BEFORE THE TENNESSEE WATER QUALITY CONTROL BOARD

IN THE MATTER OF:	)	**DIVISION OF WATER POLLUTION CONTROL**
	)	
§401 WATER QUALITY CERTIFICATION NO. NRS 03-246 (WASTE MANAGEMENT, INC. OF TENNESSEE)	)	**CASE NO. 05-0582**
	)	
	)	**DOCKET NO. 04.30-082242A**
BORDEAUX BEAUTIFUL, INC. et al., PETITIONERS	)	

WASTE MANAGEMENT'S MOTION TO COMPEL

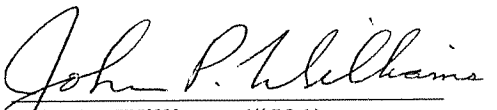
Pursuant to Rule 1360-4-1-.11(3), the Intervenor Waste Management, Inc. of Tennessee ("WM") respectfully files this motion to compel compliance with its interrogatory number 2, which requests one of the two remaining petitioners (Public Employees for Environmental Responsibility) to provide a complete list of the names and addresses of the Tennessee members of that group as of October 11, 2005 (the date that the Petition was filed initiating this case).

WM's interrogatory was properly served on PEER's counsel on May 22, 2006, and by e-mail dated June 8, 2006, PEER's counsel stated that PEER will not provide this information.

Filed with this motion are a memorandum of law and the certificate of the undersigned counsel that he has made a good-faith effort to resolve this discovery dispute.

Because the deposition of Barry Sulkin (PEER's registered agent) has been scheduled by agreement for July 10, WM respectfully requests that the Administrative Judge resolve this issue prior to that date.

Respectfully submitted,



John P. Williams (#531)
Tune, Entrekin & White, P.C.
Amsouth Center, Suite 1700
315 Deaderick Street
Nashville, TN 37238-1700
(615) 244-2770

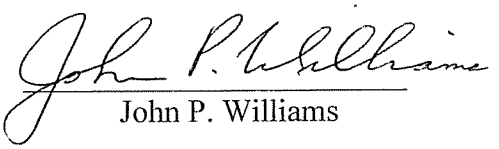
Attorney for Intervenor

Certificate of Service

I hereby certify that a copy of Waste Management's Motion to Compel was sent by first class mail, postage prepaid, this 14th day of June, 2006, to:

Patrick Parker
Office of General Counsel
Tennessee Department of Environment
and Conservation
20th floor, L&C Tower
401 Church Street
Nashville, TN 37243-1548

Greg Buppert
Dodson, Parker & Behm, P.C.
Realtors Building
306 Gay Street, Suite 400
Nashville, TN 37201



John P. Williams

BEFORE THE TENNESSEE WATER QUALITY CONTROL BOARD

IN THE MATTER OF:	)	**DIVISION OF WATER POLLUTION CONTROL**
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BORDEAUX BEAUTIFUL, INC. et al., PETITIONERS	)	**DOCKET NO. 04.30-082242A**

MEMORANDUM OF LAW IN SUPPORT OF WASTE MANAGEMENT'S MOTION TO COMPEL

The Intervenor Waste Management, Inc. of Tennessee ("WM") has filed a Motion to Compel the Petitioner Public Employees for Environmental Responsibility ("PEER") to comply with its discovery request number 2, which sought the names and addresses of the members of PEER. As stated in the June 8, 2006 e-mail from its attorney, PEER has refused to provide the names and addresses of its members. The Department of Environment and Conservation also sought this same information in its Interrogatories, and PEER refused to disclose it.

The Uniform Rules of Procedure for Hearing Contested Cases before State Administrative Agencies, Chapter 1360-4-1, govern the procedure in cases before the Water Quality Control Board. Rule 1360-4-1-.11 governs discovery issues.

Rule 1360-4-1-.11(3) sets forth the requirements for a motion to compel discovery. This Memorandum of Law and the attached Certificate of Counsel complies with these requirements.

The Interrogatories

In the Department's First Set of Interrogatories to PEER, Interrogatory 7 stated:

> INTERROGATORY 7: Please provide the following information on the members of the Tennessee Public Employees for Environmental Responsibility: name, address and published telephone numbers.

The Petitioner's attorney, Gregory Buppert, responded by letter to the Department's discovery requests and, with respect to Interrogatory 7, stated:

> Tennessee PEER is a organization of environmental whistleblowers, and its membership is confidential.

By letter dated May 8, 2006, Mr. Buppert provided the names and addresses of only two members of PEER: Dr. J. Thomas John and Dr. Brenda Butka, 5188 Old Hickory Boulevard, Nashville, TN 37218.

WM submitted Discovery Requests to the Petitioner's attorney on May 22, 2006, a copy of which is attached to this Memorandum of Law. Request No. 2 sought to obtain the names and addresses of the members of PEER. In the attached e-mail, PEER's counsel Greg Buppert stated: "PEER has asked me not to produce the names of its Tennessee members." PEER has thus refused to comply with WM's discovery request. WM has respectfully filed a Motion to Compel compliance with its discovery request.

Applicable Law

Rule 1360-4-1-.11(1) provides that "discovery shall be sought and effectuated in accordance with the Tennessee Rules of Civil Procedure." Rule 26.02(1) governs the scope of permissible discovery:

> (1) IN GENERAL. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

The Supreme Court of Tennessee has long recognized that "discovery in civil actions is a proper procedural aid for the parties to use in their case in advance of trial and should be given a broad and liberal interpretation" (emphasis added). Harrison v. Greeneville Ready-Mix, Inc., 220 Tenn. 293, 417 S.W.2d 48, 52 (1967).

