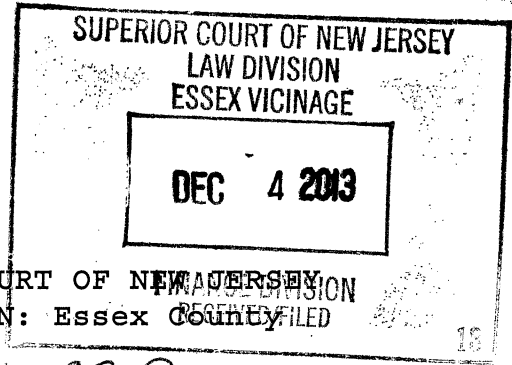


Edward L. Barocas, Esq. - 026361992
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American Civil Liberties Union
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89 Market Street, 7th Floor
P.O. Box 32159
Newark, New Jersey 07102
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Attorneys for Plaintiff



Assessmentgate (a pseudonym),
Plaintiff,
v.
Montclair Board of Education,
Defendant.

: SUPERIOR COURT OF NEW JERSEY
: LAW DIVISION: Essex County
: Docket No. 09391-13
: Civil Action

VERIFIED COMPLAINT

Plaintiff, by way of verified complaint against Defendants,
states as follows:

PRELIMINARY STATEMENT

1. Plaintiff brings this action under the New Jersey
Constitution and through the New Jersey Civil Rights Act and
other authority, to vindicate Plaintiff's right to free
anonymous speech protected by the New Jersey Constitution and to
prevent the unlawful exercise of subpoena power by a school
board.

PARTIES

2. Pseudonymous Plaintiff Assessmentgate ("AG") is a person who resides in Montclair Township in Essex County and who is the parent of at least one child in the Montclair School District. AG created Assessmentgate@gmail.com and is the subject of a subpoena issued to Google Inc.

3. Defendant Montclair Board of Education ("MBOE") of the Montclair School District is a corporate governmental entity, with offices located at 22 Valley Road, Montclair, New Jersey 07042. Pursuant to N.J.S.A. 18A:13-1 *et seq.*, it is the entity responsible for the administration and operation of schools in the Montclair School District.

VENUE

4. Venue is properly laid in Essex County because Defendant is located in Essex County and the cause of action arose in Essex County. *See R. 4:3-2(a)*.

FACTUAL ALLEGATIONS

5. Plaintiff is a parent of at least one child in the Montclair School District.

6. Plaintiff is not and has never been employed by the Defendant.

7. Plaintiff has been concerned about the District's recent decision to implement standardized testing in the form of common, quarterly assessments for each grade (e.g., every sixth

grader in the district will receive identical math tests each quarter). AG is opposed to these tests and to other decisions made by the MBOE and Montclair School District Superintendent Penny MacCormack.

8. The district planned to administer the first of the quarterly assessments during the week of Monday, October 28, 2013.

9. On October 27, 2013, to foster community discussion about the standardized tests, Plaintiff created the e-mail account Assessmentgate@gmail.com and opened accounts on Facebook and Twitter.

10. Plaintiff also started a blog on the community website Montclair Patch (www.montclair.patch.com) called Assessmentgate. AG subtitled it "What the Superintendent and BOE aren't telling you about this week's tests may harm your child's marking period, GPA, and transcripts."

11. Plaintiff believes that the MacCormack and the MBOE have been secretive and "Nixonian" in their approach to dealing with the public about their plans.

12. Plaintiff chose the moniker to analogize MacCormack's and MBOE's actions regarding the use of assessments to the Watergate controversy that resulted in President Richard Nixon's resignation from office.

13. Since the creation of these accounts, AG has used the accounts to criticize the MBOE and MacCormack.

14. Also on October 27, 2013, Superintendent MacCormack informed parents via e-mail that 14 out of 60 district-wide assessments that were scheduled to be administered to students that week had been posted on a public website.

15. A local blog reported that on Monday, October 28, 2013, MBOE President Robin Kulwin reported the incident to the Montclair Police Department.

