

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

UNITED STATES OF AMERICA, and)	
LEONARD KOCZUR, ACTING)	
INSPECTOR GENERAL OF THE)	
LEGAL SERVICES CORPORATION,)	
)	
Petitioners,)	Civil Action No. 00-MS-613 (CKK)
)	
v.)	
)	
GEORGIA LEGAL SERVICES PROGRAM)	
and ATLANTA LEGAL AID SOCIETY,)	
)	
Respondents.)	

**BRIEF OF AMICI CURIAE NATIONAL LEGAL AID AND
DEFENDER ASSOCIATION AND ATLANTA BAR ASSOCIATION
IN SUPPORT OF RESPONDENTS ATLANTA LEGAL AID
SOCIETY AND GEORGIA LEGAL SERVICES PROGRAM**

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Interests of the Amici

The National Legal Aid and Defender Association (NLADA), a non-profit organization incorporated in the District of Columbia, is the largest national organization dedicated to ensuring access to justice for the poor through the nation's civil and criminal legal aid system. Among NLADA's 2000 plus members are those legal aid programs funded by the Legal Services Corporation (LSC, or the Corporation), including Respondents Georgia Legal Services Program (GLSP) and Atlanta Legal Aid Society (ALAS). NLADA has had extensive experience providing technical assistance to recipients of LSC funds that were subject to LSC monitoring for compliance. Between 1984 and 1993, NLADA conducted a Monitoring Assistance Project that tracked all monitoring visits made by LSC staff, developed a detailed data base on LSC monitors, reviewed draft monitoring reports to help recipients respond and provided training to LSC recipients on how to prepare for and respond to monitoring visits. In recent years, NLADA has continued to work closely with LSC recipients on many issues that have arisen as a result of monitoring and other actions taken by the Inspector General (IG) and LSC management.

The Atlanta Bar Association, a non-profit corporation incorporated in the State of Georgia, is a voluntary bar association of more than 6,000 lawyers founded in 1888. Its mission is to serve as a leader in advancing excellence, ethical conduct, professionalism and public responsibility in the legal profession and to improve the efficiency, fairness and accessibility of our system of justice for all citizens. The Atlanta Bar Association and its members commenced efforts to ensure voluntary legal help for the poor in 1904; in 1924, twenty Atlanta Bar members under the leadership of E. Smythe Gambrell founded respondent ALAS. For the past three-quarters of a century, the Atlanta Bar and its

members have supported ALAS and, when it was formed, respondent GLSP, by devoting the time, talents and money of its members to secure the objectives of ensuring that: (1) the legal profession serves the poor as well as the rich; and (2) our justice system and the rule of law in our community apply equally and fairly to all persons without regard to their financial means. The members of the Atlanta Bar Association include lawyers employed by both ALAS and GLSP. The issues presented by this dispute implicate the concern of the Atlanta Bar Association that these lawyers and, indeed, all lawyers who serve the poor, are permitted to render service in accordance with the legal community's prevailing standards of excellence, ethical conduct, professionalism, and public responsibility.

Introduction

As the instant case illustrates so dramatically, the attempt by an administrative agency to subpoena information concerning private citizens can have serious consequences for those individuals. Consequently, the subpoena power of administrative agencies is limited by both the Fourth Amendment and the other constitutional privacy interests of the people or entities whose information is targeted by the subpoena. Resolution Trust Corp. v. Walde, 18 F.3d 943, 948 (D.C. Cir. 1994); United States v. Westinghouse Elec. Corp., 638 F.2d 570, 576 (3d Cir. 1980).

It is to protect these privacy interests that the federal courts have held that, as the Inspector General (IG) concedes, an administrative subpoena is enforceable only when: ““(1) the subpoena was issued for a lawful purpose within the statutory authority of the agency that issued it; (2) the documents requested are relevant to that purpose; and (3) the subpoena demand is reasonable and not unduly burdensome.”” IG’s Mem. of Points & Authorities Supp. Pet. for Summ. Enforcement at 7 (quoting United States v. Hunton & Williams, 952 F. Supp. 842, 848 (D.D.C. 1997)). These criteria must be met whether the subpoena was directed against a private individual or against a corporate entity. United States v. Morton Salt Co., 338 U.S. 632, 652 (1950).

When the information that is targeted concerns a private individual who is not suspected of any wrongdoing and who has not in any way waived his privacy rights, however, special considerations come into play. Walde, 18 F.3d at 948 (“The Supreme Court reminds us that ‘corporations can claim no equality with individuals in the enjoyment of a right to privacy.’”) (quoting Morton Salt Co., 338 U.S. at 652); FDIC v. Wentz, 55 F.3d 905 (3d Cir. 1995) (“When personal documents of individuals, as contrasted with business records of corporations, are the subject of an administrative subpoena,

privacy concerns must be considered.”). Moreover, in addition to the Fourth Amendment privacy protections, individuals have a constitutionally protected “‘interest in avoiding disclosure of personal matters.’” Westinghouse Elec. Corp., 638 F.2d at 576 (quoting Whalen v. Roe, 429 U.S. 589, 599-600 (1977)), and applying that case to the enforceability of an administrative subpoena directed to an employer for employee information); FDIC v. Wentz, 55 F.3d 905 (3d Cir. 1995) (following Westinghouse Elec. Corp.).

