DEPARTMENT OF JUSTICE

REPORT ON REVIEW OF NEWS MEDIA POLICIES

JULY 12, 2013

In May 2013, at the President's direction, the Attorney General initiated a comprehensive evaluation of the Department of Justice's policies and practices governing the use of law enforcement tools, including subpoenas, court orders, and search warrants, to obtain information or records from or concerning members of the news media in criminal and civil investigations. As part of this process, the Attorney General convened a series of meetings to solicit input from a wide range of news media stakeholders, First Amendment academics and advocates, and Members of Congress. Based on this review, the Attorney General is making significant revisions to the Department's policies regarding investigations that involve members of the news media.

As an initial matter, it bears emphasis that it has been and remains the Department's policy that members of the news media will not be subject to prosecution based solely on newsgathering activities. Furthermore, in light of the importance of the constitutionally protected newsgathering process, the Department views the use of tools to seek evidence from or involving the news media as an extraordinary measure. The Department's policy is to utilize such tools only as a last resort, after all reasonable alternative investigative steps have been taken, and when the information sought is essential to a successful investigation or prosecution.

The changes in policy outlined in this report are intended to further ensure the Department strikes the appropriate balance between two vital interests: protecting the American people by pursuing those who violate their oaths through unlawful disclosures of information and safeguarding the essential role of a free press in fostering government accountability and an open society. As set forth in more detail below, the Department's policy revisions strengthen protections for members of the news media by, among other things, requiring more robust oversight by senior Department officials and by clarifying and expanding the presumption of negotiations with, and notice to, members of the news media when Department attorneys request authorization to seek newsgathering records.

In addition, as the President and Attorney General have long stated, the Administration will continue to support efforts within Congress to pass a media shield law, which would codify many of the principles that inform the policy guidance described in this report. While the Department intends to take significant steps to improve its policies with respect to investigations involving the news media, the Department cannot adopt certain measures without legislative action. A media shield law would, for example, provide a new mechanism for advance judicial review of the use of investigative tools such as subpoenas when they involve the news media, within a framework that establishes procedures for review and appeal, including expedited judicial determinations and under seal or ex parte review for good cause. The Department looks forward to working with Congress as it considers media shield legislation.

Revisions to Department of Justice News Media Policies

I. Reversing the Existing Presumption Regarding Advance Notice

The first and most significant policy change would be to reverse and expand the presumption concerning notice to, and negotiations with, affected members of the news media whenever Department attorneys seek access to their records related to newsgathering activities. The presumption will ensure notice in all but the most exceptional cases.

Current policy provides that negotiations with the news media should occur in cases where the "responsible Assistant Attorney General determines that such negotiations *would not* pose a substantial threat to the integrity of the investigation," a determination that is then "reviewed by" the Attorney General when considering issuance of a subpoena to a third party for news media records. 28 C.F.R. § 50.10 (emphasis added). Under the new policy, the presumption of advance notice will be overcome only if the Attorney General affirmatively determines, taking into account recommendations from the newly established News Media Review Committee described below, that for compelling reasons, advance notice and negotiations *would* pose a clear and substantial threat to the integrity of the investigation, risk grave harm to national security, or present an imminent risk of death or serious bodily harm. The possibility that notice and negotiations with the media, and potential judicial review, may delay the investigation will not, on its own, be considered a compelling reason under this updated policy.

Advance notice will afford members of the news media the opportunity to engage with the Department regarding the proposed use of investigative tools to obtain communications or business records, and also provide the news media with the opportunity to challenge the government's use of such tools in federal court. By strengthening the presumption in favor of notice, and providing that notice be deferred only where the Attorney General, after a review by a committee of senior Department officials, finds that notice would present a clear and substantial threat to the investigation, grave harm to national security, or imminent risk of death or serious bodily harm, the Department's new policy reflects the gravity of the decision to forgo negotiations with, or delay notification to, affected members of the news media.

It is expected that only the rare case would present the Attorney General with the requisite compelling reasons to justify a delayed notification. Under this updated policy, if a determination is made by the Attorney General to delay notification for an initial 45-day period, only the Attorney General may authorize a delay of notification for up to an additional 45 days, and even then, only if the Attorney General again determines, after an additional review by the News Media Review Committee, that, for compelling reasons, notice would pose a clear and substantial threat to the integrity of the investigation, grave harm to national security, or imminent risk of death or serious bodily harm. No further delays may be sought beyond the 90-day period.

