

# REPORTERS COMMITTEE

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### By Email

November 6, 2014

Eric H. Holder, Jr., Esq.  
Attorney General of the United States  
United States Department of Justice  
950 Pennsylvania Avenue, NW  
Washington, DC 20530

James B. Comey, Jr., Esq.  
Director  
Federal Bureau of Investigation  
935 Pennsylvania Avenue, NW  
Washington, DC 20535

Dear Attorney General Holder and Director Comey,

We write to express our deep concern about reports that the Federal Bureau of Investigation has impersonated The Associated Press in order to deliver software to a criminal suspect in the course of an investigation and thereby trace his location.<sup>1</sup> As we understand the Associated Press case, the FBI developed a Computer and Internet Protocol Address Verifier (“CIPAV”) in order to trace a computer’s location. The FBI sought review from the Office of General Counsel (“OGC”) and obtained a Title III warrant from a magistrate judge. Yet it appears that the FBI failed to notify the OGC and the judge that the CIPAV was delivered in the guise of an Associated Press article, with an Associated Press byline, and therefore impersonated a news media organization.

The FBI’s statements in this case have been inconsistent with the records released in response to the Freedom of Information Act.<sup>2</sup> It remains unclear whether the names of both The Associated Press and The Seattle Times were used, or just one. The scope of the review and scrutiny that the Title III application and affidavit in this case underwent also remains obscure. We call upon the FBI to immediately release the full records of this case so that the press and the public can ascertain what happened, what was subject to appropriate oversight, and what was not.

The failure to comply with the FBI and Attorney General’s own requirements regarding news media impersonation is inexcusable. As you know, the Attorney General’s Guidelines on Federal Bureau of Investigation Undercover

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<sup>1</sup> Mike Carter, *FBI confirms it used fake story, denies bogus Times Web link*, SEATTLE TIMES, 28 Oct. 2014, available at <http://bit.ly/1DZSbNR>.

<sup>2</sup> *Editorial: FBI exploited press credibility in bomb ruse*, SEATTLE TIMES, 28 Oct. 2014, available

<sup>2</sup> *Editorial: FBI exploited press credibility in bomb ruse*, SEATTLE TIMES, 28 Oct. 2014, available at <http://bit.ly/1p1hjAO>.

Operations, as well as the FBI's Domestic Investigations and Operations Guide ("DIOG"), restrict the circumstances under which FBI agents may impersonate the news media during the course of an investigation.<sup>3</sup>

In addition to the Attorney General's Guidelines on FBI Undercover Operations and the DIOG, the Attorney General's Guidelines on Domestic FBI Operations also appropriately emphasize the importance of protecting First Amendment rights from unnecessary intrusion.<sup>4</sup> The complex set of approval and review requirements for investigations during which an agent may impersonate a member of the news media serves to protect these important First Amendment interests.<sup>5</sup> The same logic supports heightened approval and review requirements for "sensitive Title III applications" involving First Amendment concerns.<sup>6</sup> In addition, these guidelines provide that the official authorizing an investigation may use his or her judgment to determine that an investigation—such as, for example, an investigation that involves impersonation of a media organization through digital means—may be "sensitive" and thus demands heightened review and approval.<sup>7</sup>

We are extremely concerned that the FBI seemingly failed to follow any of these procedures in the Associated Press/Seattle Times incident. The Title III application in question failed to mention that the FBI would rely on a link to a fake Associated Press story in order to deliver a CIPAV to the suspect. Nor is it clear from the documents available to us that the OGC attorney who approved the Title III affidavit was notified that the FBI would deliver the CIPAV in question through a fake news story. As a result, it appears that neither the magistrate judge who signed the warrant nor the FBI's counsel were even aware that the CIPAV impersonated a media organization or that there were First Amendment concerns at stake.

In addition, it does not appear that the Undercover Review Committee approved the application for this operation, although it involved impersonation of the news media. Ayn Dietrich-Williams, the spokeswoman for the FBI's Seattle Field Office, acknowledged that the CIPAV used "material generated by the FBI in styles common in reporting and online media"—and appears to have done so using the name of The Associated Press.<sup>8</sup> This is the very definition of

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<sup>3</sup> Attorney General's Guidelines on FBI Undercover Operations ("AGG-UCO"), 7, *available at* <http://1.usa.gov/1q3jcaU>; DIOG, § 16.

<sup>4</sup> Attorney General's Guidelines for Domestic FBI Operations, 15, *available at* <http://1.usa.gov/1sKxsVN> ("[A]ll activities in all circumstances must be carried out in a manner consistent with the Constitution and laws of the United States."); AGG-UCO, 3 (requiring officials considering undercover operations to assess "any potential constitutional concerns"); DIOG, § 4.2.