Because individuals have a heightened privacy interest, when an agency seeks personal information a court must ensure not only that the three criterion identified by the IG are met, but also that the subpoena satisfies additional criteria. As *amici* demonstrate in section I below, heightened privacy protection – and the application of the additional criteria to the IG’s subpoena – are appropriate in this case because the IG seeks highly sensitive information about private individuals who are not suspected of any wrongdoing. These protections apply regardless of whether the IG intends to make public the information he obtains – it is the governmental intrusion into individuals’ privacy that raises constitutional concerns. See Walde, 18 F.3d at 948 (discussing individuals’ privacy concerns in case in which the Resolution Trust Corporation subpoenaed information for its own use during an investigation, without any prospect that the agency would publish that information to the public).

One additional requirement is that the court must pay particular attention to whether the investigation is within the agency’s authority, and the court must not defer to an agency interpretation that requires an intrusion into individuals’ privacy without clear Congressional intent.¹ Walde, 18 F.3d

¹The IG implies that his assessment regarding the proper scope of his investigations deserves increased deference. See IG’s Mem. of Points & Auths. Supp. Pet. for Summ. Enforcement at 12-13. However, this is true only when he is working toward his principal mission, which is “concern for preventing, deterring and identifying fraud,

at 948-49 (scrutinizing whether the Resolution Trust Corporation’s interpretation of its authority was reasonable, because the agency sought to subpoena personal information from private individuals in order to examine their wealth, not their culpability); In re Sealed Case (Administrative Subpoena), 42 F.3d 1412, 1419 (D.C. Cir. 1994) (following Walde).² This requirement is based on Justice Holmes’ admonition that “[a]nyone who respects the spirit as well as the letter of the Fourth Amendment would be loath to believe that Congress intended to authorize one of its subordinate agencies to . . . direct fishing expeditions into private papers on the possibility that they may disclose evidence of a crime.” Walde, 18 F.3d at 949 (quoting Federal Trade Comm’n v. American Tobacco Co., 264 U.S. 298, 305-06 (1924)).

Accordingly, in Walde this Circuit refused to accept the Resolution Trust Corporation’s interpretation of its governing statute as permitting it to subpoena information from former officers and directors of failed savings and loan institutions to determine whether they have sufficient net worth to be worth suing. Walde, 18 F.3d at 949. Although the court recognized that it was obligated to defer to

abuse and waste in agency operations and programs.” S. Rep. No. 1071, 95th Cong., 2d Sess. (1978). It is in these instances that the creation by Congress of a high-ranking independent official is most important, because of the fear that the head of a program being audited would believe that the “frank recognition of waste, mismanagement or wrongdoing reflects on him personally.” Id. As the IG admits, his subpoenas seek information in an attempt to assess the efficacy of a tool -- called “geocoding” -- which in turn is intended to “promote economy and efficiency in the administration of LSC’s programs and operations.” Quatrevaux Decl. ¶ 5 (Ex. 3 to U.S. Pet. for Summ. Enforcement). Consequently, the IG’s judgment regarding the proper scope of his authority does not deserve any heightened deference in this case.

²Although In re Sealed Case distinguishes between records subpoenaed from a bank that contain personal information and records subpoenaed directly from individuals, that distinction does not carry over to documents subpoenaed from lawyers that contain personal information. The distinction stems from United States v. Miller, where the Supreme Court noted that banks are not neutrals in transactions involving negotiable instruments and that account holders do not have the same expectation of privacy in information held by banks as they would have in information within their own possession. 425 U.S. 435, 440-41 (1976). Lawyers, unlike banks, gather information from clients not as actors in their own right but as their clients’ agents.

the agency's construction of the statute so long as that construction was permissible, see id. at 948, it rejected the agency's interpretation as unreasonable given the weight of the individuals' privacy interests and the absence of any evidence that Congress intended to authorize such an intrusion into those interests. See id. at 949.

As *amici* demonstrate in section II below, the IG's interpretation of his authority to subpoena information is simply incorrect – Congress has never granted him the authority to obtain confidential client information in the pursuit of the sort of non-monitoring, non-auditing enterprise in which he is currently engaged. This would be true even if the Court were inclined to provide the deference to the IG's interpretation of his authority that the IG contends he deserves. However, given the privacy interests at stake in this case, and the scrutiny with which the Court must consequently view the IG's assertion that his subpoenas are within his authority, it is clear that the IG lacks the authority to subpoena the information he seeks.

An additional requirement for administrative subpoenas seeking personal information is that the agency must “make some showing of need for the material sought beyond its mere relevance to a proper investigation.” McVane v. FDIC, 44 F.3d 1127, 1137 (2d Cir. 1995) (holding that “administrative subpoenas issued pursuant to an agency investigation into corporate wrongdoing, which seek personal records of persons who are not themselves targets of the investigation and whose connection to the investigation consists only of their family ties to corporate participants, must face more exacting scrutiny than similar subpoenas seeking records solely from corporate participants”). As *amici* discuss in section III, the IG cannot meet this burden because his subpoenas will frustrate, not further, his stated purpose of promoting the effectiveness of legal services programs because he has

unreasonably ignored the offer by the Georgia Legal Services Program (GLSP) and the Atlanta Legal Aid Society (ALAS) to provide the requested information in a manner that would protect sensitive client information, and because changes in Atlanta, Georgia, and legal services funding and delivery have all changed significantly in the past ten years.

Argument

I. The Information the IG Seeks in His Subpoena Is Highly Sensitive, Personal Information of the Sort Protected by the Fourth Amendment and Other Constitutional Privacy Protections.

The IG seeks ten years worth of potentially extremely private information about the clients of GLSP and ALAS. For each case closed he seeks: “(1) case number, (2) office code, (3) problem category, (4) gender, (5) ethnicity, (6) age, (7) closure code, (8) date opened, (9) date[] closed, (10) street address, including street number and street name, (11) city, (12) state, and (13) zip code.” See IG’s Subpoena Duces Tecum to Atlanta Legal Aid Society, dated July 17, 2000.

