

# Frequently Asked Questions (and Answers) about John Doe Anonymity

From: <http://www.chillingeffects.org/johndoe/faq.cgi>

**Question:** What is a subpoena (also spelled “subpena”)?

**Answer:** A subpoena is a formal demand that a person or company produce evidence in a civil or criminal lawsuit. A subpoena duces tecum (the kind most commonly used in John Doe cases) requires only the production of identified documents or categories of documents.

**Question:** How is Internet anonymity affected by John Doe lawsuits?

**Answer:** Often called “CyberSLAPP” suits, these lawsuits typically involve a person who has posted anonymous criticisms of a corporation or public figure on the Internet. The target of the criticism then files a lawsuit so they can issue a subpoena to the Web site or Internet Service Provider (ISP) involved and thereby discover the identity of their anonymous critic. The concern is that this discovery of their identity will intimidate or silence online speakers even though they were engaging in protected expression under the First Amendment.

**Question:** Why is anonymous speech important?

**Answer:** There are a wide variety of reasons why people choose to speak anonymously. Many use anonymity to make criticisms that are difficult to state openly - to their boss, for example, or the principal of their children’s school. The Internet has become a place where persons who might otherwise be stigmatized or embarrassed can gather and share information and support - victims of violence, cancer patients, AIDS sufferers, child abuse and spousal abuse survivors, for example. They use newsgroups, Web sites, chat rooms, message boards, and other services to share sensitive and personal information anonymously without fear of embarrassment or harm. Some police departments run phone services that allow anonymous reporting of crimes; it is only a matter of time before such services are available on the Internet. Anonymity also allows “whistleblowers” reporting on government or company abuses to bring important safety issues to light without fear of stigma or retaliation. And human rights workers and citizens of repressive regimes around the world who want to share information or just tell their

stories frequently depend on staying anonymous – sometimes for their very lives.

**Question:** Is anonymous speech a right?

**Answer:** Yes. Anonymous speech is presumptively protected by the First Amendment to the Constitution. Anonymous pamphleteering played an important role for the Founding Fathers, including James Madison, Alexander Hamilton, and John Jay, whose Federalist Papers were first published anonymously.

And the Supreme Court has consistently backed up that tradition. The key U.S. Supreme Court case is called *McIntyre v. Ohio Elections Commission*. [http://www.eff.org/Legal/Cases/mcintyre\\_v\\_ohio.decision](http://www.eff.org/Legal/Cases/mcintyre_v_ohio.decision)

**Question:** How do CyberSLAPP plaintiffs discover the identity of anonymous Internet critics?

**Answer:** CyberSLAPP plaintiffs usually get the personal information you gave an ISP or online message board when you signed up (name, address, telephone number, etc.). Some web sites that host discussion boards might only have your e-mail address, in which case a second subpoena to the ISP that hosts that address will reveal your identity. In many cases, even more detailed information about your use of the Internet can be obtained; it's important to realize that when you go online, you leave electronic footprints almost everywhere you go. (With advanced knowledge of the Internet, however, there are ways to cover your tracks.)

**Question:** Don't judges review subpoenas before they are sent to ISPs?

**Answer:** No. The issuing of civil subpoenas is not monitored by the court handling the case. Under the normal rules of discovery in civil lawsuits, parties to a suit can simply send a subpoena to anyone they believe has information that could be useful. That information doesn't even have to be relevant to the lawsuit, as long as it could possibly lead to the discovery of relevant information. The only way that a court will evaluate an identity-seeking subpoena is if either the ISP or the target of the subpoena files a motion asking the judge to block the subpoena. Unfortunately, in practice that rarely happens. That is because these subpoenas usually have a short, roughly 7-day deadline, and because many people never even find out that their Internet data has been subpoenaed.