While there are no Tennessee appellate decisions which have ruled directly on the discoverability of membership lists, the Sixth Circuit Court of Appeals has ruled on this issue. In Marshall v. Bramer, 828 F.2d 355 (6th Cir. 1987), the court held that the plaintiffs were entitled to a membership list of the Confederate Officers Patriot Squad, subject to a protective order placing the list under seal. Citing Rule 26(b)(1) of the Federal Rules of Civil Procedure, the court said that the "scope of discovery is not limited to admissible evidence, but encompasses 'any matter, not privileged, which is relevant to the subject matter involved in the pending action.'" 828 F.2d at 357-358.

Reasons for Disclosure of PEER's Membership List

WM has an obvious interest in learning why PEER is trying to reverse the decision of the Department granting an Aquatic Resource Alteration Permit (ARAP) to WM for its Southern Services Landfill. The very name of the organization – Public Employees for Environmental Responsibility – suggests that its members work for government agencies. This apparent fact is belied by the only information WM has been able to learn about PEER.

PEER's counsel has supplied the names of two members of PEER – Dr. J. Thomas John and Dr. Brenda Butka, physicians who live at the same address (5188 Old Hickory Blvd.) near the WM landfill. Neither physician is employed by a public agency, according to their practitioner profiles on the Department of Health website.

According to the Secretary of State's website, PEER is a nonprofit corporation incorporated in the District of Columbia, which filed a certificate of authority to do business in Tennessee in 1999. According to its most recent annual report filed with the Secretary of State, PEER's officers and directors all reside in California, Vermont, Arizona, and the District of Columbia. Its Tennessee agent is Barry Sulkin, a citizen activist who lives near the WM landfill and is not a public employee.

WM has the following questions about PEER which are relevant to the purpose of the organization and the reasons that it has retained an attorney to attempt to reverse a decision of the Department:

1. Does PEER have any Tennessee members who are public employees? If not, does PEER simply use this name in an effort to enhance its credibility by leading the Board and others to think that its members are conscientious government employees trying to protect the public interest?

2. If PEER does have Tennessee members who are public employees, how many does it have? 1? 10? 1,000? This information is highly important in judging the credibility of the organization.

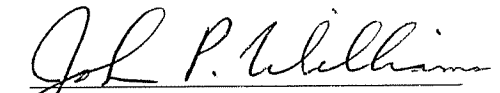
3. How many of PEER's Tennessee members work for the Department of Environment and Conservation? If there are any such members, why are they fighting a decision made by the Department? WM wishes to depose any such persons to determine whether they were involved in urging PEER to initiate this legal action. If so, they are acting as "double agents." If not, they are being "used" by Barry Sulkin to undermine a decision made by their own employer.

4. If there are very few or no Tennessee members of PEER, is Barry Sulkin simply using PEER as a "front organization" to pursue his own goals as a citizen activist, without consulting or involving others in the decision to initiate this legal proceeding?

Conclusion

The reason that PEER does not wish to comply with WM's discovery request is that the disclosure of its list of Tennessee members may undermine its credibility. However, this information is relevant to the case pending before the Board, and PEER should be compelled to comply with WM's discovery request.

Respectfully submitted,



John P. Williams (#531)
Tune, Entrekin & White, P.C.
Amsouth Center, Suite 1700
315 Deaderick Street
Nashville, TN 37238-1700
(615) 244-2770

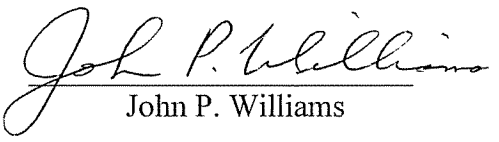
Attorney for Intervenor

Certificate of Service

I hereby certify that a copy of this Memorandum of Law in Support of Waste Management's Motion to Compel was sent by first class mail, postage prepaid, this 14th day of June, 2006, to:

Patrick Parker
Office of General Counsel
Tennessee Department of Environment
and Conservation
20th floor, L&C Tower
401 Church Street
Nashville, TN 37243-1548

Greg Buppert
Dodson, Parker & Behm, P.C.
Realtors Building
306 Gay Street, Suite 400
Nashville, TN 37201



John P. Williams

BEFORE THE TENNESSEE WATER QUALITY CONTROL BOARD

IN THE MATTER OF:	)	**DIVISION OF WATER POLLUTION CONTROL**
§401 WATER QUALITY CERTIFICATION NO. NRS 03-246 (WASTE MANAGEMENT, INC. OF TENNESSEE)	)	**CASE NO. 05-0582**
BORDEAUX BEAUTIFUL, INC. et al., PETITIONERS	)	**DOCKET NO. 04.30-082242A**

CERTIFICATION OF COUNSEL

John P. Williams, counsel for the Intervenor Waste Management, Inc. of Tennessee ("WM"), makes the following certification pursuant to Rule 1360-4-1-.11(3)(c):

1. I represent WM in this case.

2. In January 2006 the attorney for the Department of Environment and Conservation submitted the following interrogatory to the petitioners in this case:

> INTERROGATORY 7: Please provide the following information on the members of the Tennessee Public Employees for Environmental Responsibility: name, address and published telephone numbers.

3. On March 7, 2006, the petitioners' attorney stated in response to this interrogatory:

> Tennessee PEER is a organization of environmental whistleblowers, and its membership is confidential.

