

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STEWART NOZETTE, Ph.D.)
)
 and)
)
 ALLIANCE FOR COMPETITIVE)
 TECHNOLOGY, INC.)
)
 Petitioners,)
)
 v.)
)
 NATIONAL AERONAUTICS AND SPACE)
 ADMINISTRATION, OFFICE OF)
 INSPECTOR GENERAL,)
)
)
 Respondent.)
)

C.A. No.: 06-MC-00171-JR

Opposition to Petitioner's Motion to
 Quash Administrative Subpoena
Duces Tecum and for Protective Order

**NASA'S OPPOSITION TO PETITIONER'S MOTION TO QUASH ADMINISTRATIVE
SUBPOENA DECUS TECUM AND FOR PROTECTIVE ORDER**

On March 20, 2006, NASA's Office of Inspector General ("OIG") served an Inspector General Subpoena on Bank of America requiring the production of bank records associated with an account held by Alliance for Competitive Technology, Inc. ("ACT"). (See Bank of America Subpoena, attached as Exhibit A). ACT is a non-profit corporation owned by Dr. Stewart Nozette and his wife, Wendy McColough. (See Declaration of Special Agent Anthony J. Pavlik, attached as Exhibit B).

In February of 2004, ACT entered into an Intergovernmental Personnel Act ("IPA") agreement with NASA, which obligates NASA to reimburse ACT for Dr. Nozette's salary and ACT's share of Dr. Nozette's employee benefits, actually incurred, up to an amount not to exceed forty percent of his base salary. An investigation has been initiated to determine whether ACT actually incurred the expenses for Dr. Nozette's salary and employee benefits it purported to incur.

RECEIVED
 MAY -3 2006
 NANCY MAYER-WHITTINGTON, CLERK
 U.S. DISTRICT COURT

Pavlik Decl. ¶ 4. A preliminary review of ACT's 2004 tax return suggests that these expenses were not actually incurred, as the return lists salary expenses of only \$16,302 and payroll taxes of \$1,777. Pavlik Decl. ¶ 5. Additionally, ACT also charged NASA for fringe benefits relating to the Federal Unemployment Tax Act (FUTA) and Maryland Unemployment Insurance when ACT was exempt from paying FUTA, and the Maryland Department of Labor, Licensing and Regulation (DLLR) had no record of ACT or Nozette. Id.

The Bank of America subpoena was issued in accordance with the Inspector General Act of 1978, 5 U.S.C. app.3. The subpoena requires the production of ACT bank records for the period January 1, 2000 to January 31, 2006. See Exhibit A. Although the ACT's IPA agreement with NASA covers only the period March 2004 to March 2006, ACT has entered into virtually identical IPA agreements with other government agencies for the past six years, and the records during the entire time period are relevant to show, among other things, a past pattern or practice. Pavlik Decl. ¶ 8. The subpoena did not require production of Dr. Stewart Nozette's personal bank records. Pavlik Decl. ¶ 9.

On April 13, 2006, Dr. Nozette and ACT filed a motion to quash the Bank of America subpoena. In their Motion, Dr. Nozette and ACT argue that the subpoena should be quashed because it is over broad, it seeks confidential information, and it is not being used for a proper purpose by NASA-OIG because "there is no question of any fraud." See ACT Motion, at 5-7.

As more fully set out below, Dr. Nozette and ACT have no privacy rights in, nor ownership of, the records sought from Bank of America and, therefore, no standing to challenge the subpoena. Although the Right to Financial Privacy Act ("RFPA"), 12 U.S.C. § 3401, would offer some statutory protection to Dr. Nozette, individually, if NASA sought his customer records, the statute affords no privacy rights to corporations such as ACT. Moreover, even if ACT had standing to

challenge the subpoena, NASA-OIG has acted appropriately within its statutorily imposed duties and has not issued the subpoena for any dubious reason, as ACT suggests. Accordingly, the Motion to Quash should be denied and this miscellaneous action should be dismissed.

