tests of relevancy and admissibility.”).

Defense counsel informed government counsel a week ago that a review of the first 100 emails revealed no relevant documents. Instead, included among the first 100 emails are communications on such irrelevant and intrusive matters as the recent death of Mrs. Stevens’s mother; Lily Stevens’s wedding; and grave illnesses of personal friends. *See Exhibit B*. The government nonetheless insists on full compliance with its overbroad and oppressive subpoena. For this reason as well, the Subpoena should be quashed.

C. The Subpoena Seeks Privileged Documents.

The marital communications privilege “protects from disclosure private communications between the spouses in the confidence of the marital relationship.” *S.E.C. v. Lavin*, 111 F.3d 921, 925 (D.C. Cir. 1997) (citing *Blau v. United States*, 340 U.S. 332, 333 (1951) and *Wolfle v. United States*, 291 U.S. 7, 14 (1934)).

⁴ Unlike the civil rules of discovery, in a criminal case “[t]he fact that [materials] are potentially relevant or may be admissible is not sufficient.” *United States v. RW Prof'l Leasing Servs. Corp.*, 228 F.R.D. 158, 162 (E.D.N.Y. 2005) (citing *United States v. Marchisio*, 344 F.2d 653, 669 (2d Cir. 1965)). “Rule 17(c) precludes use of a trial subpoena to obtain evidence that is not relevant to the charges being prosecuted or where the claim that subpoenaed materials will contain such evidence represents mere speculation.” *In re Sealed Case*, 121 F.3d 729, 754–55 (D.C. Cir. 1997).

The Subpoena to Mayer Brown explicitly seeks disclosure of private communications between Senator and Mrs. Stevens. To date, Senator Stevens has not waived the marital communications privilege. He may elect to do so at trial, but he has not done so yet. Even in that event, however, there would be no basis to enforce this blunderbuss subpoena, which far exceeds the scope of what is permissible under Rule 17(c).

CONCLUSION

For the foregoing reasons, Senator Stevens respectfully requests that this Court quash the government's September 15, 2008 subpoena directed to non-party Mayer Brown LLP.

Dated: October 11, 2008

Respectfully Submitted,

WILLIAMS & CONNOLLY LLP

By: /s/ Joseph M. Terry
Brendan V. Sullivan, Jr. (Bar No. 12757)
Robert M. Cary (Bar No. 431815)
Craig D. Singer (Bar No. 445362)
Alex G. Romain (Bar No. 468508)
Joseph M. Terry (Bar No. 473095)
Beth A. Stewart (Bar No. 486684)

725 Twelfth Street, N.W.
Washington, D.C. 20005
(202) 434-5000
(202) 434-5029 (facsimile)

Attorneys for Defendant Theodore F. Stevens

EXHIBIT A

**UNITED STATES DEPARTMENT OF JUSTICE
CRIMINAL DIVISION**



IMPORTANT: This facsimile is intended only for the use of the individual or entity to which it's addressed. It may contain information that is privileged, confidential, or otherwise protected from disclosure under applicable law. If the reader of this transmission is not the intended recipient or the employee or agent responsible for delivering the transmission to the intended recipient, you are hereby notified that any dissemination, distribution, copying or use of this transmission or its contents is strictly prohibited. If you have received this transmission in error, please notify us by telephoning and returning the original transmission to us at the address given below.

TO: Mark W. Ryan, Esq.
David Krakoff, Esq.

Phone: (202) 263-3234

Fax: (202) 263-3300

FROM: Edward P. Sullivan

Phone: 202-514-1412

Fax: 202-514-3003

DATE: September 15, 2008

SUBJECT:

NUMBER OF PAGES (INCLUDING COVER): 7

MESSAGE:



U.S. Department of Justice

Criminal Division
Public Integrity Section

Washington, D.C. 20530

September 15, 2008

BY FACSIMILE

Mark W. Ryan, Esq.
David Krakoff, Esq.
Mayer Brown
1909 K Street, N.W.
Washington, D.C. 20006-1101

Dear Messrs. Ryan and Krakoff:

Please find attached a trial subpoena for Mayer Brown's document custodian. As noted in the subpoena attachment, Mayer Brown need not reproduce documents previously provided to the government on a voluntary basis.

It appears to us based on documents produced by Senator Stevens' counsel that any spousal privilege between Senator Stevens and Catherine Stevens has been waived as it relates to matters in the government's indictment. We therefore request the production of any responsive documents that may have been otherwise withheld on the grounds of spousal privilege.

Sincerely,

WILLIAM M. WELCH II
Chief, Public Integrity Section

A handwritten signature in cursive script, appearing to read "B. Morris", written over a horizontal line.

BRENDA K. MORRIS
Principal Deputy Chief

NICHOLAS A. MARSH
EDWARD P. SULLIVAN
Trial Attorneys
Public Integrity Section

JOSEPH W. BOTTINI
JAMES A. GOEKE
Assistant United States Attorneys
District of Alaska

SEP. 15. 2008 2:46PM DOJcriminal

NO. 2011 P. 3

AO89 (Rev. 7/95) Subpoena in a Criminal Case

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA

v.