4. On May 8, 2006, the petitioners' attorney provided the names of two of PEER's members, but would not provide the names of any other members of PEER.

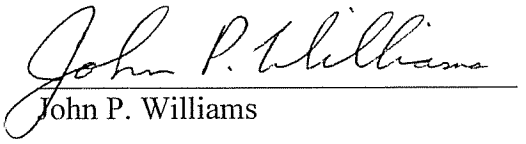
5. On May 22, 2006, WM's counsel submitted a set of interrogatories to the petitioners. The first and second interrogatories are:

1. Is the Petitioner which is referred to by its counsel as "Tennessee PEER" the same as the nonprofit Washington corporation Public Employees for Environmental Responsibility?

2. If the answer to question 1 is "Yes" please provide a complete list of the names and addresses of the Tennessee members of Public Employees for Environmental Responsibility as of October 11, 2005?

6. I have discussed this issue by phone and by e-mail with petitioners' counsel. On June 8, 2006, he informed me by e-mail that PEER would not release the names of its members.

7. I have made a good faith effort to resolve this discovery dispute, without success.



John P. Williams

Attached Documents

1. First Discovery Requests Propounded to Petitioners by Intervenor Waste Management, Inc. of Tennessee

2. E-mail from Greg Buppert dated June 8, 2006 to John Williams

3. Marshall v. Bramer, 828 F.2d 355 (6th Cir. 1987)

4. Letter from Greg Buppert to Patrick Parker dated May 8, 2006

5. Tennessee Department of Health practitioner profiles on Dr. James Thomas John, Jr. and Dr. Brenda J. Butka, both M.D.'s

6. PEER's 2005 Annual Report to the Tennessee Secretary of State

BEFORE THE TENNESSEE WATER QUALITY CONTROL BOARD

IN THE MATTER OF:	)	**DIVISION OF WATER POLLUTION CONTROL**
§401 WATER QUALITY CERTIFICATION NO. NRS 03-246 (WASTE MANAGEMENT, INC. OF TENNESSEE)	)	**CASE NO. 05-0582**
BORDEAUX BEAUTIFUL, INC. et al., PETITIONERS	)	**DOCKET NO. 04.30-082242A**

FIRST DISCOVERY REQUESTS PROPOUNDED TO PETITIONERS BY INTERVENOR WASTE MANAGEMENT, INC. OF TENNESSEE

The Intervenor Waste Management, Inc. of Tennessee ("WM") propounds the following discovery requests (including interrogatories and requests for production of documents) to the Petitioners Bordeaux Beautiful, Inc. ("Bordeaux") and Public Employees for Environmental Responsibility ("PEER"), pursuant to Tenn. Rule §1360-4-1-.11:

1. Is the Petitioner which is referred to by its counsel as "Tennessee PEER" the same as the nonprofit Washington corporation Public Employees for Environmental Responsibility?

Response:

2. If the answer to question 1 is "Yes," please provide a complete list of the names and addresses of the Tennessee members of Public Employees for Environmental Responsibility as of October 11, 2005?

Response:

3. Did the board of directors of Public Employees for Environmental Responsibility authorize the submission of a Petition to TDEC Commissioner Jim Fyke requesting a hearing

before the Water Quality Control Board with respect to the ARAP permit for WM's Southern Service Landfill?

Response:

4. If the answer to question 3 is "yes", on what date did the board of directors meet to authorize the filing of that Petition?

Response:

5. Are all the Tennessee members of Public Employees for Environmental Responsibility employees of some public agency, and if that is not so, what are the criteria for membership in that organization?

Response:

6. Are Dr. J. Thomas John and Dr. Brenda Butka employees of a public agency, and if so, which public agency?

Response:

7. In the Petitioners' March 6, 2006 Response to TDEC's Discovery Inquiry, "Tennessee PEER" was described as an "organization of environmental whistleblowers." What is the meaning of the term "environmental whistleblower", as used by Petitioners?

Response:

8. Please provide a complete list of the names and addresses of the members of Bordeaux Beautiful, Inc. as of October 11, 2005?

Response:

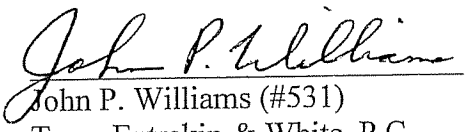
9. Did the board of directors of Bordeaux Beautiful, Inc. authorize the submission of a Petition to TDEC Commissioner Jim Fyke requesting a hearing before the Water Quality Control Board with respect to the ARAP permit for WM's Southern Services Landfill?

Response:

10. If the answer to question 9 is "yes", on what date did the board of directors meet to authorize the filing of that Petition?

Response:

Respectfully submitted,



John P. Williams (#531)
Tune, Entrekin & White, P.C.
Amsouth Center, Suite 1700
315 Deaderick Street
Nashville, TN 37238-1700
(615) 244-2770

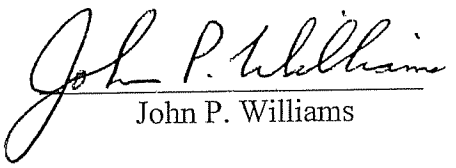
Attorney for Intervenor

Certificate of Service

I hereby certify that a copy of these First Discovery Requests Propounded to Petitioners by Waste Management, Inc. of Tennessee was sent by first class mail, postage prepaid, this 22nd day of May, 2006, to:

Patrick Parker
Office of General Counsel
Tennessee Department of Environment
and Conservation
20th floor, L&C Tower
401 Church Street
Nashville, TN 37243-1548

Greg Buppert
Dodson, Parker & Behm, P.C.
Realtors Building
306 Gay Street, Suite 400
Nashville, TN 37201



John P. Williams

John Williams

From: Greg Buppert [gbuppert@dodsonparker.com]
Sent: Thursday, June 08, 2006 8:20 AM
To: John Williams
Subject: RE: Sulkin Deposition

John:

PEER has asked me not to produce the names of its Tennessee members so I believe we can proceed to a hearing before the ALJ sometime this month or next before Barry's deposition.