DISCUSSION

The Inspector General Act of 1978 (the "Act"), as amended, creates independent Inspectors General in NASA and other federal agencies, who are responsible for overseeing the integrity of agency programs and the conduct of agency contractors and other recipients of agency funds. See 5 U.S.C. app. 3 § 1 et seq.; Burlington Northern R.R. Co. v. Office of Inspector Gen., R.R. Retirement Bd., 983 F.2d 631, 634-35 (5th Cir. 1993); Adair v. Rose Law Firm, 867 F. Supp. 1111, 1115 (D.C.D.C. 1994). Under the Act, the duties of the Inspector General of NASA include: (i) preventing and detecting fraud and abuse in NASA's programs and operations, 5 U.S.C. app. 3 § 4(a)(3); (ii) conducting, supervising, and coordinating audits and investigations relating to NASA's programs and operations, id. § 4(a)(1); (iii) helping identify and prosecute those participating in defrauding NASA's programs, id. § 4(a)(4)(B); and (iv) identifying deficiencies in the administration of NASA's programs and recommending corrective action, id. § 4(a)(5).

To enable the Inspector General to carry out these statutory duties and responsibilities, the Act expressly confers upon the Inspector General broad subpoena power:

In addition to the authority otherwise provided by this Act, each Inspector General, in carrying out the provisions of this Act, is authorized--* * * to require by subpoena [sic] the production of all information, documents, reports, answers, records, accounts, papers, and other data and documentary evidence necessary in the performance of the functions assigned by this Act...

Id. § 6(a)(4); see also Burlington Northern, 983 F.2d at 641 ("[T]he Inspector General Act of 1978 gives Inspectors General broad--not limited-- investigatory powers.") (emphasis in original).

A. Dr. Nozette and ACT lack standing to challenge a subpoena issued to a third party

In United States v. Miller, 425 U.S. 435 (1976), the Supreme Court ruled that there is no legitimate expectation of privacy in bank records in possession of a bank because documents and other materials are voluntarily conveyed to banks and exposed to bank employees in the ordinary course of business. See, 425 U.S. at 438-442. In response to the Miller decision, Congress enacted the RFPA, 12 U.S.C. §3401 et seq., which permits customers who are individuals to contest Government access to certain records held by banks and other financial institutions, as defined by the statute, and requires the Government authority to notify the bank customer of the subpoena or summons served on the financial institution as well as the nature of the law enforcement inquiry to which the subpoena or summons relates. The application of the RFPA is expressly limited to natural persons or partnerships of five or fewer persons. See 12 U.S.C. §3401(4). See also *Construction and Application of the Right to Financial Privacy Act of 1978*, 112 A.L.R. Fed. 295 (1993).

Thus, ACT has no right to object to the bank records sought because corporations are not covered by the RFPA. Accordingly, ACT has no standing to challenge the subpoena. Additionally, Dr. Nozette has no privacy rights in the bank records sought because the subpoena does not require the production of his personal records. Thus, he too lacks standing to challenge the subpoena.

B. Even if subject to challenge, the Bank of America subpoena is a valid and legitimate exercise of NASA-OIG's authority

Even if Dr. Nozette and/or ACT had standing to challenge the subpoena, the issuance of this subpoena is not, as Dr. Nozette and ACT suggest, over broad and is not designed solely for the purpose of harassment or to serve as a fishing expedition. See ACT Motion, at 7. The subpoena was issued by NASA-OIG pursuant to an investigation into allegations that ACT submitted false statements/claims for expenses that were not actually incurred. Pavlik Decl. ¶ 4. This investigation

falls squarely within the Inspector General's express authority under the Inspector General Act to investigate fraud, waste, and abuse in the administration's programs and operations, 5 U.S.C. app. 3 § 4 (a) (3). The subpoena requests information reasonably related to the Inspector General's investigation. Because investigatory subpoenas "must by their very nature be broad," it is not for the reviewing court to determine whether the information sought is relevant to whatever eventual action the agency might take. United States v. Firestone Tire & Rubber Co., 455 F. Supp. 1072, 1083 (D.D.C. 1978). The court's inquiry is limited to whether the requested information, "however broad," is relevant to the "general purpose" of the investigation. Id. Here, the subpoena seeks documents that go directly to the question of whether ACT's claims were valid and truthful and whether ACT had a pattern and practice of submitting like claims or making like statements under past IPA's with Government agencies. Pavlik Decl. ¶ 9.