This information has the potential to reveal the sort of personal matters protected by the Fourth Amendment and other constitutional privacy protections discussed above. In this section, *amici* discuss how different combinations of the information the IG seeks have the potential to reveal to the IG different aspects of clients’ lives.

A. The HIV-Positive Status of Some Clients Will Be Revealed if the IG Succeeds in Obtaining Clients’ Addresses, Ages, Genders, Ethnicities and Office Codes.

Although the IG does not seek the identity of individual clients, his request for client addresses combined with client age, gender and ethnicity will in many instances be sufficient to reveal client identity. Clients’ neighbors and others in their communities are sure to know the identities of the individuals living at the clients’ addresses. Someone who lacks access to knowledgeable neighbors can easily obtain a reverse telephone directory and ascertain the identities of the individuals living at a given address that way. If, as is often the case, there is only one person of a specific age, gender and ethnicity living at a particular address, the client will be easily identified.

As ALAS and GLSP argue in their brief, revealing clients' identities (by revealing their address, age, gender and ethnicity) along with their office codes will, for clients of the ALAS AIDS Legal Project, reveal that those clients are HIV-positive. Clients' medical status is the classic sort of information protected by the constitutional privacy rights. Westinghouse Elec. Corp., 638 F.2d at 577. When clients' medical condition involves being HIV-positive, an often highly stigmatized condition, it is difficult to conceive of information more personal.

B. The Location of Some Domestic Violence Shelters Will Be Revealed if the IG Succeeds in Obtaining Clients' Addresses, Genders and Problem Categories.

Revealing clients' address, gender and problem category could pose a danger to women living in domestic violence shelters, because the location of those shelters – which is generally a closely guarded secret – will be revealed if ALAS or GLSP has provided legal assistance falling within the “family” problem category to a large number of women living that address.

C. Highly Personal Client Information Will Be Revealed if the IG Succeeds in Obtaining Clients' Addresses, Ages, Genders, Ethnicities and Problem Categories.

A client's identity plus his problem category has the potential to reveal two types of confidential client information. First, identity plus problem category may reveal personal information about the client's life. For example, the fact that a client is suffering from enough family-related problems to seek assistance falling within the “family” problem category is certainly a very personal matter. Likewise, the fact that a client has sought legal assistance falling within the “income maintenance” problem category will reveal that the client's financial situation is such that he needs some sort of government assistance in order to survive.

Identity plus problem category may reveal another type of information as well – it may reveal to a potential litigation opponent that the client is considering legal action. This information may subject a client to a danger of retaliation, and it is consequently highly confidential information. For example, to avoid retaliation, tenants generally keep confidential the information that they have consulted a lawyer about a housing matter until they file papers in court and gain statutory protection from retaliation. A landlord who learns that some unidentified member of a family living on one of his properties has sought legal advice regarding the “housing” problem category will not care which member of the family is the potential client. Instead, he will likely take action against the entire family. The fact that a client has sought assistance with respect to this category is consequently private information.

Moreover, in some cases it will be apparent which member of a family has sought legal counsel with respect to a particular problem category. For example, if the client is the only member of his family of his particular gender, ethnicity and age who is in school, it will be apparent that he is the one who sought legal counsel with respect to the “education” problem category. Although it may not be apparent what type of education matter that individual is considering pursuing, that may not matter to the school board, college or university that believes itself to be a potential defendant. See, e.g., Whitehead v. School Bd. for Hillsborough County, Florida, 918 F. Supp. 1515 (M.D. Fla. 1996) (holding school board responsible for retaliation against parents who sought to enforce their child’s statutory right to an adequate and appropriate education). The fact that a client has sought assistance with respect to this category is consequently private information.

Likewise, if the client is the only member of his family of his particular gender, ethnicity and age who is employed, it will be apparent that it is the client who has sought legal counsel with respect to the

“employment” problem category. The client’s employer or fellow employees may well be alarmed to learn that they are potential defendants, causing them to retaliate against the employee. See, e.g., Davis v. Fidelity Tech. Corp., 38 F. Supp. 2d 629, 634 (W.D. Tenn. 1998) (employee was assigned to the night shift and required to perform menial tasks after she filed a sexual harassment complaint with the EEOC), aff’d, 208 F.3d 213 (6th Cir. 2000); Yudovich v. Stone, 839 F. Supp. 382, 391-92 (E.D. Va. 1993) (employer refused to renew contracts of plaintiffs who filed a claim with the EEOC claiming discrimination based on religion and national origin); Knox v. Indiana, 93 F.3d 1327, 1335 (7th Cir. 1996) (co-workers threatened employee and subjected her to “vicious gossip” after she complained to her employer about sexual harassment). This will be particularly true for those clients who are dependent on their employers for housing as well as employment, such as many domestic workers and migrant workers. Moreover, if future employers learn that the employee has brought or considered bringing such an action, they may decide not to hire him or her. See, e.g., Davis, 38 F. Supp. 2d at 634 (potential employer rejected an applicant because she had sued her previous employer for sexual harassment). The identity of clients who have sought assistance falling within this problem category is consequently confidential client information.

D. A Lawyer’s Assessment That Some Clients’ Cases Lack Merit Will Be Revealed if the IG Succeeds in Obtaining Clients’ Addresses, Ages, Genders, Ethnicities and Case Closing Codes.

