



2006

Recent Developments: Lubin v. Agora, Inc.: To Compel Production of Newsletter Subscriber and Purchaser Lists, a Government Agency Must Establish a Substantial Relationship between the Information Sought and an Overriding and Compelling State Interest

Christopher Heagy

Follow this and additional works at: <http://scholarworks.law.ubalt.edu/lf>



Part of the [Law Commons](#)

Recommended Citation

Heagy, Christopher (2006) "Recent Developments: Lubin v. Agora, Inc.: To Compel Production of Newsletter Subscriber and Purchaser Lists, a Government Agency Must Establish a Substantial Relationship between the Information Sought and an Overriding and Compelling State Interest," *University of Baltimore Law Forum*: Vol. 36 : No. 2 , Article 11.

Available at: <http://scholarworks.law.ubalt.edu/lf/vol36/iss2/11>

This Article is brought to you for free and open access by ScholarWorks@University of Baltimore School of Law. It has been accepted for inclusion in University of Baltimore Law Forum by an authorized editor of ScholarWorks@University of Baltimore School of Law. For more information, please contact snolan@ubalt.edu.

RECENT DEVELOPMENT

LUBIN v. AGORA, INC.: TO COMPEL PRODUCTION OF NEWSLETTER SUBSCRIBER AND PURCHASER LISTS, A GOVERNMENT AGENCY MUST ESTABLISH A SUBSTANTIAL RELATIONSHIP BETWEEN THE INFORMATION SOUGHT AND AN OVERRIDING AND COMPELLING STATE INTEREST

By: Christopher Heagy

The Court of Appeals of Maryland held government agencies cannot compel newsletter publishers to produce subscriber and purchaser lists without establishing a substantial relationship between the information sought and a compelling state interest. *Lubin v. Agora, Inc.*, 389 Md. 1, 882 A.2d 833 (2005). The Court held this information fell within the First Amendment's scope of protection and required the government to meet a higher standard of scrutiny before disclosure was compelled. *Id.*

In May of 2002, Agora, Inc. ("Agora"), a Maryland newsletter publisher, delivered a mass e-mail to subscribers of its newsletters and other potential purchasers. The e-mail offered an investment report ("report") on an unnamed company and promised purchasers could profit by purchasing this company's stock. The e-mail stated Agora would reveal the name of the company only to purchasers of the \$1,000 report.

After the release of the e-mail, the Maryland Division of Securities ("Division") investigated Agora to determine if Agora violated Maryland securities law. First, the Division alleged Agora potentially violated the antifraud provisions of the Securities Act. Second, Agora potentially offered individualized investment advice without registering as an investment advisor. Finally, Agora potentially referred customers to specific brokers without registering as a broker-dealer, as required by the Securities Act.

In furtherance of the Division's investigation, it served two subpoenas *duces tecum* on Agora. The subpoenas sought identifying information for all persons and newsletter subscribers who purchased

the report. Agora refused to produce any information that would identify its subscribers or purchasers of the report.

In May 2003, the Division filed a complaint to enforce the subpoenas against Agora in the Circuit Court for Baltimore City. *Id.* Agora argued the First Amendment of the United States Constitution and Article 40 of the Maryland Declaration of Rights protected the requested information. The circuit court denied enforcement of the subpoenas, stating the Division failed to make a compelling showing why Agora should release its subscriber lists. The Division appealed to the Court of Special Appeals. The Court of Appeals of Maryland issued a writ of certiorari before consideration by the Court of Special Appeals. *Id.*

First, the Court of Appeals stated administrative agency subpoenas are usually enforced if the agency's investigation is authorized by statute, the information sought is relevant to the investigation, and the agency's demand is not indefinite or overbroad. *Id.* at 15, 882 A.2d at 843 (citing *Banach v. St. Comm'n on Human Rel.*, 277 Md. 502, 506, 356 A.2d 242, 245-46 (1976)). However, if the investigation invades the constitutionally protected rights of speech, press, association or petition, the state must convincingly demonstrate a "substantial relation between the information sought and a subject of overriding and compelling state interest." *Agora*, 389 Md. at 16, 882 A.2d at 842 (quoting *Gibson v. Fla. Legislative Investigation Comm.*, 372 U.S. 539, 546 (1963)).