In particular, the information sought by the subpoena would assist in verifying ACT's expenses for Dr. Nozette's salary and benefits reimbursed by NASA, and whether such expenses were actually incurred. For example, if ACT incurred health insurance expenses for Dr. Nozette, ACT bank records would presumably reflect those expenses. Moreover, ACT's attorney has represented that Dr. Nozette is paid in-kind rather than in salary. (See Exhibit C, Letter from ACT attorney Kiyonaga, dated February 7, 2006.) An analysis of the subpoenaed documents would enable NASA OIG to determine the truth of that assertion, and whether the historical expenses that ACT incurred over time have any semblance to the salary negotiated by ACT in its IPA agreement with NASA. Production, therefore, would advance the investigation to its logical conclusion, rather than the delay sought by ACT's counsel.

CONCLUSION

For the foregoing reasons, the NASA-OIG respectfully requests that the Court deny Dr. Nozette and ACT's Motion to Quash and dismiss this miscellaneous action.

Respectfully submitted,

PETER KEISLER
Assistant Attorney General



MICHAEL F. HERTZ
MICHAEL D. GRANSTON
(D.C. Bar No. 446258)
RYAN P. FAYHEE
Attorneys, Civil Division
United States Dept. of Justice
601 D Street, NW, Rm. 9607
Washington, D.C. 20004
Tel: (202) 307-0240, Fax: (202) 305-7797

Dated: May 3, 2006

ATTORNEYS FOR THE UNITED STATES

National Aeronautics and
Space Administration

Office of Inspector General
Washington, DC 20546-0001



Bank of America Subpoena Processing #5474
Mail Code CA9-705-05-19
P.O. Box 3609
Los Angeles, CA 90051

To Custodian of Records:

Pursuant to Title 5 United States Code, Appendix 1, Section 6(a)(4), the enclosed subpoena *duces tecum* has been issued. The materials identified should be produced by the date and time indicated on the subpoena at the:

NASA Office of Inspector General
Goddard Space Flight Center
Building 1, Room 208
Greenbelt, MD 20771

Your personal appearance is required at the time indicated on the subpoena in order to testify as to the completeness, accuracy, and authenticity of the documents produced. Failure to appear at the time and place set forth and as specified in the subpoena will be taken as a failure to comply with the subpoena. In lieu of your personal appearance, you may provide a signed written statement and return of service by mail to the NASA OIG at the above address. If you choose the latter, please make arrangements through Special Agent Anthony J. Pavlik, or designee of this office, at (301) 286-9316.

Please note that the enclosed subpoena is for original documents and does not allow for the substitution of copies except as specifically authorized by Special Agent Anthony J. Pavlik or his designee.

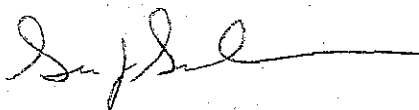
Materials required by the subpoena should be accompanied by an index identifying each document or other materials and the item or items of the subpoena to which it relates. We also request that the enclosed Certificate of Compliance be completed and forwarded with the subpoenaed materials. If for any reason any of the required materials are not furnished, list and indicate the location of such materials and the reason for non-production. In addition, if any document called for is withheld because of a claim of attorney-client privilege, identify: (a) the attorney and client involved; (b) all persons or entities who were involved in the preparation of the document; (c) all persons or entities who received the document; (d) all persons or entities known to have been furnished the document or

informed of its substance; (e) the date of the document; and, (f) the subject matter of the document.

This investigation is private and we request such privacy be maintained. Enclosed herewith is a notice pursuant to the Privacy Act of 1974.

You should bear in mind, you have the right to consult with and be represented by an attorney in connection with this matter. If you have any questions concerning the subpoena or the materials required to be produced, please call Special Agent Anthony J. Pavlik at (301) 286-1812 or the undersigned at (301) 286-7776.

Sincerely,

A handwritten signature in black ink, appearing to read 'S. J. Simpkins', with a long horizontal flourish extending to the right.

Samuel J. Simpkins
Resident Agent-in-Charge
Goddard Space Flight Center

Enclosures

United States of America

National Aeronautics and Space Administration

Office of Inspector General

To Custodian of Records Bank of America

7680 Girard Avenue

La Jolla, CA 92037

} **SUBPOENA**

YOU ARE HEREBY COMMANDED TO APPEAR BEFORE Special Agent Anthony J. Pavlik

an official of the Office of Inspector General at Goddard Space Flight Center

in the City of Greenbelt and State of Maryland

on the 21st day of MARCH, 2006 at 10:00 o'clock a.m. of that day.
(Month) (Year)

And you are hereby required to bring with you and produce at said time and place the following information, documents, reports, answers, records, accounts, papers, and other data and documentary evidence:

See Attachment

which are necessary in the performance of the responsibility of the Inspector General under Public Law 95-452, to conduct and supervise audits and investigations and to promote economy, efficiency, and effectiveness in the administration of, and to prevent and detect fraud and abuse in and relating to the programs and operations of the National Aeronautics and Space Administration.