**Question:** Isn't my ISP required by law to tell me if someone asks for my Internet-usage records and identity?

**Answer:** Unfortunately, in practice CyberSLAPP subpoenas are rarely challenged because ISPs often fail to notify the individual whose personal information is sought. Even when they do, the short deadline (often as little as 7 days) does not provide enough time for the speaker to find and hire an attorney and the attorney to prepare the Constitutional arguments necessary to defend against the subpoena.

**Question:** What is a "motion to quash" a subpoena?

**Answer:** This is a formal request for a court to rule that your information should not be given to the requesting party. This normally includes the request, plus a legal brief (sometimes called a memorandum of points and authorities) explaining why, by law, your information should not be overturned. Samples of briefs filed in other John Doe cases are available at:

<http://www.eff.org/Legal/Cases/>

<http://www.citizen.org/litigation/briefs/IntFreeSpch/articles.cfm?ID=5801>

**Question:** What should I do if I receive notice that my ISP has received a subpoena for my data?

**Answer:** First you should decide whether you wish to fight to protect your identity, Internet usage records, or whatever else is being sought. You might want to ask your ISP for a copy of the subpoena if they haven't already provided one. If you decide to fight it, you should inform the ISP immediately, and you may want to request that they delay compliance to give you time to find a lawyer. Then find a lawyer, who will file a motion to have the subpoena thrown out. (If your lawyer can later prove that the lawsuit was frivolous, you may be able to recover legal fees if your state has passed an anti-SLAPP statute.)

**Question:** How much time would I have to try to fight a subpoena?

**Answer:** The ISP's deadline for complying with a subpoena can vary depending on the judge, the jurisdiction where the case was filed, and other factors. A typical deadline is 7 days. This isn't much time, so again you may want to request an extension of the deadline from the ISP and the court so your lawyer can prepare your challenge to the subpoena.

**Question:** What are the typical claims behind a CyberSLAPP suit?

**Answer:** The most common complaints by CyberSLAPP plaintiffs are defamation, trademark or copyright infringement, and breach of contract. Speech that involves a public figure - such as a corporation - is only defamatory if it is false and said with "actual malice." It also must be factual rather than an expression of opinion. In the US, because of our strong free speech protections, it is almost impossible to prove defamation against a public figure. Trademark and copyright complaints typically claim that defendants have violated intellectual property rights by using the name of a corporation or its products, or by quoting from some of their copyrighted materials such as an annual report. In reality, the First Amendment includes a clear right to criticize and discuss corporations and their products, and the law includes clear exceptions for the "fair use" of protected material for those purposes. Breach of contract suits often involve a claim that anonymous speakers might be employees who have violated a contract by releasing confidential information. Of course, the right to anonymous speech is meaningless if a corporation can unmask your identity at will because you might be an employee breaking a promise of confidentiality.

**Question:** How do judges decide whether to let a subpoena go forward?

**Answer:** This is a very new area of the law, and there are few well-established principles. The courts do have a duty to balance the right of anonymity against the need to prevent true defamation. So far there have been both good and bad rulings from judges; fortunately several have ruled that the plaintiff must prove that his case has at least a theoretical chance of prevailing before anonymity can be stripped away. Other cases have established a set of key factors to be used in judging anonymity-stripping subpoenas. In most of these the key factors are 1) that the party seeking the subpoena provide evidence that the identity is needed; 2) that the identity is directly needed for a key element in the case; 3) and that the identity information is not otherwise available to the party seeking it. While not yet firmly entrenched in the law, these common-sense principles are clearly the right way to ensure that

First Amendment rights are protected while still allowing identity to be revealed when there is a genuine need to do so.

**Question:** What are some of the important cases in this area of law?

**Answer:** Important CyberSLAPP cases include

Dendrite v. Does, <http://www.citizen.org/documents/dendriteappeal.pdf>,  
Melvin v. Doe, <http://legal.web.aol.com/decisions/dlpriv/melvinop.html>,  
Doe v 2TheMart.com, 20010427\_2themart\_order.html,  
Global Telemedia International v. Doe, <http://www.casp.net/busted.html>.