THEODORE F. STEVENS

**SUBPOENA IN A
 CRIMINAL CASE**

Case Number: 1:08-cr-00231-EGS


TO: Custodian of Records
 Mayer Brown LLP
 1909 K Street, N.W.
 Washington, DC 20006

YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below, or any subsequent place, date and time set by the court, to testify in the above referenced case. This subpoena shall remain in effect until you are granted leave to depart by the court or by an officer acting on behalf of the court.

PLACE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA United States Courthouse Third & Constitution Avenue, N.W.: 20001	COURTROOM 24a
	DATE AND TIME September 24, 2008 9:30 a.m.

YOU ARE ALSO COMMANDED to bring with you the following document(s) or object(s):

See Attachment A

U.S. MAGISTRATE JUDGE OR CLERK OF COURT NANCY MAYER-WENTZ, CLERK (By) Deputy Clerk 	DATE September 15, 2008
ATTORNEY'S NAME, ADDRESS AND PHONE NUMBER: Brenda Morris, Principal Deputy Clerk Department of Justice, Criminal Division, Public Integrity Section 1400 New York Ave., NW, Suite 12100, Washington, DC 20005 Telephone: (202) 514-1412	

ATTACHMENT A**DEFINITIONS AND INSTRUCTIONS**

Unless explicitly stated otherwise, the following definitions and instructions shall apply to this subpoena.

1. The terms "document" or "documents" refers to all written, graphic or electronic matter, however produced or reproduced, or to any other tangible permanent record, including, without limitation, the following: letters, correspondence, memoranda, records, books, schedules, reports, studies, appraisals, analyses, lists, interviews, books of account, telegrams, notes and minutes of meetings, interoffice communications, results of investigations, working papers, electronic mail ("e-mails"), computer and/or electronic data, items similar to any of the foregoing and other writings of every kind or description (whether or not actually used, and including drafts of all documents and any non-identical copies or versions of documents), computer aided drafting ("CAD") drawings, photostatic or microfilmed copies in whatever form, and sound recordings or electronic data compilations in whatever form. The terms "document" or "documents" also include any items that are claimed to be privileged, confidential, or personal.
2. A document "relating to" a given subject matter means any document or communication that constitutes, contains, embodies, comprises, reflects, identifies, describes, analyzes, or is in any way pertinent to that subject, including, without limitation, documents concerning the presentation of other documents.
3. The term "VECO" refers to VECO Corporation, any of its predecessors or successors in interest, including, but not limited to, subsidiaries, holding companies, joint ventures, partnerships, affiliates, and divisions, and including all present and past employees, directors, officers, shareholders, consultants, experts, agents, investigators, and representatives, including counsel, and all other persons or entities acting or purporting to act on VECO's behalf.
4. The term "Firm" refers to Mayer, Brown, Rowe and Maw LLP, any of its predecessors or successors in interest, including, but not limited to, subsidiaries, holding companies, joint ventures, partnerships, affiliates, and divisions, and including all present and past employees, partners, directors, officers, shareholders, consultants, experts, agents, investigators, and representatives, including counsel, and all other persons or entities acting or purporting to act on the Firm's behalf.
5. Unless a particular demand states otherwise, produce all responsive documents prepared from January 1, 1999, to the present.
6. The Firm need not reproduce documents previously provided to the government on a voluntary basis.

DOCUMENTS TO BE PRODUCED

1. Any and all documents relating to the residence and/or real property owned by Catherine A. Stevens and Senator Theodore F. Stevens in Girdwood, Alaska, more particularly described as the real property located at 138 Northland Road, Girdwood, Alaska, including but not limited to any correspondence or other communications between Catherine Stevens and Senator Stevens.

2. Any and all documents relating to any communication, correspondence, contact, or other relationship between Catherine A. Stevens (including any Firm staff who performed tasks at the direction of Catherine A. Stevens) and any of the following individuals, entities, or email addresses:
 - a. Barbara Flanders
 - b. DeLynn Henry
 - c. Robert "Rocky" Williams
 - d. David Anderson
 - e. Augie Paone
 - f. Christensen Builders
 - g. VECO
 - h. Bill J. Allen (a.k.a. "Bill Allen")
 - i. Mark Allen
 - j. Richard L. Smith (a.k.a. "Rick Smith")
 - k. Peter Leathard
 - l. Roger Chan
 - m. Jack Billings
 - n. John C. Hess
 - o. Linda Croft
 - p. Billie Sue Hill
 - q. Dee Walker
 - r. Michael "Tate" Richeson
 - s. John Fugate
 - t. Mark Tyree
 - u. Robert L. Persons (a.k.a. "Bob Persons")
 - v. Deanna Persons
 - w. "muskvx2@aol.com"
 - x. Charlie Hart
 - y. Chugach Sewer and Drain
 - z. MaryLou Whitney
 - aa. John Hendrickson
 - bb. John Rubini
 - cc. Centerpoint LLC
 - dd. George Walton