Greg

From: John Williams [mailto:jwilliams@tewlawfirm.com]
Sent: Thursday, June 01, 2006 10:41 AM
To: Patrick Parker; gbuppert@dodsonparker.com
Subject: RE: Sulkin Deposition

This day and time are fine with me as well, Greg. I have secured the services of a court reporter from Vowell and Jennings. Please let me know when you have decided whether you will produce the list of Tennessee members of PEER. If you do not intend to do so, I would like to brief and argue this issue before the ALJ as soon as feasible, certainly before Barry's deposition.

John

-----Original Message-----
From: Patrick Parker [mailto:Patrick.Parker@state.tn.us]
Sent: Thursday, June 01, 2006 9:55 AM
To: gbuppert@dodsonparker.com; John Williams
Subject: Re: Sulkin Deposition

This is fine with me.

>>> "Greg Buppert" <gbuppert@dodsonparker.com> 06/01/06 9:22 AM >>>
Patrick and John:

Barry is available for deposition on Monday, July 10. How is 9AM at my office?

Greg

court's control and may, in appropriate cases, be modified or suspended altogether in the court's discretion—a discretion reviewable only for abuse. Whether that discretion was abused in this case, is not before us. The district court never exercised its discretion in the matter.

I would affirm the decision of the trial court not because I agree with its resolution of the issues in this case, but because I am satisfied that there is no first amendment entitlement to access to the motion documents or to be present at the hearings on the motions. I would remand to the district court with instructions that the court make a discretionary determination whether to honor the public's presumptive common-law right of access to the motion documents that have been sealed.

Robert MARSHALL and Martha Marshall, Plaintiffs-Appellees,

v.

Carl Ray BRAMER, Billy Wayne Emmones, John Doe, and unknown defendants K–1 through K–50, Ku Klux Klan members and others who participated in the events set out in this complaint and those whose names are unknown at this time, Defendants,

Alex Young, Nonparty-Appellant.

No. 86–5633.

United States Court of Appeals, Sixth Circuit.

Argued Feb. 5, 1987.

Decided Aug. 26, 1987.

Plaintiffs, whose home was destroyed by arson, brought action against three named defendants and unnamed members of white supremacist organization. Member of organization moved to quash subpoena duces tecum requiring him to produce membership and other information regarding organization. The United States District Court for the Western District of Kentucky, 110 F.R.D. 232, Edward H. Johnstone, Chief Judge, found member in contempt for failure to comply with subpoena. Member appealed. The Court of Appeals, Ryan, Circuit Judge, held that: (1) evidence of involvement of white supremacist organization in firebombing of plaintiff's house justified order requiring nonparty member of organization to produce list, and (2) First Amendment freedom of association rights of members of organization did not entitle nonparty member to refuse to disclose membership list.

Affirmed.

1. Evidence ⇐11

District court deciding whether plaintiffs were entitled to discover membership list of white supremacist organization was not finding adjudicative facts, when it referred to findings and rulings in other court cases for proposition that organization had history of harassing and injuring blacks and when court determined that membership list would help plaintiffs discover who firebombed their home; thus, judicial notice rule was inapplicable. 42 U.S.C.A. §§ 1985(3), 1986; Fed.Rules Evid. Rules 201, 201(a), 28 U.S.C.A.

2. Evidence ⇐43(3)

District court deciding whether plaintiffs were entitled to discover membership list of white supremacist organization did not radically depart from standard for taking judicial notice and was entitled to draw inference that local organization had taken part in firebombing of plaintiffs' house; court based inference on other court cases, in which organization's history of harassing and injuring blacks was described and in which members of organization had been convicted of crimes of racial violence. Fed. Rules Evid.Rules 201, 201(a, b), 28 U.S. C.A.; Fed.Rules Civ.Proc.Rule 26(b)(1), 28 U.S.C.A.

3. Federal Civil Procedure ⇐1555

Evidence of involvement of white supremacist organization in firebombing of plaintiffs' house justified discovery order requiring nonparty member of organization to produce list under seal for civil rights plaintiffs. Fed.Rules Civ.Proc.Rule 26(b)(1), 28 U.S.C.A.

4. Constitutional Law ⇐91

First Amendment freedom of association rights of members of white supremacist organization did not entitle nonparty member to refuse to disclose membership list to civil rights plaintiffs under seal, where district court issued protective orders prohibiting public filing of list of members and use of any of those names in court pleading. 42 U.S.C.A. §§ 1985(3), 1986; U.S.C.A. Const.Amend. 1.

Mark L. Miller (argued), Miller and Meade, Louisville, Ky., Don C. Meade, for nonparty-appellant.

Phillip J. Shepherd, Shepherd, Shepherd & Childers, Frankfort, Ky., Morris S. Dees, Jr., Montgomery, Ala., J. Richard Cohen, Alexander R. Sussman (argued), New York City, for plaintiffs-appellees.

Samuel H. Fritschner, Louisville, Ky., for amicus curiae, American Civ. Liberties Union of Kentucky.