The IG’s request for problem categories plus addresses, age and gender also raises the specter that he will obtain information with the potential to harm clients. As discussed above, a client’s address, age and gender may well be enough to identify the individual client. Revelation that the client’s case had been closed because of CSR Category D (“Insufficient Merit to Proceed”), and that his case involved a

particular problem category could harm that client if he disagrees with the lawyer's judgment and proceeds with that case pro se or with a different attorney. Based on this information, the client's litigation opponent could assume that the current case is the same as the case that was closed because of insufficient merit to proceed. The opponent could seek discovery of the legal services lawyer's files in an attempt to learn whether the two cases were the same, and also to learn the basis for the lawyer's closure of the case. See, e.g., Kockums Indus. Ltd. v. Salem Equip., Inc., 561 F. Supp. 168, 172 (D. Or. 1983) (where patent defendant counterclaimed, charging that plaintiff instituted patent action knowing that it would be unsuccessful on the merits, in contravention of antitrust laws, requiring that plaintiff produce attorney records that might show whether the plaintiff had instituted his patent case in bad faith). The opponent could even attempt to call the legal services lawyer as a witness against his own former client. Even without that discovery or testimony, however, the opponent could use the knowledge of the case closure under CSR Category D as a basis for taking several damaging actions against the client, including seeking sanctions against the client under Federal Rule of Civil Procedure 11 or an analogous state rule for making baseless legal or factual contentions, charging the client with malicious prosecution, or charging the client with fraud. The opponent's motion would be bolstered by the definition of CSR Category D, which says, "A case closed after an applicant has been accepted as a client because new facts or circumstances arise or become apparent leading to the conclusion that *there is an insufficient basis, in law or in fact, to pursue the case.*" See http://lsc.gov/foia/rfoia_csr.htm (emphasis added). The information that a client's case was closed under this case closing code consequently constitutes extremely private information.

II. The IG Cannot Show That the Subpoenas Fall Within His Authority Because Section 1006(b)(3) of the Legal Services Corporation Act Bars Him from Seeking Confidential Client Information, and Because the Exception Created by Section 509(h) of the Omnibus Appropriations Act Does Not Apply Here.

As *amici* discuss above in the introduction, when an administrative subpoena seeks the sort of personal information from private individuals that the IG seeks here, that subpoena is not enforceable unless the subpoena is clearly within the agency's authority. See discussion supra at 2-3. In making this determination, the court must not defer to an agency interpretation requiring an intrusion into individuals' privacy. Id. *Amici* support GLSP and ALAS in arguing that section 1006(b)(3) of the Legal Services Corporation Act of 1974, 42 U.S.C. § 2996 *et seq.*, bars the IG from obtaining confidential client information of the sort he seeks here. See Respondents' Resp. Opposing Pet. for Summ. Enforcement at § II. *Amici* further adhere to the argument of GLSP and ALAS that the IG wrongly contends that Section 509(h) of the Omnibus Appropriations Act provides an exception to Section 1006(b)(3) that applies in this case. *Amici* write here to provide additional legislative history regarding Section 509(h) that makes clear that the IG is not conducting an activity falling within the Section 509(h) exception.

A. The Study That the IG Seeks to Undertake Is Not Done Under His Monitoring Responsibility.

The IG seeks in his petition to blur any distinction between monitoring and LSC's other functions, including reviewing program effectiveness and efficiency, and to suggest that the study for which the information that is the subject of the subpoena is sought is simply part of the IG's overall monitoring effort. *Amici* contend that both legislative history and the IG's own recent statements

describing this study belie this suggestion and make it clear that the “monitoring” exception of 509(h) cannot be read broadly enough to encompass a study of this nature.

Both Congress and the LSC have always understood that monitoring is a process to ensure that recipients are in compliance with statutes, regulations, grant conditions and other requirements of law and that monitoring is a different and largely separate function from overall efforts to improve the efficiency and effectiveness of the delivery of legal services, and research into the effect and impact of legal services. The IG never intended the study that is the basis for the subpoena to be a weapon in the IG’s arsenal to ensure recipients’ compliance with the requirements imposed upon them by Congress or LSC. Rather, as the IG repeatedly admits, he has intended the study to test a tool that could potentially have some use in determining the overall effectiveness of the legal services delivery system.

In 1974, when Congress adopted the LSC Act, it gave LSC “. . . the authority to insure the compliance of recipients and their employees with the provisions of this title and the rules, regulations, and guidelines promulgated pursuant to this title” 42 U.S.C. § 2996e(b)(1)(A). LSC and the legal services community have always understood that LSC’s monitoring activities were done in furtherance of its authority under this provision.

Beginning in the early 1990s, Congress acknowledged the specific role of compliance monitoring and enforcement in various legislative proposals leading up to and surrounding the adoption of Section 509 of the Omnibus Appropriations Act in April of 1996. While these proposals included a variety of approaches to monitoring, they all recognized that the goals of the monitoring function were limited to ensuring recipient compliance with legal requirements.

In 1991, for example, the House adopted the Legal Services Reauthorization Act of 1991 (HR 2039), attached hereto as Ex. 1, which would have reauthorized LSC and amended various provisions of the LSC Act, including the provisions on monitoring. Section 6 of HR 2039 distinguished monitoring from efforts to oversee program efficiency and effectiveness:

The Corporation shall have the authority to enforce the rules regulations, guidelines and instructions issued under this title Pursuant to regulations adopted by the Corporation . . . , the Corporation shall—

(I) arrange for independent evaluations to determine whether recipients and other grantees and contractors of the Corporation are providing comprehensive, economical, and effective legal assistance of high quality to eligible clients, and

(II) conduct reasonable *monitoring* and investigations into *allegations that a recipient or other grantee or contractor has violated this title, the rules, regulations, guidelines, or instructions issued under this title, or other laws.*

(Emphasis added).