IN TESTIMONY WHEREOF, the seal of the OFFICE OF INSPECTOR GENERAL, NATIONAL AERONAUTICS AND SPACE ADMINISTRATION, is affixed hereto, and I have hereunto set my hand at Washington, DC, this 17th

day of March, 2006
(Month) (Year)

Thomas J. Howard
Inspector General

ATTACHMENT

The following documents are requested for the period January 1, 2000 to January 31, 2006 for Alliance for Competitive Technology, 141 Grafton Street, Chevy Chase, MD 20815, Account Number 01706-20411, Routing Number 121000661:

1. All monthly account statements.
2. All checks drawn on the account.
3. All deposit slips with supporting deposit.
4. Account application and authorized users.
5. All incoming and outgoing wire transfers and cashier checks.

NOTICE PURSUANT TO THE PRIVACY ACT OF 1974

This notice is provided pursuant to the Privacy Act of 1974, 5 U.S.C. 522a. You are hereby informed of the following:

1. Authority for Solicitation of the Information. The authority for requiring production of the information is set forth in the Inspector General Act of 1978, Public Law 95-452. Disclosure of information is mandatory subject to the valid assertion of a legal right or privilege.
2. Principal Uses of the Information. The Inspector General's principal purpose in soliciting the information is to promote economy, efficiency, and effectiveness in the administration of the programs and operations of NASA and to prevent and detect fraud and abuse in such programs and operations.
3. Effect of Noncompliance. Failure to comply with the subpoena may result in the Inspector General's requesting a court order for compliance. If such an order is obtained and you thereafter fail to supply the information, you may be subject to civil and/or criminal sanctions for contempt of court.
4. Routine Uses of the Information. Information you give may be used and disseminated in the routine operation of NASA, including criminal, civil, and administrative proceedings. Routine uses include, but are not limited to, the categories listed below.
 - (a) In any case in which there is an indication of a violation or potential violation of law, whether civil, criminal, or regulatory in nature, the record in question may be dissemination to the appropriate Federal, state, local, or foreign agency charged with the responsibility for investigating, auditing, or prosecuting such violation or charged with enforcing or implementing such law, including but not limited to: the Department of Justice; the Defense Contract Audit Agency, which performs contractor audits on behalf of the NASA Office of Inspector General on a reimbursable basis; and NASA procurement personnel responsible for determining whether debarment or suspension proceedings should be initiated.
 - (b) In the course of investigating the potential or actual violation of any law, whether civil, criminal, or regulatory in nature, or during the course of a trial or hearing or the preparation for a trial or hearing for such violation, a record may be disseminated to a Federal, state, local, or foreign agency, or to an individual or organization, if there is reason to believe that such agency, individual, or organization possesses information relating to the investigation, trial, or hearing and the dissemination is reasonably necessary to elicit such information or to obtain the cooperation of a witness or an informant.

- (c) A record relating to a case or matter may be disseminated in an appropriate Federal, state, local, or foreign court or grand jury proceeding in accordance with established constitution, substantive, or procedural law or practice.
- (d) A record relating to a case or matter may be disseminated to an actual or potential party of his attorney for the purpose of negotiation or discussion on such matters as: settlement of the case or matter, plea bargaining, or informal discovery proceedings.
- (e) A record relating to a case or matter that has been referred by an agency for investigation, prosecution, or enforcement, or that involves a case or matter within the jurisdiction of an agency, may be disseminated to such agency to notify the agency of the status of the case or matter or of any decision or determination that has been made, or to make such other inquiries and reports as are necessary during the processing of the case or matter.
- (f) A record relating to a case or matter may be disseminated to a foreign country pursuant to an international treaty or convention entered into and ratified by the United States or to an executive agreement.
- (g) A record may be disseminated to a Federal, state, local, foreign, or international law enforcement agency to assist in the general crime prevention and detection efforts of the recipient agency or to provide investigative leads to such agency.
- (h) A record may be disseminated to a Federal agency, in response to its request, in connection with the hiring or retention of an employee, issuance of a security clearance, reporting an investigation of an employee, letting a contract, or issuance of a license, grant, or other benefit by the requesting agency, to the extent that the information relates to the requesting agency's decision on the matter.
- (i) A record may be disseminated to the public, news media, trade associations, or organized groups, when the purpose of the dissemination is educational or informational, such as descriptions of crime trends or distinctive or unique *modus operandi*, provided that the record does not contain any information identifiable to a specific individual other than such *modus operandi*.