These changes regarding notice would enhance the protections already found in 28 C.F.R. § 50.10. In addition, Department policy would make clear that when Department attorneys seek news media-related materials, they should employ search methods – such as

computer search protocols and keyword searches – to limit the scope of intrusion into potentially protected materials. These strategies will assist in balancing the need for law enforcement to collect necessary evidence from, or relating to, targets of criminal investigations with the legitimate news gathering functions of the media.

II. Enhanced Approvals and Heightened Standards for Use of Search Warrants and Section 2703(d) Orders

The Privacy Protection Act of 1980 (PPA), 42 U.S.C. § 2000aa, generally prohibits the search or seizure of work product and documentary materials held by individuals who have a purpose to disseminate information to the public. The PPA, however, contains a number of exceptions to its general prohibition, including the "suspect exception" which applies when there is "probable cause to believe that the person possessing such materials has committed or is committing a criminal offense to which the materials relate," including "the receipt, possession, or communication of information relating to the national defense, classified information, or restricted data" under enumerated code provisions. *See* 42 U.S.C. §§ 2000aa(a)(1) and (b)(1). Under current Department policy, a Deputy Assistant Attorney General may authorize an application for a search warrant that is covered by the PPA, and no higher level reviews or approvals are required.

First, the Department will modify its policy concerning search warrants covered by the PPA involving members of the news media to provide that work product materials and other documents may be sought under the "suspect exception" of the PPA only when the member of the news media is the focus of a criminal investigation for conduct not connected to ordinary newsgathering activities. Under this revised policy, the Department would not seek search warrants under the PPA's suspect exception if the sole purpose is the investigation of a person other than the member of the news media.

Second, the Department would revise current policy to elevate the current approval requirements and require the approval of the Attorney General for all search warrants and court orders issued pursuant to 18 U.S.C. § 2703(d) directed at members of the news media. In addition, as part of the new approval process the Attorney General would consider the factors in 28 C.F.R. § 50.10 – which currently apply to subpoenas to members of the news media or to communication service providers for the telephone toll records of members of the news media, but not to search warrants or § 2703(d) orders – including demonstrating that the information sought is essential to a successful investigation, that other reasonable alternative investigative steps to obtain the information have been exhausted, and that the request has been narrowly tailored to obtain only the information necessary for the investigation (including the use of search methods that limit any intrusion into potentially protected materials, as described above). The presumption of notice, and standards applicable to requests for delayed notice, will also apply to search warrants and § 2703(d) orders that seek access to records of members of the news media related to newsgathering activities. A thorough evaluation of relevant considerations, including these factors, will be presented to the Deputy Attorney General, and ultimately the Attorney General, for authorization. This policy change will bring the approval protocols for search warrants issued under the PPA and § 2703(d) orders in line with those required for other investigative tools that implicate records of members of the news media.

III. Establishment of News Media Review Committee

The Department will create a standing News Media Review Committee, akin to its Capital Case Review Committee and State Secrets Review Committee, to advise the Attorney General and Deputy Attorney General when Department attorneys request authorization to seek media-related records in investigations into the unauthorized disclosure of information; when Department attorneys request authorization to seek media-related records in any law enforcement investigation without providing prior notice to the relevant member of the media; and when Department attorneys request authorization to seek testimony from a member of the media that would disclose the identity of a confidential source. The News Media Review Committee will include senior Department officials, including but not limited to the Department's Director of the Office of Public Affairs and the Department's Chief Privacy and Civil Liberties Officer. Members of the committee will have the opportunity to provide both individual and collective assessments of the merits of requests and to raise relevant issues for consideration by the Deputy Attorney General and the Attorney General. This committee will ensure that senior Department officials with relevant expertise and experience, and who are neither directly involved nor play a supervisory role in the investigations involved, are engaged in the consideration of the use of investigative tools that involve members of the news media.

IV. Centralization of Review and Public Reporting Requirements

To ensure consistency in the evaluation of requests for authorization to use legal process to obtain information from, or records of, members of the news media, the Department will require that all such requests be submitted to, and initially evaluated by, the Criminal Division's Office of Enforcement Operations before they are ultimately forwarded to the Attorney General for decision. Additionally, recognizing the special concerns related to using legal process to seek information from or about the news media, Department policy will be revised to require that requests for authorization to use legal process to obtain information from, or records of, members of the news media be expressly endorsed by the relevant United States Attorney or Assistant Attorney General before submission to the Criminal Division for review and evaluation.