In 1992, the Senate Committee on Labor and Human Resources adopted the Legal Services Corporation Reauthorization Act of 1992 (S. 2870) which was modeled on HR 2039 and would have reauthorized LSC and amended the LSC Act in similar ways.³ It contained identical language on monitoring as appeared in the House bill. The Senate Report which accompanied S. 2870 talked about the need to improve the Corporation’s monitoring process and expressly acknowledged that monitoring was an activity to assure compliance with the LSC Act and regulations: “[M]onitoring

³This bill never reached the floor of the Senate for a vote before the Congress adjourned before the 1992 Congressional election, and the reauthorization effort in both the House and the Senate died with the end of the Congress.

focuses exclusively on assuring compliance with the Act, LSC regulations, and the wide variety of grant conditions and assurances imposed by the Corporation on recipients.” *Senate Committee on Labor and Human Resources Report 102-365*, accompanying S. 2039, Aug. 5, 1992, at 34, attached hereto as Ex. 2.

In 1995, the House Judiciary Committee again adopted a bill to amend the LSC Act. The Legal Aid Act of 1995 (H.R. 2277) would have funded legal services through restricted block grants to the states rather than through grants from LSC, which is the structure under the current LSC Act. H.R. 2277 focused on monitoring for compliance with and enforcement of the requirements of the Act. See Sec. 3 (d) of H.R. 2277. The Committee Report noted: “It is the Committee’s intent through section 3(d) to require the states to actively *monitor* qualified providers with whom they contract in order to enable the state *to enforce all restrictions and prohibitions set forth in this Act.*” *House Committee on the Judiciary Report 104-255*, accompanying H.R. 2277, Sept. 21, 1996, at 25 (emphasis added), attached hereto as Ex. 3.

Although none of the proposed legislation discussed above was enacted, the language of those proposals and the accompanying legislative reports underscore that “monitoring” has a distinct meaning in the LSC context and refers to activities intended to assess compliance with LSC rules, regulations and other requirements.

B. Section 509(h) Applies Only to Monitoring and Audit Activities.

As the preceding history makes clear, when the Congress adopted Section 509 of the Omnibus Appropriations Act in 1996, it did so against a backdrop that reflected Congress’ clear understanding of the historical role of LSC in monitoring for compliance. To the extent that Section 509 expanded the

IG's authority, it unmistakably directed that expansion only to the IG's compliance monitoring and auditing⁴ functions.

Every single provision of Section 509, including Section 509(h), deals with the conduct and effect of compliance monitoring and audits. Section 509(a) revised Section 1009(c) of the LSC Act to expand recipient's annual audits to cover compliance with Federal laws and regulations in addition to financial requirements that had been their focus and to vest the authority to supervise recipients' audits in the IG. Section 509(b) lays out procedures that program auditors are required to follow in testing for and reporting instances of non-compliance. Section 509(c) deals with the consequences for a recipient of an unacceptable audit. Section 509(d) gives the IG authority to remove, suspend or debar a local program auditor. Section 509(e) requires a local program auditor to notify the IG if it ceases work for a recipient. Section 509(f) specifies that audits under Section 509 are in lieu of audits under Section 1009(c) of the LSC Act. Section 509(g) authorizes the IG "to conduct on-site monitoring, audits, and inspections in accordance with Federal standards." Section 509(j) imposes on recipient management responsibility to resolve all issues raised by program audits. Section 509(k) provides that when the IG

⁴ Auditing and investigations, including on-site inspections, are subsets of the IG's enforcement and compliance monitoring function, and are addressed in various places in the LSC Act and Section 509. Prior to the passage of Section 509, LSC staff and consultants conducted compliance monitoring through on-site monitoring and a variety of reporting requirements. Independent public accountants (IPAs) who were hired by local programs reviewed their financial systems and conducted annual financial audits to ensure compliance with fiscal requirements. After the passage of Section 509, the role of the IPA was expanded to cover monitoring for compliance with statutory and regulatory compliance, and responsibilities were shifted within the Corporation. The IG was given the responsibility to oversee and review compliance audits conducted by IPAs. Those audits are now conducted in accordance with Government Auditing Standards and are governed by the provisions of Office of Management and Budget Circular A-133, *Audits of States, Local Governments, and Non-Profit Organizations* as well as the IG's *Audit Guide for Recipients and Auditors*. The *Audit Guide* includes the *Compliance Supplement for Audits of LSC Recipients* that provides detailed direction for assessing compliance with LSC statutory and regulatory requirements.

reports an audit finding to LSC management, LSC is required to follow-up “to ensure that instances of deficiencies and noncompliance are resolved in a timely manner” in accordance with the requirements of Office of Management and Budget Circular A-50.

Nothing in Section 509 specifically relates to or expands any authority not related to monitoring or audits that LSC or the IG may have under the LSC Act or the Inspector General Act. There is nothing in the statute itself or in the legislative history to suggest that Congress intended the term “monitoring” to have any different meaning than it had prior to the adoption of Section 509(h).

Section 509(h) gave LSC and the IG limited authority to access six specific records – financial records, time records, retainer agreements, client trust fund and eligibility records and client names – that could be required in the exercise of their compliance monitoring and auditing function. The first five all constitute documentary evidence that could be used to support findings related to compliance with financial, statutory and regulatory requirements. Access to personal information about clients is limited solely to client names. Nothing in Section 509(h) suggests that it was intended to apply to any activities conducted by either LSC or the IG that are not specifically related to auditing and monitoring for compliance. Access to records sought for other activities is plainly governed by Section 1006(b)(3) of the LSC Act, as it has been since 1974, and that provision makes such access subject to the rules of professional responsibility of each jurisdiction where the records are maintained.