5. Freedom of Information Act. The Freedom of Information Act, 5 U.S.C. 552, and NASA's regulations at 14 C.F.R 1206, pursuant thereto, generally provide for access by members of the public to governmental records, unless the requested records fall within specified exemptions.

CERTIFICATE OF COMPLIANCE

I hereby certify that the materials and documents produced in response to the subpoena issued by the Inspector General of NASA dated _____, and delivered (or mailed via registered mail) to Special Agent Anthony J. Pavlik of the Office of the Inspector General, Goddard Space Flight Center, are genuine, complete and in full compliance with the demand made in the subpoena for the materials specified therein.

I declare under penalty of perjury that the foregoing is true and correct.

(Signature)

(Name – type or print)

(Title, if applicable)

(Date Executed)

(City and State)

WITNESS:

(Signature)

(Name and Title)

(Date)

CERTIFICATE OF SERVICE

I, Anthony J. Pavlik, Special Agent for the Office of Inspector General, National

Aeronautics and Space Administration, certify that I have this 20 day of MARCH,

in the year 2006, served a subpoena (check whichever applies): X in person,

_____ by first-class mail, _____ facsimile, _____ other (please print method of service)

_____ upon:

Custodian of Records
Bank of America
La Jolla Main
7680 Girard Avenue
La Jolla, CA 92037

Tiffany GRANT WARD
Personal Banker
8827 Greenbelt Road
Greenbelt MD 20770

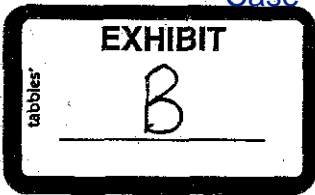


Name (print)

20 MAR 06

(Signature/Date)

3-20-06 Ms Ward advised she would forward subpoena
per address on letter via BofA internal mail.



DECLARATION OF ANTHONY J. PAVLIK
SPECIAL AGENT, OFFICE OF INSPECTOR GENERAL
GODDARD SPACE FLIGHT CENTER
NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

I, Anthony J. Pavlik, hereby declare as follows:

- (1) I am a criminal investigator in the Office of Inspector General (OIG) of the National Aeronautics and Space Administration (NASA), Goddard Space Flight Center, Greenbelt, MD. The following statement is based upon personal knowledge acquired in the performance of my official duties and is submitted in support of an action opposing Petitioners' motion to quash an administrative subpoena issued by the NASA Inspector General and served upon the Bank of America.
- (2) As a special agent, I plan and conduct investigations primarily involving fraud committed by NASA employees and contractors. I have over 14 years experience conducting a variety of white collar fraud investigations in multiple federal agencies. I am currently conducting a criminal investigation involving violations of 18 U.S.C §287, false, fictitious or fraudulent claims.
- (3) By virtue of the Inspector General Act of 1978 (the Act), as amended, the Inspector General (IG) of NASA has the duty and responsibility "... to conduct, supervise, and coordinate audits and investigations relating to the programs and operations of {NASA}." 5 U.S.C. App. 4(a) (1). Pursuant to section 6 of the Act, NASA IG has authority to issue subpoenas for "the production of all information, documents, reports, answers, records, accounts, papers, and other data and documentary evidence necessary in the performance of the functions assigned by this Act." 5 U.S.C. App. (6) (a)
- (4) I am familiar with the procedures followed in the NASA OIG for requesting, issuing, and serving subpoenas and specifically in regards to the subpoena to the Bank of America.
- (4) On January 17, 2006, this investigation was initiated based on information that the ACT, a non-profit corporation owned by Dr. Stewart Nozette as the president and his wife, Wendy McColough, as the director, may have submitted false claims to NASA and the Department of Defense. In February 2004, ACT entered into an Intergovernmental Personnel Act (IPA) agreement with NASA, for the period March 1, 2004 to February 28, 2006, which stipulated that NASA will "reimburse" ACT for Nozette's salary of \$141,718 and ACT's share of Nozette's employee benefits up to 40% of his base salary, and that ACT agrees to continue to pay Dr. Nozette's salary and benefits, and make his payroll deductions.
- (5) Preliminary investigation disclosed that ACT submitted potential false claims to NASA when it invoiced NASA for reimbursement for the salary and an additional 40% for fringe benefits and expenses it allegedly paid to Nozette, when according to ACT's federal income tax returns, these expenses were not fully paid. For example, in 2004