The Court stated First Amendment protection extends beyond the right to speak, write and publish. *Agora*, 389 Md. at 16, 882 A.2d at 842-43 (citing *Griswold v. Conn.*, 381 U.S. 479 (1965)). The First Amendment protects an individual's right to read and receive ideas and is implicated when the government limits access to material based on its content. *Agora*, 389 Md. at 17, 882 A.2d at 843. The Supreme Court overturned a government requirement that individuals identify themselves before receiving certain reading materials through the mail. *Id.* at 18, 882 A.2d at 844 (citing *Lamont v. Postmaster Gen.*, 381 U.S. 301 (1965)). The Court of Appeals stated *Lamont* suggests the First Amendment creates the right to read without government surveillance. *Agora*, 389 Md. at 19, 882 A.2d at 844.

Further, the Supreme Court has recognized the "vital relationship between freedom to associate and privacy in one's associations." *Id.* (quoting *NAACP v. Alabama*, 357 U.S. 449, 462 (1958)). "Associational anonymity" is an essential component of the freedom of association because government inquiry into an individual's choice

of associates chills an individual's exercise of this right. *Agora*, 389 Md. at 19, 882 A.2d at 844.

The Supreme Court's First Amendment decisions suggest the government cannot inquire into an individual's choice of reading materials or associates. *Id.* at 20, 882 A.2d at 845. Compelled disclosure of an individual's decision to subscribe to certain publications infringes on an individual's right to privacy of belief and freedom of association. *Id.* at 22, 882 A.2d at 846. Disclosure of the identities of *Agora's* subscribers could subject those subscribers to government interrogation and discourage the subscribers from reading *Agora's* publications. *Id.*

To compel release of the subscriber lists, the Division had to show a "substantial relation between the information sought and an overriding and compelling State interest." *Id.* at 23, 882 A.2d at 846. The Division could not show a compelling need for the subscriber lists. *Id.*, 882 A.2d at 847. The subscriber lists would not help the Division prove *Agora* provided individualized investment advice because the report offered was not tailored to individual investors. *Id.* Further, to determine if *Agora* made fraudulent statements in its advertisements, the Division could examine the advertisements. *Id.* at 24, 882 A.2d at 847. Although the subscriber lists might be helpful, enforcement of the demand would "sacrifice First Amendment protections for too speculative of a gain." *Id.* (quoting *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973)).

The Division argued *Agora's* subscribers were entitled to a lower level of First Amendment protection because *Agora's* report was "commercial speech." *Agora*, 389 Md. at 22, 882 A.2d at 846. However, disclosure of the subscriber lists would reveal the identity of subscribers who obtained a variety of *Agora's* publications. *Id.* Therefore, even if the report was commercial speech, the Division failed to demonstrate that all *Agora's* publications fell within this category. *Id.* at 23, 882 A.2d at 846.

Although individual purchasers of the report may not have the same freedom of association concerns as *Agora's* regular subscribers, the Court of Appeals decided the First Amendment protects these purchasers as well. *Agora*, 389 Md. at 24, 882 A.2d at 847. First Amendment principles protect against the disclosure of individual purchasers' because disclosure would burden their rights to receive information and *Agora's* right to distribute information. *Id.* at 25, 882 A.2d at 848 (citing *In re Grand Jury Subpoena to Kramerbooks & Afterwords Inc.*, 26 Media L. Rptr. 1599 (D.D.C. 1998)). Further, the

commercial speech doctrine did not limit the protection of purchaser information because the report was not solely commercial speech if the report did more than propose a commercial transaction. *Id.* at 25, 882 A.2d at 847.

The purchaser information was judged by the standard for First Amendment implicated subpoenas. *Id.* The Division could evaluate the statements made in the report without knowing the purchaser's identities. *Id.* In addition, a purchaser could voluntarily contact the Division. *Id.* The Court held, like the subscriber lists, the First Amendment interests of the purchasers outweighed the speculative value of the purchaser information to the Division. *Id.* at 26, 882 A.2d at 848.

In *Lubin v. Agora, Inc.*, the Court of Appeals of Maryland protected an individual's right to purchase reading materials and to associate anonymously without government intrusion. In a time of increasing access to a wide range of materials and when government seeks to regulate a wide range of activities, *Agora* limits the ability of government to discern what information individuals seek to discover. Although the Court withheld disclosure within the context of a securities investigation, the Court might not prevent disclosure in a more compelling investigation.