C. The IG Has Acknowledged That This Study Is Not Monitoring or Auditing.

In describing to the LSC Board the research project that he was planning to undertake, the IG was very explicit that this effort was an activity designed to help programs generally to better serve their clients, and not monitoring or auditing activity of ALAS or GLSP designed to determine or ensure their

compliance with statutes, rules and requirements. It was not even an evaluation of the Georgia programs themselves, but rather an evaluation of geocoding to assist programs generally. His descriptions made it clear that this study was intended to provide both LSC and recipients with analytical tools to help improve the delivery of legal services.

Mr. Quatrevaux repeatedly emphasized the nature of the undertaking, noting that “. . . we plan to do an evaluation of a GIS, that’s for Geographic Information Systems, analytical tool.” (Transcript of June 26, 2000, LSC Board of Directors Meeting (Open Session), p. 96), attached hereto as Ex. 4. Mr. Quatrevaux also stated that “. . . we do plan to do an evaluation. We will meet in early July with the two program directors in Atlanta and discuss with them because this, as we see it, has several objectives and beneficiaries” Id., p. 98.

The IG explained that this study was intended to evaluate an analytical tool, not the programs that would be using it. “So we are promoting this tool. We are going to evaluate it. The evaluation, the only way you can evaluate an analytical tool is by trying to use it and that’s what we plan to do at this time. We will ask the programs for those hypotheses that are of interest to them, what trend they would like to examine, identify if they are there and so on and so forth.” Id., p. 99.

To ensure that the Board would not view this study as an attempt to intimidate or investigate the programs that would be involved, Mr. Quatrevaux stated, “We will also ourselves come with a set of hypotheses to be examined. Let me hasten to add there’s nothing sinister about it, it’s simply a desire to increase the amount of analysis and evaluation of this federal national program” Id.

At the same LSC Board meeting, LSC Board member Hulett Askew made clear that he understood the IG would be focusing on the goals of the study by seeking to “. . . encourage

collaboration and cooperation of the programs as you develop this and involve them in the design of the project so that we make sure that the data that's produced, the information that's produced, is useful to those programs. That's obviously the goal here. The programs learn from this and can use this information to better serve clients" *Id.*, p. 107. In response, Mr. Quatrevaux stated, "Well, I agree with you and we have told grantees that we are going to rely on them for input to structure those kinds of analyses that are of interest to the program." *Id.*, pp. 107-108.

Amici contend that there is no way that this study could be legitimately viewed as part of the IG's monitoring and audit function, which is the subject of Section 509(h). Rather, it is in the nature of an academic/social science research project to determine the value of geocoding over time. ALAS and GLSP were not selected because of any complaints or suspicions about their compliance with LSC requirements over the last 10 years, but rather because the IG thought they might be willing to cooperate with him in carrying out his research. While LSC and the IG may wish to encourage recipients to participate in such research efforts, LSC and IG authority to compel disclosure of data and cooperation by the recipients in data collection efforts is governed by Section 1006(b)(3) of the LSC Act, not Section 509(h), and is subject to the limitations in the Georgia Rules of Professional Conduct and the ABA Model Rules of Professional Conduct.⁵

⁵ The American Bar Association's Committee on Ethics and Professional Responsibility addressed a very similar situation in a June, 1974 informal ethics opinion, where the Committee was asked whether federally funded legal services programs could ethically participate in a research study which would involve the release of a random sampling of client names, addresses and telephone numbers to an outside research group. The Committee determined that it would be a violation of the then applicable ethical rules on client confidentiality for a legal services office to release such information. ABA Informal Op. 1287 (June 7, 1974), attached hereto as Ex. 5. The current ethical rules governing release of confidential client information are more stringent than those applicable in 1974.

D. Even if the Study Is Part of Monitoring, Access to the Data Is Governed By Section 1006(b)(3) of the LSC Act, Not Section 509(h) of the Omnibus Appropriations Act.

Even if the Court were to determine that the IG's study of geocoding is appropriately conducted under the IG's monitoring and audit authority, Section 509(h) would not authorize access to the information that the IG seeks under the subpoena. By its terms, Section 509(h) is limited to the six items listed – financial records, time records, retainer agreements, client trust fund and eligibility records, and client names – and it does not apply to any other records, even if LSC or the IG asserts that they are needed for monitoring and evaluation. The information about clients that the IG seeks, including addresses, gender, ethnicity and age, is not encompassed within any of the specific items that Congress determined should be available to the IG, subject to the attorney-client privilege. Because the information that the IG seeks does not fall within the specific Section 509(h) exceptions, release of that information is governed by Section 1006(b)(3) of the LSC Act, which bars the release of information protected by the ABA Model Rules of Professional Conduct and the Georgia Rules of Professional Conduct. As the Respondents explain in their Response, those rules protect the confidential client information that is the subject of the subpoena that is at issue from disclosure to the IG.

Section 1006(b)(3) has two complementary sides. First, it bars LSC and the IG from “abrogat[ing] as to attorneys in programs assisted under this title the authority of a State or other jurisdiction to enforce the standards of professional responsibility generally applicable to attorneys in such jurisdiction.” Second, it also imposes on LSC and the IG the obligation to “ensure that activities under this title are carried out in a manner consistent with attorneys’ professional responsibilities.” By

demanding access to confidential client information that is protected from disclosure by the applicable rules of professional responsibility, the IG is violating both aspects of Section 1006(b)(3). The IG is abrogating the authority of the State of Georgia to determine what information is to be protected from disclosure. In addition, in attempting to gain access to confidential information, without making any effort to reach a compromise position that would meet the IG's desire for information without compromising client confidentiality, the IG is failing in its duty to ensure that recipients comply with the applicable rules of professional responsibility.