ACT's tax returns showed salary expenses of only \$16,302 and payroll taxes of \$1,777. ACT also charged NASA for fringe benefits relating to the Federal Unemployment Tax Act (FUTA) and Maryland Unemployment Insurance when ACT was exempt from paying FUTA, and the Maryland Department of Labor, Licensing and Regulation (DLLR) had no record of ACT or Nozette. Even if ACT was self-insured it was nonetheless required to report all employee wages to the State of Maryland, which was not done.

(6) In response to a NASA OIG subpoena served on ACT on January 27, 2006, Nozette's attorney, John Kiyonaga, wrote a letter to the NASA IG Robert Cobb. With the letter, he provided two months' worth of ACT's checking account statements and copies of checks.

(7) My review of the ACT bank statements provided for November and December 2005 revealed that for that time period, NASA paid ACT \$53,388. However, no checks were written to Nozette, nor were any checks written to the US Department of Treasury for FICA taxes or other payroll taxes. The checks written from ACT's business account indicated numerous payments for apparent personal expenses including utilities, three different mortgages, nine credit cards, La Jolla Tennis Club, Mercedes Benz Credit Corp, and pool cleaning.

(8) In addition to the IPA agreement with NASA, Nozette had two additional IPA agreements, one with the Navy Research Laboratory (NRL) from January 13, 2000, to January 12, 2002, and one with the Defense Advanced Research Projects Agency (DARPA) from March 18, 2002, to March 17, 2004. ACT also had at least one employee, Michael Abrams, who worked under another IPA agreement between ACT and NRL from December 5, 2001 to December 4, 2003. Based on my review of ACT's federal tax returns, a similar pattern of alleged fraudulent activity occurred in connection with these agreements. In fact, I compared ACT's invoices to the NRL for Michael Abrams' IPA agreement and information provided by Abrams. The agreement called for the NRL to reimburse ACT for Abrams' salary and fringe benefits. Based on my analysis, I believe that ACT had requested reimbursement from the NRL for over \$50,000 in fringe benefits and salary that it had not incurred nor provided to Abrams per the IPA agreement.

(9) On March 17, 2006, the NASA Deputy Inspector General, Thomas J. Howard, signed a NASA Office of Inspector General Subpoena to the Bank of America, which I served on March 20, 2006. (Exhibit A). The subpoena was required to obtain ACT's business checking account records to verify financial transactions and expenses relating to the IPA agreements between ACT and various federal agencies including NASA. The subpoena did not require production of Nozette's personal records. I had requested these records for a period of time beginning in January 2000, which correlated to the start of ACT's alleged fraudulent activity and continued through the end of ACT's IPA agreement with NASA.

(10) On April 18, 2006, I received a copy of ACT and Nozette's Motion to Quash the NASA IG subpoena to Bank of America, along with a copy of a letter dated April 14, 2006, written by Mr. Kiyonaga to the Bank of America (Exhibit D).

(11) On April 26, 2006, I received a letter from Bank of America, dated April 19, 2006, which stated that the bank has "discontinued production of the documents requested in your subpoena pending our receipt of court ordered instruction signed by the judge presiding over the Motion to Quash hearing and/or further instruction signed by you *and* the opposing party." (emphasis in original) (Exhibit E).

(12) To date, no documents have been received in compliance with the subpoena.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 3, 2006, at Greenbelt, Maryland.



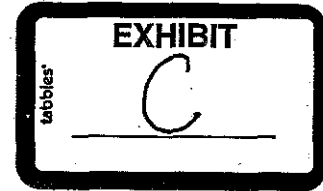
Anthony J. Pavlik
Special Agent
Office of Inspector General
National Aeronautics and Space Administration
Goddard Space Flight Center
Greenbelt, Maryland

LAW OFFICE
JOHN C. KIYONAGA
526 KING STREET, SUITE 213
ALEXANDRIA, VIRGINIA 22314

ALSO ADMITTED DC AND NY BARS

(703) 739-0009
FAX (703) 549-2988

February 7, 2006



Robert W. Cobb
Inspector General
National Aeronautics and Space Administration
300 E St., SW
Washington, D.C. 20546