16. That same day, MacCormack advised parents via e-mail that the district had launched "a full legal investigation to determine how the common assessments came to be posted to an external website without our knowledge and to identify the individual or individuals involved."

17. Plaintiff was not involved in obtaining or posting the assessments.

18. Plaintiff has not accessed nor attempted to access information that Defendant sought to secure.

19. On November 1, 2013, the MBOE passed a resolution authorizing its attorney to "conduct [an] investigation and hearings" and "vested [him] with the authority to issue subpoenas in [its] name. . . for the purposes of obtaining relevant documentation and/or testimony." The resolution is appended to Exhibit 1.

20. The MBOE purports to have such authority pursuant to *N.J.S.A.* 18A:6-19 and -20.

21. *N.J.S.A.* 18A:6-19 provides:

Any member of any board of education, governing board or of any other board or any person, lawfully authorized to hold a hearing, may administer oaths to witnesses in such hearing, in any dispute or controversy under the school laws or the rules of the commissioner or of the State board, of which they or he have jurisdiction.

22. *N.J.S.A.* 18A:6-20 provides:

Any party to any dispute or controversy or charged therein, may be represented by counsel at any hearing held in or concerning the same and shall have the right . . . to have compulsory process by subpoena to compel the attendance of witnesses to testify and to produce books and documents in such hearing when issued by (a) the president of the board of education, if the hearing is to be held before such board

The subpoena shall be served in the same manner as subpoenas issued out of the superior court are served.

23. The resolution states that the MBOE would use its authority "for the purpose of conducting hearings regarding the suspected unauthorized release of proprietary/confidential District tests/assessments, *as well as investigating other incidents of conduct contrary to the Board's best interest...*" See Exhibit 1 (emphasis added).

24. On November 7, 2013, MBOE attorney signed a subpoena to Google Inc. The subpoena provides:

In accordance with N.J.S.A. 18A:6-19 and 20 [sic] and the Resolution of the Montclair Board of Education... and in anticipation of the investigatory hearing to be held before the Board of John Doe and/or Jane Doe, the Board Demands that you produce the following... by the close of business on November 18, 2013:

- Any and all information relating to the personal identification for the user "Assessmentgate@gmail.com," including without limitation, the full name, address(es), email or gmail addresses, telephone number, alternate email addresses, ISP information and computer IP addresses used.

25. On November 15, 2013, Google Inc. contacted Plaintiff advising AG that unless AG took formal legal action by December 5, 2013, Google may comply with the subpoena.

26. Attorneys for Plaintiff requested MBOE withdraw the subpoena by November 24, 2013, outlining its dubious legality. MBOE did not withdraw the subpoena.

CAUSES OF ACTION

Count I

The Right to Free Expression

(brought directly under the New Jersey Constitution and
pursuant to *N.J.S.A. 10:6-2(c)*)

27. Plaintiff repeats and realleges the preceding paragraphs as if fully set forth herein.

28. The actions of Defendant described herein violate the right of Plaintiff to "freely speak, write and publish his sentiments on all subjects" as guaranteed by Article I, Paragraph 6 of the New Jersey Constitution.

29. The Constitution affords this protection to speech that is anonymous and posted on the internet.

30. Defendant has abridged this right by seeking to pierce AG's right to speak anonymously with an overbroad resolution purporting to authorize the issuance of subpoenas.

31. Defendant has no meaningful nexus between Plaintiff and alleged wrongdoing nor has Defendant provided a sufficient justification to override AG's right to anonymous speech.

32. There are alternative avenues for MBOE to obtain the identity of the poster of the assessments at issue without infringing upon Internet posters' right to anonymous speech.

Count II
The Right to Privacy and to be Secure Against
Unreasonable Searches and Seizures
(brought directly under the New Jersey Constitution and
pursuant to *N.J.S.A. 10:6-2(c)*)

33. Plaintiff repeats and realleges the preceding paragraphs as if fully set forth herein.

34. The actions of Defendant described herein violate the right of Plaintiff to privacy under Article I, paragraph 1, of the New Jersey Constitution, and the right of Plaintiff to be secure in his person, papers, and effects and to be free from unreasonable search and seizure, in violation of Article I, Paragraph 7, of the New Jersey Constitution.