Before LIVELY, Chief Judge; RYAN, Circuit Judge; and PORTER, Senior District Judge.*

RYAN, Circuit Judge.

This is an appeal by nonparty appellant Alex Young from civil contempt orders entered after he refused to produce a list of members of a Ku Klux Klan group, 110 F.R.D. 232. Plaintiffs Robert and Martha Marshall sought the list as a part of the discovery process in their civil rights case against those who twice firebombed their home.[1] We affirm the contempt orders.

* The Honorable David S. Porter, Senior Judge for the United States District Court for the Southern District of Ohio, sitting by designation.

1. In the companion case, *In re Courier-Journal and Louisville Times Co.*, 828 F.2d 361 (6th Cir.1987) we have rejected a publisher's challenge to protective orders preventing public access to the membership list after its production.

I.

Sylvania is a small community of seventy-five homes located near Louisville in Jefferson County, Kentucky. Blacks who have lived there in the past have been targets for harassment. No blacks were living there in 1985 until the Marshalls bought a house and attempted to move into it. After word was out in the community that a black family had bought a house in Sylvania, but before the Marshalls moved in, there was a Ku Klux Klan meeting in Jefferson County. At about this same time, Klan members posted some one hundred fifty "Join the Klan" signs and distributed hundreds of Klan leaflets in Sylvania.

The first night Mrs. Marshall spent in her new home she was alone with her two children. Around bedtime, she saw a pick-up truck drive by and heard someone shout "nigger." Later, about 3:00 a.m., a firebomb was thrown into the house, causing a great deal of damage.

Defendants Bramer and Emmones pled guilty to the firebombing. It is not clear what connection, if any, these two have with the Klan, but Klan emblems were found in the Marshalls' front yard the morning after the attack.

The first arson occurred on July 29, 1985. The Marshalls filed a civil rights action under 42 U.S.C. §§ 1985(3) & 1986 (1981) on August 22, 1985. On August 24, 1985, a Ku Klux Klan rally was scheduled to be held at the home of the brother-in-law of one of those who pled guilty to the first arson. This home was two blocks from the Marshalls' home. A few hours before the rally, the remains of the Marshalls' home were again firebombed. At the rally, which was attended by the Imperial Wizard of the Invisible Empire of the Ku Klux Klan, one speaker promised that no blacks would be permitted to live in Sylvania.

Appellant Young, at the time of the first arson, was a Jefferson County police officer. Soon after that first arson, a Louisville television station broadcast a story exposing him as a member of the Ku Klux Klan. Apparently in response, Young was transferred on August 1, 1985, from his job as a helicopter pilot to the police property room. After filing suit, the Marshalls noticed Young's deposition and served him with a subpoena duces tecum requiring him to bring a list of members of the Confederate Officers Patriot Squad (COPS) or the Ku Klux Klan. Young's efforts to quash the subpoena were unsuccessful, but a protective order was entered.[2]

Young was deposed on November 5, 1985. He said his involvement with the Ku Klux Klan had long been known and tolerated in the police department, and that he had been an officer in the Klan, but had resigned on July 23, 1985. He said the COPS was never an organization in its own right, but only a post office box where he received Klan correspondence and information. He admitted that he raised money for the Klan and kept it in a bank account under the COPS name. He admitted having attended the Klan meeting which preceded the first arson, but claimed that his only knowledge about the perpetration of that crime was a second-hand story to the effect that it was not racially motivated, but was done on a dare by some rowdy kids. Nonetheless, Young admitted to having contacted Hawkins, the police sergeant assigned to investigate the first arson, to assure him that there had been no Klan involvement in that crime.

Young's lawyer advised him not to produce the membership list or to reveal any of the names that were on it. Accordingly, Young admitted that he had access to a list of Klan members, possibly forty names and addresses, and that probably more than half of these were law enforcement officers, but he refused to produce the list itself.

2. The two protective orders entered in this case are discussed in the companion case. *See* note 1 *supra*.

After this deposition was taken and sealed, plaintiffs relied upon information in it to draft pleadings which they filed with the court. This limited use of information from the deposition was apparently permitted under the terms of the first protective order. The sensational news that a couple of dozen local police were in the Ku Klux Klan was soon reported in the local media. Young was then fired from the police force.

In March of 1986 Young was again ordered to produce the membership list, subject to a more stringent protective order. The second order was carefully designed to preserve the anonymity of nonparties whose names might appear on the membership list. When Young refused to produce the list, the court held him in contempt. This court stayed the $1,000 per day fine until Young's appeal of the production order could be resolved.

II.

In order to help resolve the question of whether the Marshalls are entitled to discover Young's list of Jefferson County Ku Klux Klan members, the district court took judicial notice of:

> findings and rulings contained in [five] cases in which the Ku Klux Klan is identified as a violence-prone group with a history of harassing, intimidating, and injuring blacks and members of other minority groups ... [and] of [18] criminal cases in which individual Klan members were found or pleaded guilty to numerous crimes, many involving racial violence.

Federal Rule of Evidence 201, which treats judicial notice, "governs only judicial notice of adjudicative facts." Fed.R.Evid. 201(a). Adjudicative facts are facts about the parties or the issues to which the law is applied, usually by the jury, in the trial of a case. Discovery is plainly designed by the Federal Rules of Civil Procedure as a process distinct from the trial process. The scope of discovery is not limited to admissi-

ble evidence, but encompasses "any matter, not privileged, which is relevant to the subject matter involved in the pending action." Fed.R.Civ.P. 26(b)(1). A discovery request is generally unobjectionable "if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." *Id.*

[1] In taking judicial notice of the nature of the Ku Klux Klan, the judge here was not finding the adjudicative facts of this case. He simply determined that it is reasonable of the plaintiffs to suppose that the Klan's membership list would help them discover who firebombed their home. If this same information about the nature of the Klan were judicially noticed at trial and employed as circumstantial evidence tending to prove, for example, the liability of a particular Klan member, then Rule 201 would apply. The rule does not apply here.