- ee. Alaska Gold and Diamond
 - ff. Kenai River Classic
 - gg. Kenai River Sportfishing Association
 - hh. Robert C. Penney (a.k.a. "Bob Penney")
 - ii. "rcpenney@aol.com"
 - jj. Henry Penney
 - kk. "hpenney@aol.com"
3. Any and all documents relating to any financial disclosure requirement, form, or filing by Senator Theodore F. Stevens.
 4. Any and all documents relating to any electronic communication between Catherine A. Stevens and any email address bearing the trunk "senate.gov", including any electronic communication exclusively between Catherine A. Stevens and Theodore F. Stevens.
 5. Any and all documents relating to any thing of value given to or provided to Senator Theodore F. Stevens, Catherine A. Stevens, or Lily Stevens, including, without limitation, any documents relating to diamond earrings. For purposes of this request only, you may exclude documents reflecting salary, partnership distributions, similar forms of compensation, and any other work-related benefits provided to Catherine A. Stevens by the Firm.

EXHIBIT B

From: Cary, Rob
Sent: Friday, October 03, 2008 11:14 AM
To: 'Sullivan, Edward'
Cc: Morris, Brenda; Marsh, Nicholas; Goeke, James (USAAK); Bottini, Joe; Sullivan, Brendan; Romain, Alex; Singer, Craig; Stewart, Beth; Terry, Joseph
Subject: Subpoena for E-mails

Ed:

Mayer Brown has forwarded to me the e-mails responsive to your recent subpoena so that we may review them for spousal privilege. I have been through the first 100 or so of several thousand e-mails. There are no spousal privileged documents in the first 100 or so e-mails. Neither are there any relevant e-mails. Examples of the types of e-mails found in the first 100 or so include: condolence e-mails arising from the recent death of Mrs. Stevens's mother, e-mails regarding Lily Stevens's wedding, and e-mails regarding grave illnesses of personal friends. None of the first 100 or so e-mails are remotely relevant to this case.

The subpoena cannot possibly meet the requirements of Nixon. If you insist on enforcing it, we will move to quash. Please advise regarding your intentions.

Thanks.

Rob

EXHIBIT C

From: Cary, Rob
Sent: Friday, October 10, 2008 7:20 PM
To: 'Sullivan, Edward'; Krakoff, David S.
Cc: Morris, Brenda; Marsh, Nicholas; Goeke, James (USAAK); Bottini, Joe; Sullivan, Brendan; Romain, Alex; Singer, Craig; Stewart, Beth; Terry, Joseph
Subject: RE: Subpoena for E-mails

Ed:

I sent you an e-mail over a week ago asking whether you really intended to enforce the subpoena, given that it cannot possibly meet the criteria of Nixon. When you did not respond, I believed it to be a dead issue. You then waited until after the close of business today to insist on compliance over the weekend, without getting back to us at all. We will file a motion to quash tomorrow. Perhaps Mayer Brown can tender the e-mail to the Court in the meantime.

Rob

-----Original Message-----

From: Sullivan, Edward
Sent: Friday, October 10, 2008 7:03 PM
To: Cary, Rob; Krakoff, David S.
Cc: Morris, Brenda; Marsh, Nicholas; Goeke, James (USAAK); Bottini, Joe; Sullivan, Brendan; Romain, Alex; Singer, Craig; Stewart, Beth; Terry, Joseph
Subject: RE: Subpoena for E-mails

David -- Please provide us with the three disks that you have in your possession. We ask that you provide them by 6:00 p.m. tomorrow. If we don't receive the material by then, we will have to move to compel production pursuant to our subpoena. If a courier is going to bring the material over, please have them call me beforehand so I can ensure that someone will meet them outside our building (1400 New York Avenue, NW).

Thank you.

Ed

-----Original Message-----

From: Cary, Rob
Sent: Friday, October 03, 2008 11:14 AM
To: Sullivan, Edward
Cc: Morris, Brenda; Marsh, Nicholas; Goeke, James (USAAK); Bottini, Joe; Sullivan, Brendan; Romain, Alex; Singer, Craig; Stewart, Beth; Terry, Joseph
Subject: Subpoena for E-mails

Ed:

Mayer Brown has forwarded to me the e-mails responsive to your recent subpoena so that we may review them for spousal privilege. I have been through the first 100 or so of several thousand e-mails. There are no spousal privileged documents in the first 100 or so e-mails. Neither are there any relevant e-mails. Examples of the types of e-mails found in the first 100 or so include: condolence e-mails arising from the recent death of Mrs. Stevens's mother, e-mails regarding Lily Stevens's wedding, and e-mails regarding grave illnesses of personal friends. None of the first 100 or so e-mails are remotely relevant to this case.

The subpoena cannot possibly meet the requirements of Nixon. If you insist on enforcing it, we will move to quash. Please advise regarding your intentions.

Thanks.

Rob

NOTICE:

This message is intended for the use of the individual or entity to which it is addressed and may contain information that is privileged, confidential and exempt from disclosure under applicable law. If the reader of this message is not the intended recipient or the employee or agent responsible for delivering this message to the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please notify us immediately by reply or by telephone (call us collect at (202) 434-5000) and immediately delete this message and all its attachments.

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