35. Plaintiff has a reasonable expectation of privacy in his Google account information. AG has made disclosures to Google for the limited purpose of using its technology and has not consented to such information being released to third parties.

36. Defendant has violated Plaintiff's right to privacy and to be free from unreasonable searches and seizures by demanding from Google Plaintiff's private and personal information without lawful basis to do so and without sufficient authority.

Count III
Ultra Vires Action
(brought directly under the New Jersey Constitution and
pursuant to *N.J.S.A. 10:6-2(c)*)

37. Plaintiff repeats and realleges the preceding paragraphs as if fully set forth herein.

38. Government agencies such as municipal school districts only have authority granted to them by statute.

39. Subpoena power for school districts under *N.J.S.A.* 18A:6-20 only takes effect when there is an actual hearing to take place, and is not for the purpose of gathering information about individuals who make negative comments about the District, nor even to be used as part of an investigation prior to holding a hearing.

40. The issuance of the subpoena to Google Inc. was not authorized under *N.J.S.A.* 18A:6-20, and is therefore an unlawful *ultra vires* action by Defendant.

REQUEST FOR RELIEF

WHEREFORE, Plaintiff requests judgment against the Defendant as follows:

(a) Declaratory relief, including but not limited to a declaration that the MBOE subpoena to Google Inc. is *ultra vires*, unconstitutional, and unenforceable;

(b) Injunctive relief, enjoining MBOE from issuing subpoenas pursuant to *N.J.S.A.* 18A:6-19 and -20 unless and until there is a scheduled hearing;

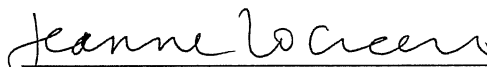
(c) Attorney's fees and costs associated with this action, pursuant to *N.J.S.A.* 10:6-1 et seq. and other relevant authority;

(d) Any further relief as this Court deems just and proper and any other relief as allowed by law.

DESIGNATION OF TRIAL COUNSEL

Plaintiff designates Jeanne LoCicero as trial counsel.

Dated: December 3, 2013



Jeanne LoCicero, Esq.

ACLU-NJ Foundation

P.O. Box 32159

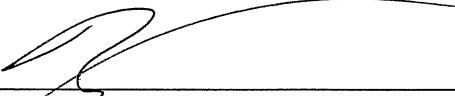
Newark, NJ 07102

973-854-1715

jlocicero@aclu-nj.org

VERIFICATION

I, AssesmentGate, hereby affirm under the penalty of perjury that the factual statements contained in the foregoing Verified Complaint are, to the best of recollection and belief, true and accurate.



AssesmentGate
Montclair, New Jersey 07043

Dated: December 2, 2013

CERTIFICATION PURSUANT TO R. 4:5-1


Plaintiff, via counsel, hereby certifies that there are no other proceedings or pending related cases arising from the same factual dispute described herein. The matter in controversy is not the subject of any other action pending in any other court or a pending arbitration proceeding, and no other action or arbitration proceeding is contemplated. Further, other than the parties set forth in this complaint, the undersigned knows of no other parties that are required to be joined in this lawsuit.

Plaintiff is providing Google Inc., the recipient of the subpoena at issue, copies of all legal filings in this matter.

The undersigned recognizes the continuing obligation to file and serve on all parties and the court an amended certification if there is a change in the facts stated in this original certification.