[2] This is not to say that a trial court's recourse to judicial notice in passing on a discovery motion is unreviewable. Discovery is not made subject to the same evidence rules that would apply at trial, but Rule 201 does supply a well-accepted standard for judicial notice, and radical departure from this standard could amount to an abuse of the trial court's discretion in overseeing the discovery process. However, we perceive no such abuse of discretion here.

> Rule 201 provides in part:
>
> A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

Fed.R.Evid. 201(b). The nature of the Ku Klux Klan, and its historic commitment to violence against blacks in particular, is generally known throughout this country and is not subject to reasonable dispute. Although it is generally not appropriate to judicially notice findings of fact made in other cases, the essence of the finding here, at least with respect to the criminal cases, is simply that Klan members have been convicted of crimes of racial violence. This is a legal conclusion, not a mere finding of fact, and the court records resorted to here may properly be viewed as "sources whose accuracy cannot reasonably be questioned."

Young objects not simply to the judicial notice, but to the inference the court drew, that, because the Klan has historically and nationally been violent, it is likely that a particular local Klan group has taken part in violent acts. This inference may well be impermissible if offered at trial to establish liability of a particular Klan member for a particular violent act, especially if the other evidence tending to connect that individual with the act were insubstantial. But here the inference has been drawn in the discovery process, and used in conjunction with specific facts already discovered tending to suggest a connection between the Klan and the acts of racial violence alleged in the complaint. The district court's use of judicial notice was unobjectionable.

III.

[3] Young contends that there is insufficient evidence of Ku Klux Klan involvement to justify an order requiring production of a list of Jefferson County Klan members. While there is no direct evidence connecting any particular known Klan member to the arsons, there is ample circumstantial evidence to justify the discovery order. This evidence includes:

1) Young's testimony that his involvement with the Klan was known and tolerated in the police department as long as it was not public knowledge;

2) Sylvania's proven history of racial "purity" obtained by hounding blacks out of the community;

3) Various broad hints that the police investigation into a possible Klan link to the first arson was less than zealous including, for example, Hawkins' admission that he knew "going in" that there was no Klan involvement, and Young's unsolicited call to Hawkins to inform him that the Klan was not involved;

4) The temporal and physical proximity of Klan meetings to the acts of arson;

5) The promise at the August 24, 1985, meeting, just hours after the second arson, that the Klan would see to it that no blacks lived in Sylvania;

6) The Klan emblems found on the scene of the first arson;

7) The Klan activities of Young, including phone calls to Klan leaders temporally related to the two arsons; and

8) Young's disclosures about the size of the local Klan membership and its overlap with local law enforcement personnel.

The purpose of the broad scope of discovery is to permit parties to "obtain the fullest possible knowledge of the issues and facts before trial." *Hickman v. Taylor*, 329 U.S. 495, 501, 67 S.Ct. 385, 389, 91 L.Ed. 451 (1947). Even without reference to the judicially noticed facts, the evidence here was quite sufficient to justify the subpoena, subject to the court's protective order and the federal rules pertaining to discovery.

IV.

[4] In support of his refusal to comply with the subpoena duces tecum, appellant Young relies upon a series of cases which upheld the right of the NAACP to keep its membership lists secure from forced disclosure by government. *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539, 83 S.Ct. 889, 9 L.Ed.2d 929 (1963); *Bates v. City of Little Rock*, 361 U.S. 516, 80 S.Ct. 412, 4 L.Ed.2d 480 (1960); *NAACP v. Alabama*, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958). In these cases, the Court balanced the government's professed reasons for requiring the names of group members against the privacy and association rights of the group members and determined that the government's slim basis for seeking disclosure did not outweigh the rights of NAACP members.

Gibson states the balancing test the Court applied in these cases:

> [I]t is an essential prerequisite to the validity of an investigation which intrudes into the area of constitutionally protected rights of speech, press, association and petition that the State convincingly show *a substantial relation between the information sought and a subject of overriding and compelling state interest.* Absent such a relation between the NAACP and conduct in which the State may have a compelling regulatory concern, the Committee has not "demonstrated so cogent an interest in obtaining and making public" the membership information sought to be obtained as to "justify the substantial abridgment of associational freedom which such disclosures will effect."

372 U.S. at 546, 83 S.Ct. at 893–94 (quoting *Bates v. City of Little Rock*, 361 U.S. at 524, 80 S.Ct. at 417) (emphasis added). The Court's rationale was expressed in *Bates:*

> Like freedom of speech and free press, the right of peaceable assembly was considered by the Framers of our Constitution to lie at the foundation of a government based upon the consent of an informed citizenry—a government dedicated to the establishment of justice and the preservation of liberty.... And it is now beyond dispute that freedom of association for the purpose of advancing ideas and airing grievances is protected by the Due Process Clause of the Fourteenth Amendment from invasion by the States.
>
> . . . . .
>
> Freedoms such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference.... "It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute [an] effective ... restraint on freedom of association.... This Court has recognized the vital relationship between freedom to associate and privacy in one's associations.... Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs."