Re: Dr. Stewart D. Nozette

Dear Mr. Cobb:

As counsel for Dr. Nozette, I was served on January 27 with a subpoena *duces tecum* by SA Anthony Pavlik. I read neither the Intergovernmental Personnel Act ("IPA") nor NASA's Assignment Agreement under the IPA with the Alliance for Competitive Technology ("ACT"), pursuant to which Dr. Nozette serves at NASA, to entitle NASA to the documents subject of the subpoena. Nonetheless, I have attached ACT's bank statements and checks for the last two months of 2005.

As an organization devoted to the promotion and transfer of technology and the reduction of the burden of government, and accorded tax-exempt status under Sec. 501(c)(3), ACT provides Dr. Nozette to NASA. ACT's outlays reflected in the attached checks comprise expenses directly incurred by Dr. Nozette in service to NASA (e.g. travel and entertainment), expenses incurred in the maintenance of ACT's situs which is also Dr. Nozette's home (e.g. mortgage, telephone, utilities and internet access), and checks for a vehicle lease and insurance for Dr. Nozette. ACT's monthly outlays over the life of its agreement with NASA have not been identical, but the aggregate of the outlays well exceeds amounts invoiced to NASA (which can be confirmed as to 2004 by reference to ACT's publicly filed IRS Form 990; the Form 990 as to 2005 is not yet due).

While none of the enclosed checks reflect "salary" payments directly to Dr. Nozette, many reflect in kind compensation. A review of fully burdened contracts by NASA under the Federal Acquisitions Regulation in supplement of IPA agreements for the acquisition of similar personnel should reveal that the cost to NASA under its agreement with ACT and the compensation enjoyed by Dr. Nozette are more than reasonable for a scientist of his stature in the field of aeronautics and space exploration.

Mr. Nozette's service to NASA under ACT's Assignment Agreement is easily confirmed from NASA's records. The breadth of documentation subpoenaed,

Robert W. Cobb
February 7, 2006
Page 2

however, exceeds NASA's authority under 42 U.S.C. Sec. 4764(b) to review "the status and application of Federal grant funds and the operation of the training program..." Review of issues such as the classification and reporting of Dr. Nozette's compensation are properly the province of the Internal Revenue Service. It bears noting, however, that ACT's mission and Dr. Nozette's professional pursuits are virtually congruent, as distinct from a non-profit managed by an administrator not directly performing the non-profit's mission. Consequently, ACT funds spent for the benefit of Dr. Nozette can and are considered spent for the benefit of ACT and largely tax exempt. See *Universal Church of Scientific Truth v. United States*, (N.D. Ala.) (Sept. 25, 1973). Further, the IRS prefers payment of expenses to outsize salary payments for organizations with ACT's total revenue. *Id.*

You are free to disagree with this position and to report it to the IRS if you choose, but it remains an issue outside the enforcement purview of NASA. It is not an appropriate basis for adverse action by NASA against ACT or Dr. Nozette, particularly since he has been described within NASA as an effective "change agent."


I am confident Dr. Nozette's senior management concurs that NASA receives very good value under the agreement. Dr. Nozette would very much like NASA to renew its agreement with ACT so that he can continue his work without interruption. His senior management should confirm that this is their wish as well. Consequently, I would ask that you close the investigation of Dr. Nozette without more.

I understand that NASA insisted on the language parsing ACT's expenses viz Dr. Nozette in the Assignment Agreement with ACT. I am unaware of any statutory or regulatory requirement for parsing ACT's expenses in its agreement with NASA and would suggest the parties negotiate a contract renewal for a sum certain plus allowable mission expenses.

Should you have any concerns not resolved by this letter, I would be happy to meet with you.

Thank you.

Sincerely,



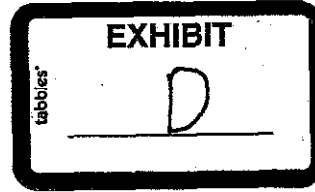
John C. Kiyonaga

Cc: Michael C. Wholley, Esq.