Additional information about these and other cases can be found by searching the Internet or looking on the Web sites listed below.

**Question:** Can I do anything to help change this situation?

**Answer:** You can do several things. Be educated about your rights. Find out your ISP's policy on the handling of subpoenas, and encourage them - and any Web sites you frequent - to adopt good policies, especially a pledge to notify you of any subpoena before any private information is disclosed. Encourage your state legislators to pass legislation requiring such notice, and press them to amend state anti-SLAPP statutes to explicitly include Internet anonymity cases.

**Question:** What other resources are available?

**Answer:** Web sites dealing with this issue include:

[www.aclu.org](http://www.aclu.org),  
[www.citizen.org](http://www.citizen.org),  
[www.eff.org](http://www.eff.org),  
[www.epic.org](http://www.epic.org),  
[www.johndoes.org](http://www.johndoes.org),  
[www.casp.net](http://www.casp.net),  
[www.cybersecuritieslaw.com](http://www.cybersecuritieslaw.com),  
[cyber.findlaw.com/expression/censorship.html](http://cyber.findlaw.com/expression/censorship.html)

**Question:** Can someone ask for my identity even if I am not the Defendant in the case?

**Answer:** Yes. The rules of civil discovery allow a party to a lawsuit (the plaintiff or defendant) to ask anyone for any information that may lead to the discovery of relevant evidence to their case. However, your ability to quash such a request if you are not named as a party to the lawsuit is the same as if you are named. You can still file a motion to quash. Below is a link to the case files for such a case:

[http://www.eff.org/Cases/2TheMart\\_case/](http://www.eff.org/Cases/2TheMart_case/)

**Question:** I am in California. Do I have a right to both resist such a subpoena and to ask a court to throw out the case, right away, and award me attorneys fees?

**Answer:** Yes. California has a specific statute, called the anti-SLAPP statute, that allows an early motion to be brought to have a case dismissed if it is aimed at silencing protected expression and participation in matters of public concern.

Code of Civil Procedure § 425.16(b)(1) provides:

A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.

A legal brief explaining the California statute further in a case involving claims of online defamation is available at:

[http://www.eff.org/Legal/Cases/Kesler\\_v\\_Doe/](http://www.eff.org/Legal/Cases/Kesler_v_Doe/)

**Question:** Aren't people required to explain why they're subpoenaing my identity and other information?

**Answer:** Not with the initial request. The reasons for the subpoena are only provided if the subpoena is challenged, through a motion to quash. In opposing the motion to quash, the person seeking the information must demonstrate, at a minimum, that it is likely to lead to the discovery of information that would be useful in a lawsuit.

**Question:** I signed a confidentiality/privacy agreement with my ISP that provides that they will not release my information. Doesn't that protect me?

**Answer:** No. Most privacy agreements state that information will be turned over in response to legal requests, and a subpoena is such a request. Even if the agreement does not say so, a legally issued subpoena overrides such agreements as a matter of public policy. Each ISP has a different policy about notifying users when their information has been subpoenaed, but they cannot simply ignore a subpoena under the law without risking legal sanction themselves.

**Question:** I don't know whether my ISP keeps track of web sites I've visited or other personal online activity. Could a subpoena include information like that?

**Answer:** Any information that your ISP has may be subject to a subpoena, including information you may keep in calendars, preferences, "myXXX" systems hosted by your ISP, as well as log files. Different ISPs keep different kinds of records of customer behavior. Ask your ISP to be certain that you know what information they maintain about you.

**Question:** What does "respond" to the subpoena mean?

**Answer:** Usually, it means that the ISP will give the requested information to the requesting person. In some cases, ISPs have resisted requests for information on behalf of their customers, but this is not the norm. Unless specifically told differently by your ISP, you should assume that your ISP will turn over your information as part of its response.