361 U.S. at 522–23, 80 S.Ct. at 416 (quoting *NAACP v. Alabama*, 357 U.S. at 462, 78 S.Ct. at 1172) (citations omitted).

There are several significant points of distinction between the cited cases and appellant Young's. First, the NAACP cases were about government attempts at public disclosure of individual affiliation. Here, it is not a question of the government seeking to obtain and publicize a list of names, but of a private litigant seeking to view a list for the purpose of deposing individuals who may have relevant information about a pending case. Thus, there is not only a strong interest to justify "disclosure," but the disclosure itself, under the court's protective orders, is not to be public disclosure, but private disclosure for a limited use.

Young argues that merely turning over the list will destroy his rights and those of the Klan members on the list permanently and drastically. Young correctly insists that Klan members have first amendment rights,[3] and that exposure of their Klan affiliation could have a devastating impact upon some of them. Young already has lost his job. He correctly notes that the initial protective order, which was supposed to protect the contents of his deposition, was ineffective, and served, in practice, to permit key revelations to the press.

Young's claim would be compelling if this case involved public disclosure, as the NAACP cases did. In this case, however, the court's second protective order prohibits both the public filing of the list of members and the use of any of those names in a court pleading. Individuals named would presumably be deposed, but unless they were subsequently named as parties or called as witnesses, there would be no reason for any public disclosure of their affiliation. In the absence of evidence that the court's second protective order will be as ineffectual as the first, the risk of public disclosure is minimal, and the threat to first amendment rights is inconsequential.[4]

The discovery process is generally private; monitored at the request of the parties by district courts, who have "substantial latitude" in the exercise of their oversight. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36, 104 S.Ct. 2199, 2209, 81 L.Ed.2d 17 (1984). The district court acted reasonably in recognizing the right of plaintiffs to conduct discovery and ordering that the Ku Klux Klan membership list be turned over. The court also acted reasonably to protect the right of Klan members to privacy in their associations by ordering that the anonymity of those whose names appear on the list be preserved. Because the court's discovery order adequately guarded the rights of those whose names would be revealed, Young's claim of privilege did not suffice to justify his refusal to comply with the subpoena.

V.

We therefore AFFIRM the district court's orders finding Young in contempt for failure to comply with its subpoena.

3. In the companion case, *see* note 1 *supra*, we set forth our reasons for rejecting the argument that Klan members have no associational rights. Briefly, our view is that *Bryant v. Zimmerman*, 278 U.S. 63, 49 S.Ct. 61, 73 L.Ed. 184 (1928), which supports the view that Klan members have no associational rights, gained little force by being distinguished in *NAACP v. Alabama*, 357 U.S. 449, 465, 78 S.Ct. 1163, 1173, 2 L.Ed.2d 1488 (1958), and lost all force when *Brandenburg v. Ohio*, 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969), overruled *Whitney v. California*, 274 U.S. 357, 47 S.Ct. 641, 71 L.Ed. 1095 (1927).

4. An amicus brief filed in this case by the American Civil Liberties Union proposes that we require a more stringent protective order, involving the coding of the list of names to insure anonymity and the submission by plaintiffs of a standardized set of interrogatories to all of these still-anonymous individuals. The ACLU also proposes that the normal scope of discovery must be narrowed here, because of the danger of infringing individual rights. These proposals would be useful if it had been shown that the discovery as ordered was an abuse of the trial court's discretion. In the absence of such a showing, the Court of Appeals will not redraft the discovery orders. We therefore decline to consider the merits of these proposals.

LAW OFFICES
DODSON, PARKER & BEHM, P.C.

HARLAN DODSON III
PAUL S. PARKER
MARGARET L. BEHM
TRAVENIA A. HOLDEN
DONALD CAPPARELLA
CYNTHIA C. CHAPPELL
KRISTEN B. AMONETTE
GREGORY D. BUPPERT

400 REALTORS BUILDING, 306 GAY STREET
P.O. BOX 198806
NASHVILLE, TN 37219-8806

TELEPHONE (615) 254-2291
FACSIMILE (615) 726-2241

dodsonparker.com

OF COUNSEL
MICHAEL B. BRESSMAN

HARLAN DODSON JR
(1916-1986)

May 8, 2006

Patrick Parker
Office of the General Counsel
Tennessee Department of the Environment & Conservation
Life and Casualty Tower
401 Church Street, 20th Floor
Nashville, TN 37243

Re: TN PEER Membership

Dear Patrick:

Tennessee PEER has authorized the release of two names for standing purposes in the Southern Services matter. They are:

Dr. J. Thomas John and Dr. Brenda Butka
5188 Old Hickory Boulevard
Nashville, TN 37218

Please let me know if you need additional information.

Sincerely,

Gregory Buppert

Gregory Buppert

PRACTITIONER PROFILE DATA

This information is provided by the licensee as required by law.