LAW OFFICE
JOHN C. KIYONAGA
526 KING STREET, SUITE 213
ALEXANDRIA, VIRGINIA 22314

ALSO ADMITTED DC AND NY BARS

(703) 739-0009
FAX (703) 549-2988



red orig
APR 20 AM 10:06
JFK

April 14, 2006

Elizabeth A. Stanford
AVP, Operations Mgr.
Bank of America
Subpoena Processing #5473
Mail Code: CA9-705-05-19
P.O. Box 3609
Los Angeles, CA 90051

BY FAX AND MAIL

Re: Federal Subpoena/Alliance for Competitive Technology
Bank of America File: 1356-23MAR06

Dear Ms. Stanford:


Enclosed, please find a copy with date stamp of the Motion to Quash the above-referenced subpoena which motion was filed yesterday in the United States District Court for Washington, D.C.

Under the relevant statutory and judicial authorities, Bank of America is no longer obliged to comply with the subpoena.

Please be advised that Bank of America's election to comply would be regarded by your depositor, the Alliance for Competitive Technology, as an actionable breach of the bank's duty of confidence to its depositor.

Thank you.

Sincerely,


John C. Kiyonaga

Cc: Elizabeth Richardson, Esq., NASA Office of Inspector General
Ryan Fayhee, Esq., Department of Justice

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

STEWART D. NOZETTE, Ph.D.)

And)

ALLIANCE FOR COMPETITIVE)
TECHNOLOGY, INC.)

Plaintiffs,)

v.)

Misc. Action No. _____

NATIONAL AERONAUTICS AND)
SPACE ADMINISTRATION/)
OFFICE OF INSPECTOR GENERAL,)

Defendant.)

**PLAINTIFFS' MOTION TO QUASH ADMINISTRATIVE SUBPOENA
DUCES TECUM AND FOR PROTECTIVE ORDER**

Pursuant to Fed. R. Civ. P. 81(a)(3), Plaintiffs Stewart D. Nozette, Ph.D. and Alliance for Competitive Technology, Inc., through undersigned counsel, hereby move for an Order quashing an administrative subpoena *duces tecum* that was issued by the National Aeronautics and Space Administration/Office of Inspector General ("NASA-OIG") and served on the Bank of America on or about March 27, 2006 and for the entry of a protective order.

I. FACTUAL BACKGROUND

A. NASA and ACT

Dr. Nozette, is a geophysicist and a director of the Alliance for Competitive Technology ("ACT"), a corporation incorporated in California and based in Maryland that has been accorded tax exempt status under § 501(c)(3) of the Internal Revenue Code. ACT's mission is to promote

Bank of America



Subpoena Processing #5473
Mail Code: CA9-705-05-19
P. O. Box 3609
Los Angeles, CA 90051

April 19, 2006

Special Agent Anthony J. Pavlik
NASA Office of Inspector General
Goddard Space Flight Center
Building 1, Room 208
Greenbelt, MD 20771

Re: Case Name: Alliance for Competitive Technology
Bank of America File: I356-23MAR06

Dear Mr. Pavlik:

Bank of America has received a copy of a Notice of Motion to Quash pertaining to the case referenced above. Please be advised that we have discontinued production of the documents requested in your subpoena pending our receipt of court ordered instruction signed by the judge presiding over the Motion to Quash hearing and/or further instruction signed by you *and* the opposing party.

Any questions or concerns you may have regarding this Motion should be addressed with John C. Kiyonaga, Esq.

Thank you for your attention to this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Elizabeth A. Stanford".

Elizabeth A. Stanford
AVP, Operations Team Manager
CA Subpoena Processing
213-240-6636

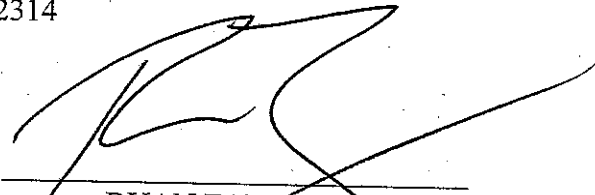
cc: John C. Kiyonaga, Esq.
Law Offices of John C. Kiyonaga
526 King Street, Suite 213
Alexandria, VA 22314

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the United States' Opposition to ACT and Dr. Nozette's Motion to Quash was served by mail this 3rd day of May 2006 on:

Paul Kiyonaga, Esq.
Kiyonaga & Soltis, P.C.
910 17th Street, N.W.
Suite 800
Washington, D.C. 20006

John Kiyonaga, Esq.
526 King Street
Suite 213
Alexandria, VA 22314



RYAN FAYHEE
Commercial Litigation Branch
United States Department of Justice