To further enhance oversight and to facilitate the Department's tracking of the outcome of news media subpoenas, Department attorneys will be required to report to the Criminal Division's Office of Enforcement Operations whether an approved subpoena, court order, or search warrant was issued, served, or executed, and whether the affected member of the news media or recipient of the subpoena, court order, or search warrant complied with or challenged the subpoena, court order, or search warrant, and the outcome of any such challenge. From this information, the Department will make public, on an annual basis, statistical data regarding the use of media-related process.

V. Intelligence Community Certification

In investigations of unauthorized disclosures of national defense information or of classified information, under the Department's revised policy the Director of National Intelligence after consultation with the relevant Department or agency head, would certify to the Attorney General the significance of the harm that could have been caused by the unauthorized

disclosure and reaffirm the intelligence community's continued support for the investigation and prosecution before the Attorney General authorizes the Department to seek media-related records in such investigations. The certification will be sought not more than 30 days prior to submission of the approval request to the Attorney General, and will formalize current practice by providing the Attorney General with information about whether the information disclosed was properly classified, whether the disclosure could have caused harm to the national security or foreign policy of the United States, and whether the victim Department or agency continues to support the investigation and potential prosecution of persons responsible for the unauthorized disclosure. This change will ensure that the Department's investigative efforts are consistent with the harm assessment of the relevant intelligence agency prior to employing investigative tools involving members of the news media.

VI. Safeguarding Information

The Department's policies will be revised to provide formal safeguards regarding the proper use and handling of communications records of members of the news media. Among other things, the revisions will provide that with respect to information obtained pursuant to the Department's news media policy: (i) access to records will be limited to Department personnel who are working on the investigation and have a need to know the information; (ii) the records will be used solely in connection with the investigation and related judicial proceedings; (iii) the records will not be shared with any other organization or individual inside or outside of the government, except as part of the investigation or as required in the course of judicial proceedings; and (iv) at the conclusion of all proceedings related to or arising from the investigation, other than information disclosed in the course of judicial proceedings or as required by law, only one copy of records will be maintained in a secure, segregated repository that is not searchable. Under circumstances where the Deputy Attorney General finds that specific, identifiable records are evidence of a separate past or imminent crime involving (i) death; (ii) kidnapping; (iii) substantial bodily harm; (iv) conduct that constitutes a criminal offense that is a specified offense against a minor as defined in 42 U.S.C. § 16911; or (v) incapacitation or destruction of critical infrastructure as defined in 42 U.S.C. § 5195c(e), the Deputy Attorney General may authorize broader use of the information.

VII. Technical Revisions

The Department will also make additional technical revisions to the Department's policies regarding news media subpoenas. Most significantly, to account for technological changes in news gathering, distribution, and publication, the Department's policies regarding the use of legal process to obtain information from, or records of, members of the news media will be revised to make clear that those policies apply to "communications records" or "business records" of members of the news media that are stored or maintained by third parties.

VIII. Written Guidance and Training Requirements

In order to ensure that these policy revisions are incorporated into all of the Department's operations, the changes described herein will be formalized in guidance to the Department's law enforcement officials and attorneys. The Department will also take steps to incorporate these

policy revisions into the United States Attorney's Manual, and through revisions to the governing 28 C.F.R. § 50.10, where appropriate. Additionally, the Department will prepare training materials regarding these new policies for dissemination to the Department's law enforcement officials and attorneys.

IX. Establishment of News Media Dialogue Group

The Department will establish an Attorney General's News Media Dialogue Group to assess the impact of the Department's revised news media policies and to maintain a dialogue with the news media. This group will meet six months after the proposed revisions to the Department's news media policies are effective and on an annual basis thereafter. The group will meet to discuss any policy issues relating to the application of the Department's news media policies. The group will include members of the news media, attorneys from various Department components, and the Director of the Department's Office of Public Affairs.

X. Intelligence Agency Administrative Remedies

Cases involving the unauthorized disclosure of classified or national defense information are inherently difficult to investigate and prosecute; they are time and resource intensive, pose complex issues regarding intelligence equities in the disclosure of certain information, require a careful narrowing of the universe of individuals privy to the information and identifying the leaker, and require proof of harm that may itself result in further harmful disclosures. The Department will work with others in the Administration to explore ways in which the intelligence agencies themselves, in the first instance, can address information leaks internally through administrative means, such as the withdrawal of security clearances and imposition of other sanctions.