Dated: December 3, 2013

By:



Jeanne LoCicero, Esq.
ACLU-NJ Foundation
P.O. Box 32159
Newark, NJ 07102
973-854-1715
jlocicero@aclu-nj.org

EXHIBIT 1

Mark A. Tabakin, Esq. - 028121990
WEINER LESNIAK LLP
629 Parsippany Road
P.O. Box 438
Parsippany, New Jersey 07054-0438
Phone: (973) 403-1100 Fax: (973) 403-0010
Attorneys for Montclair Board of Education
Our File No. MBOE-146
693606_1

IN THE MATTER OF THE
INVESTIGATION OF JOHN DOE(S) and/or
JANE DOE(S), STAFF MEMBER(S) IN THE
MONTCLAIR PUBLIC SCHOOLS

BEFORE THE MONTCLAIR BOARD OF
EDUCATION, COUNTY OF ESSEX,
STATE OF NEW JERSEY

ADMINISTRATIVE ACTION

SUBPOENA DUCES TECUM

TO: Google Inc.
c/o Corporation Service Company
830 Bear Tavern Road
West Trenton, NJ 08628

In accordance with N.J.S.A. 18A:6-19 and 20 and the Resolution of the Montclair Board of Education (the "Board"), dated November 1, 2013 (annexed hereto and made a part of as **Exhibit A**), and in anticipation of the investigatory hearing to be held before the Board of John Doe and/or Jane Doe, the Board demands that you produce the following materials at the office of counsel for the Board, Weiner Lesniak LLP, 629 Parsippany Road, Parsippany, New Jersey 07054 (Facsimile 973-403-0010), attention Mark A. Tabakin, Esq., by the close of business on November 18, 2013:

- Any and all information relating to the personal identification for the user "assessmentgate@gmail.com," including without limitation, the full name, address(es), email or gmail addresses, telephone number, alternate email addresses, ISP information, and computer IP addresses used.

You may satisfy this Subpoena by forwarding the requested information to the Board's counsel at the address or facsimile number listed above on or before November 18, 2013.

Questions concerning this Subpoena should be directed to Mark A. Tabakin, Esq. at (973) 403-1100.

Failure to produce the requested information by the date noted may subject you such penalties provided by law.

WEINER LESNIAK LLP
Attorneys for Montclair Board of Education

By: Mark A. Tabakin
MARK A. TABAKIN, ESQ.

Dated: November 7, 2013

This Subpoena is authorized by the President of the Montclair Board of Education.

THE PUBLIC SCHOOLS

Montclair, New Jersey

RESOLUTION RE: AUTHORIZATION TO CONDUCT INVESTIGATION/HEARINGS

WHEREAS, the Montclair Board of Education has been provided with sufficient basis for believing that there has been an unauthorized release of proprietary/confidential District tests/assessments by District staff; and

WHEREAS, the act of releasing proprietary/confidential tests/assessments by District employees without authorization subjects such employees to disciplinary action, up to and including termination; and

WHEREAS, in anticipation of disciplinary hearings of John Doe(s) and/or Jane Doe(s) to be held before the Board, N.J.S.A. 18A:6-19 and 20 empowers the Montclair Board of Education with authority to issue subpoenas to any person within this State to provide relevant documents and/or appear before the Board to provide testimony regarding the unauthorized release of proprietary/confidential District tests/assessments by District staff; and

WHEREAS, pursuant to this authority, the Montclair Board of Education wishes to act as a Committee of the Whole for the purpose of conducting hearings regarding the suspected unauthorized release of proprietary/confidential District tests/assessments, as well as investigating other incidents of conduct contrary to the Board's best interest, as may be disclosed by further investigation; and

WHEREAS, the Montclair Board of Education wishes to appoint independent counsel for the purpose of prosecuting the investigation and hearings;

NOW, THEREFORE, BE IT RESOLVED that the Montclair Board of Education appoints Mark A. Tabakin, Esq., to conduct this investigation and hearings pursuant to the terms of his appointment as General Counsel to the Board; and

BE IT FURTHER RESOLVED that Mark Tabakin, Esq., is vested with the authority to issue subpoenas in the name of the Montclair Board of Education for the purpose of obtaining relevant documentation and/or testimony, and to take such other action as lawfully permitted in furtherance of this resolution to conduct the necessary investigation and prosecute hearings before the Board.



Brian Fleischer
Chief Operating Officer

APPROVED BY ACTION OF THE
MONTCLAIR BOARD OF EDUCATION
NOVEMBER 1, 2013