Section 1006(b)(3) was intended to insulate legal services program clients from exactly the kind of wide-ranging foray into confidential client information that the IG is attempting to make here. Lawyers and clients have a special relationship that our society has deemed is worthy of protection from intrusion by outsiders, including funders, and Section 1006(b)(3) requires LSC to both respect and protect that relationship. Section 509(h) acknowledges that certain limited and specific information that LSC and the IG may determine to be necessary to fulfill the Corporation's monitoring and audit responsibilities should nevertheless be provided, as long as its release does not violate the attorney-client privilege. However, that narrow exception does not give the IG *carte blanche* to have access to any non-privileged information that it decides would serve its interest or further its goals.

The IG may believe that geocoding is an interesting and potentially useful tool. He may determine that this study is sufficiently valuable to devote the limited resources of his office to an evaluation of its potential. He may well believe that broad access to client information will increase the value of the results of that evaluation. Nevertheless, subject to the limited exceptions of Section 509(h), the IG is still required to respect the professional obligation of attorneys to protect clients, and he

cannot avoid the protections of the rules of professional responsibility by cavalierly issuing subpoenas for any information that he would like to have to serve his ends.

III. The Court Should Not Enforce the Inspector General's Subpoenas Because He Cannot Show Sufficient Need for the Information He Seeks.

Because the enforcement of the IG's subpoenas will undermine the efficiency and effectiveness of ALAS and GLSP, and are therefore not relevant to the IG's stated purpose, this Court should not order enforcement of those subpoenas. As noted above, an administrative subpoena is only enforceable by the federal courts if, in addition to meeting other requirements, "the documents requested are relevant to [a lawful purpose within the statutory authority of the agency that issued it]." IG's Mem. of Points & Authorities Supp. Pet. for Summ. Enforcement at 7 (quoting United States v. Hunton & Williams, 952 F. Supp. 842, 848 (D.D.C. 1997)). The IG's subpoenas fail this prong of the test for enforcement. As noted above, when, as here, an administrative subpoena seeks personal information regarding private individuals, the agency must show more need for the material than its "mere relevance to a proper investigation." See McVane, 44 F.3d at 1137; see also discussion supra at 4. The IG cannot make that showing here for the following reasons.

First, the IG claims that his purpose in issuing the subpoenas is as part of an Evaluation Project meant "to promote economy and efficiency in the administration of LSC's programs and operations." Quatrevaux Decl. ¶ 5. (Ex. 3 to U.S. Pet. for Summ. Enforcement.) As a result of this Evaluation Project, the IG expects to be able to make recommendations regarding the "future demand for legal services, increased access to LSC-funded legal services to under-served areas, and improved allocations of LSC resources, generally." Id. ¶ 8. The manner in which his subpoenas demand the

production of sensitive client information, however, will frustrate rather than serve these purposes. The subpoenas therefore can hardly be said to be relevant to the purpose of promoting economy and efficiency.

The IG's demand for several categories of client information will impede the ability of LSC grantees to increase access to their services and to improve allocations of their resources. If the subpoenas are enforced, the population of eligible legal services clients in Georgia -- and throughout the country when the IG fulfills his promise to repeat his Evaluation Project elsewhere -- will know that their legal services lawyers will be unable to keep secret from the IG much personal and potentially harmful information about them, including: 1) their status as being eligible for free legal services; 2) the legal problem area in which they sought assistance; 3) the reason, including lack of merit, for which the legal services office closes their case; 4) the legal services office from which they sought assistance; and 4) other personal information such as age, gender, and ethnicity. See discussion supra § I. Because of this inability to trust that legal services lawyers will be able to maintain the confidentiality of sensitive information, eligible clients will be less likely to seek legal assistance from these lawyers. This result is directly counter to the IG's announced purposes of increasing access to legal services lawyers and improving allocations of those lawyers' resources. Consequently, the IG's subpoenas will frustrate, not further, the purpose he seeks to achieve through his subpoenas. Therefore, the IG cannot show that his subpoenas are relevant to his investigation, much less that they fulfill a need greater than mere relevance to an investigation.

The second reason that the IG cannot show sufficient need for his subpoenas is that he has unreasonably rejected offers by Georgia's legal services providers to provide their client information in

a manner that would permit the IG to meet his auditing goals but would still protect the privacy of their clients. According to the IG, the purpose of his current Evaluation Project is to “analyze the spatial, socio-demographic, and temporal characteristics of legal aid populations in the state of Georgia.” See Quatrevaux Decl. ¶ 5. To do this, the IG “will use geocoding software to map client populations.” See id. ¶ 6. In rejecting the suggestion of ALAS and GLSP that the IG limit its data request to zip codes, C. Eric Kirkland, the Assistant Inspector General for Evaluation, wrote that zip codes are too big and diverse to serve as useful units of evaluation. See June 29, 2000 Letter from Kirkland to Gottlieb. (Attach. C to U.S. Pet. for Summ. Enforcement.) Instead, Kirkland stated that he would evaluate the performance of legal services agencies by census tracts, which “are relatively homogenous with respect to demographic characteristics.” Id.