JOHN JR MD, JAMES T	
PRACTICE ADDRESS:	THE CONSULTANT GROUP PC 4230 HARDING RD #709 NASHVILLE, TN 37205
LANGUAGES: (Other than English)	None Reported
SUPERVISING PHYSICIAN:	None Reported

GRADUATE/POSTGRADUATE MEDICAL/PROFESSIONAL EDUCATION AND TRAINING

PROGRAM/ INSTITUTION	CITY STATE/ COUNTRY	DATE OF GRADUATION	TYPE OF DEGREE
UNIV OF NC	CHAPEL HILL,NC	01/01/1969	MD

OTHER EDUCATION AND TRAINING

PROGRAM/ INSTITUTION	CITY STATE/ COUNTRY	FROM	TO
INTERN INT MED VANDERBILT	NASHVILLE,TN	01/01/1969	01/01/1970
RESD INT MED VANDERBILT	NASHVILLE,TN	01/01/1970	01/01/1972
RESD CHIEF RESD NASHVILLE GEN HOSP	NASHVILLE,TN	01/01/1972	01/01/1973
FELLOW RHEUMATOLOGY VANDERBILT	NASHVILLE,TN	01/01/1975	01/01/1977

SPECIALTY BOARD CERTIFICATIONS

CERTIFYING BODY/ BOARD/ INSTITUTION	CERTIFICATION/ SPECIALTY/ SUBSPECIALTY
AMER BD OF INT MED	INT MED 1972
AMER BD OF INT MED	RHEUMATOLOGY 1978

FACULTY APPOINTMENTS

TITLE	INSTITUTION	CITY/STATE
ASSOCIATE CLINICAL PROF OF MED	VANDERBILT	NASHVILLE T

STAFF PRIVILEGES

This practitioner currently holds staff privileges at the following hospitals

HOSPITAL	CITY/STATE
ST. THOMAS	NASHVILLE, TN
BAPTIST	NASHVILLE, TN

PRACTITIONER PROFILE DATA

This information is provided by the licensee as required by law.

BUTKA MD, BRENDA J			
PRACTICE ADDRESS:	BRENDA BUTKA MD 4220 HARDING RD NASHVILLE, TN 37205		
LANGUAGES: (Other than English)	SPANISH-NOT FLUENT		
SUPERVISING PHYSICIAN:	None Reported		
GRADUATE/POSTGRADUATE MEDICAL/PROFESSIONAL EDUCATION AND TRAINING			
PROGRAM/ INSTITUTION	**CITY STATE/ COUNTRY**	**DATE OF GRADUATION**	**TYPE OF DEGREE**
EMORY UNIVERSITY	ATLANTA GA	01/01/1979	MD
OTHER EDUCATION AND TRAINING			
PROGRAM/ INSTITUTION	**CITY STATE/ COUNTRY**	**FROM**	**TO**
INTERN MED VANDERBILT UNIV	NASHVILLE TN	01/01/1979	01/01/1980
RESD MED VANDERBILT UNIV	NASHVILLE TN	01/01/1980	01/01/1982
FELLOW PULM MED VANDERBILT UNIV	NASHVILLE TN	01/01/1982	01/01/1984
SPECIALTY BOARD CERTIFICATIONS			
CERTIFYING BODY/ BOARD/ INSTITUTION	**CERTIFICATION/ SPECIALTY/ SUBSPECIALTY**		
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INTERNAL MEDICINE	BOARD CERTIFIED PULMONARY MEDICINE		
INTERNAL MEDICINE	CERTIFICATION IN INTENSIVE CARE MEDICINE		
FACULTY APPOINTMENTS			
TITLE	**INSTITUTION**	**CITY/STATE**	
ASSOC PROF DEPT OF MEDICINE 1984-PRESENT	VANDERBILT UNIV SCH OF MED	NASHVILLE T	
MEDICAL DIRECTOR PROGRESSIVE RESPIRATORY CARE UNIT	SAINT THOMAS HOSPITAL 1993-PRESENT	NASHVILLE T	
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WASHINGTON

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WASHINGTON, DC 20036

5635.0426

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2001 S STREET NW, STE 750, WASHINGTON, DC 20009

B CHANGE OF PRINCIPAL ADDRESS: (EFFECTIVE 11/100)

STREET	CITY	STATE	ZIP CODE + 4
2000 P STREET, NW, SUITE 240	WASHINGTON	DC	20036

(4) NAME AND BUSINESS ADDRESS INCLUDING ZIP CODE, OF THE PRESIDENT, SECRETARY AND OTHER PRINCIPAL OFFICERS (ATTACH ADDITIONAL SHEET IF NECESSARY)

TITLE	NAME	BUSINESS ADDRESS	CITY, STATE, ZIP CODE + 4
PRESIDENT	JEFF RUCH	2000 P ST NW STE 240	WASHINGTON, DC 20036
TREASURER SECRETARY	CAROL GOLDBERG	2000 P ST NW STE 240	WASHINGTON DC 20036
CHAIRMAN	HOWARD WILSHIRE	3727 BURNSIDE RD	SEBASTAPOL CA 95472

(5) BOARD OF DIRECTORS (NAMES, BUSINESS ADDRESS INCLUDING ZIP CODE) (ATTACH ADDITIONAL SHEET IF NECESSARY) ☐ SAME AS ABOVE ☐ NONE

OR LISTED BELOW: NAME	BUSINESS ADDRESS	CITY, STATE, ZIP CODE + 4
LOUIS CLARK	1612 K ST NW STE 400	WASHINGTON DC 20006
MACI SHAPIRO	16411 GUN BARREL RD	MONTPELIER, VA 23192
FRANK BUONO	PO BOX 3835	SIERRA VISTA, AZ 85635

(6) A NAME OF REGISTERED AGENT AS APPEARS ON SECRETARY OF STATE RECORDS
BARRY SULKIN
B REGISTERED ADDRESS AS APPEARS ON SECRETARY OF STATE RECORDS
4443 PECAN VALLEY RD, NASHVILLE, TN 37218
C INDICATE BELOW ANY CHANGES TO THE REGISTERED AGENT NAME AND/OR REGISTERED OFFICE

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