Although knowing the census tract of each client would apparently permit the IG to carry out his study, the IG persists in demanding that grantees disclose the precise address of their clients. At a July 6, 2000 meeting with members of the IG’s office, the grantees offered to themselves “‘geocode’ [clients’] street addresses into census blocks tracts so that client identity would not be available to [the IG].” July 7, 2000 Letter from Phyllis Holmen and Steve Gottlieb to C. Eric Kirkland, et al. (Attach. D to U.S. Pet. for Summ. Enforcement.) Unfortunately, the IG has rejected this compromise. At one point, the IG has stated that this proposal “would change [the Evaluation] into an undertaking by [the LSC grantees].” July 12, 2000 Letter from C. Eric Kirkland and Laurie Tarantowicz to Phyllis Holmen and Steve Gottlieb, at 1. (Attach. E. to U.S. Pet. for Summ. Enforcement.) In his declaration, the IG has similarly stated that accepting the proposal of ALAS and GLSP to geocode client information “would amount to an impermissible delegation by the OIG of its investigative and monitoring activities

under the IG Act.” Quatrevaux Decl. ¶ 11. In both instances, the IG failed to cite any authority other than the IG Act’s requirement that the IG function as an “independent and objective unit[.]” See id. (citing 5 U.S.C. app. 3 § 2).

The IG’s rationale for rejecting the proffered compromise is implausible. As the IG himself has declared, the purpose of the Evaluation is to examine several characteristics of Georgia’s legal services clients. In performing this Evaluation, he will rely upon information gathered and coded by ALAS and GLSP over a ten year period. The IG has never explained how permitting ALAS and GLSP to refine data that could identify their clients before publicly disclosing it will hamper his ability to study the distribution of legal services clients across census tracts. The IG is apparently content to permit ALAS and GLSP to encode much of the other information he seeks for his Evaluation, such as problem categories, problem closing codes, and office codes, and it is unclear why he wishes to treat client address information differently. In fact, permitting grantees to geocode client address information will serve the dual purposes of allowing the IG to complete his project while ensuring that the IG does not violate its responsibility to “ensure that activities under [the LSC Act] are carried out in a manner consistent with attorneys’ professional responsibilities.” 42 U.S.C. § 2996e (b)(3). It is therefore evident that the IG has no need whatsoever for clients’ addresses instead of clients’ census tracts.

The third reason that the IG cannot show sufficient need for his subpoenas is that his demand for ten years worth of client information risks the privacy of great numbers of legal services clients without the expectation of yielding useful research results. Since the early 1990’s, both Atlanta and Georgia have changed tremendously as a result of population explosions. As a result, information gathered by the IG about the early 1990’s will have little relevance to the provision of legal services in

Georgia in the 21st century. The Atlanta area, for instance, grew by about 30% from 1990 until 2000. See Dick Pettys, Atlanta Region 5th in Growth Last Year, The Florida Times-Union, Oct. 20, 2000, at A1. One Georgia county, Forsyth County, grew by over 95% from 1990 through 1999, see David Pace, Census Analysis Shows Increasing Racial Diversity in Georgia, Associated Press Newswires, Sept. 16, 1999, and, along with three other Georgia counties, was among the top 10 fastest-growing counties in the United States, see Lucy Soto, Forsyth County Leaps to Lead U.S. in Growth, The Atlanta Constitution, Mar. 12, 1999, at A1. Also, as ALAS and GLSP point out in their brief, 1990 census data has little relevance to the distribution and numbers of eligible clients after 1995. See ALAS & GLSP Resp. at 28 n.12. Because of these great shifts in population throughout Georgia between 1990 and 2000, the IG's request for information from the early years of the last decade will have little relevance to the provision of legal services by LSC grantees today.

The final reason that the IG cannot show sufficient need for his subpoenas is that the LSC program has undergone great programmatic changes in the past decade that make the collection of data from before 1996 unhelpful in analyzing the need for legal services today. In fiscal year 1996, for instance, Congress imposed on LSC a 30% reduction in funding. See LSC, Annual LSC Appropriations 1980-1999 <http://www.lsc.gov/press/pr_aLSCa.htm>. This loss of funding had a drastic effect on the operations of LSC grantees. GLSP, for instance, reduced its staff by over 25 percent after 1996 and closed one of its offices. See Testimony of Phyllis Holmen, Executive Director of GLSP, before U.S. Civil Rights Comm'n (1997), attached hereto as Ex. 6. LSC's appropriations still have not recovered from this deep cut. Also in 1996, Congress imposed many restrictions on the types of cases and clients that LSC grantees could accept. For instance, LSC grantees can no longer

assist many non-citizens, Omnibus Appropriations Act § 504(a)(11), any prisoners, id. § 504 (a)(15), or certain welfare recipients, id. § 504 (a)(16). Additionally, Congress has prohibited LSC grantees from using several important legal tools, including class actions, id. § 504 (a)(7), attorneys' fees, id. § 504 (a)(13), or lobbying on behalf of eligible clients, id. § 504 (a)(2)-(4). LSC-funded programs have consequently had to change the types of clients they serve and the types of cases in which they engage. For this reason, information regarding GLSP and ALAS clients prior to 1996 is unlikely to shed light on the provision of legal services by GLSP and ALAS today. Consequently, the IG cannot show sufficient need for information prior to 1996.

The IG's demand for private client information from the early 1990's will compromise client privacy without producing information relevant to the need for legal services in the coming years. Throughout the past decade, the distribution of people throughout Georgia has shifted and grown, and ALAS and GLSP have altered the delivery of their services because of developments in Washington, D.C. that drastically reduced their funding and then restricted the scope of their activities. The IG's demand for private client information from the early 1990's, when these population changes were just getting underway and before Congress reduced and restricted LSC in 1996, is therefore unreasonable because it will produce little more than a historical document describing the provision of legal services in Georgia in an earlier time.

Conclusion

For the reasons set forth herein, *amici* respectfully urge this Court to deny the IG's motion to enforce the subpoenas against GLSP and ALAS.

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