<sup>5</sup> AGG-UCO, 7–11; *see also* DIOG, § 10.1.2.2.5 (construing the definition of "news media" broadly).

<sup>6</sup> DIOG, § 18.7.2.6.

<sup>7</sup> DIOG, § 10.1.2.1.

<sup>8</sup> Mike Carter, *FBI created fake Seattle Times Web page to nab bomb-threat suspect*, Seattle Times, 30 Oct. 2014, *available at* <http://bit.ly/1DnzEJ5>.

impersonation. The Attorney General’s Guidelines on Undercover Operations call for the Undercover Review Committee to individually review an application for an undercover operation involving sensitive circumstances, including impersonation of the news media, “to determine whether adequate measures have been taken to minimize the incidence of sensitive circumstances and reduce the risks of harm and intrusion.”<sup>9</sup> None of the records released in response to the 2007 FOIA request appear to show any involvement by the Undercover Review Committee.

Additionally, the DIOG requires Title III applications involving “sensitive circumstances,” including those with significant First Amendment concerns, to be reviewed by the Office of General Counsel and approved by a Deputy Assistant Director or higher. The DIOG further requires the agent drafting the Title III affidavit to consult with the AUSA to determine how and when the federal judge issuing the warrant will be notified of the existence of these sensitive circumstances.<sup>10</sup> Again, this consultation appears not to have taken place.

The utilization of news media as a cover for delivery of electronic surveillance software is unacceptable. This practice endangers the media’s credibility and creates the appearance that it is not independent of the government. It undermines media organizations’ ability to independently report on law enforcement. It lends itself to the appearance that media organizations are compelled to speak on behalf of the government. We therefore urge the Attorney General and FBI to clarify that impersonation of the media is unacceptable, whether it is digital or physical, and whether it is of the individual or of an organization. The Associated Press/Seattle Times incident should have been subjected to heightened review and scrutiny, disclosed to OGC and the magistrate judge, and evaluated for what it was—an investigation that involved significant First Amendment concerns.

This issue raises special concerns in light of pending proposed changes to Rule 41 of the Federal Rules of Criminal Procedure. The proposed changes specifically address, among other things, the authority of magistrate judges to authorize the use of “remote access” to search electronic storage.<sup>11</sup> It is of the utmost importance that the FBI is transparent about its impersonation of the news media in facilitating remote access so that the potential First Amendment implications of these changes are clear.

We are also concerned about apparent disjunctions in the protections afforded to the news media by the applicable guidelines. Although both the

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<sup>9</sup> AGG-UCO, 8.

<sup>10</sup> DIOG, § 18.7.2.6.

<sup>11</sup> Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, *Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure*, UNITED STATES COURTS (Aug. 2014), <http://www.uscourts.gov/uscourts/rules/preliminary-draft-proposed-amendments.pdf>.

Attorney General’s Guidelines on Undercover and Sensitive Operations and the DIOG use the identical term “sensitive circumstances,” the DIOG’s definition of “sensitive circumstances” in the Title III context appears to be broader than that in the Attorney General’s rules governing undercover operations, encompassing not just relationships of confidence but also First Amendment concerns.<sup>12</sup> The Attorney General’s rules emphasize that “undercover activity involving sensitive . . . circumstances constitutes an undercover operation regardless of the number of contacts involved,” but adopts a narrower definition of sensitive circumstances involving the news media.<sup>13</sup> We ask that you harmonize the meaning of “sensitive circumstances” in these two documents so that it is clear that undercover operations involving significant First Amendment concerns are always subject to heightened review by the Undercover Review Committee. This is essential to protecting the digital rights of media organizations.

Finally, we urge the FBI to release additional information regarding when and under what circumstances it uses links to what are or appear to be news media websites to digitally impersonate the news media in the course of criminal investigations. On Friday, October 31, the Reporters Committee for Freedom of the Press submitted two requests under the Freedom of Information Act for documents relating to the practice of digitally impersonating the news media. We call on the FBI to release these records expeditiously.

Sincerely,

The Reporters Committee for Freedom of the Press	National Newspaper Association The National Press Club
American Society of News Editors	National Press Photographers Association
Association of Alternative Newsmedia	The New York Times Company
Bloomberg L.P.	The Newspaper Guild – CWA
The Center for Investigative Reporting	Newspaper Association of America
Committee to Protect Journalists	North Jersey Media Group Inc.
Courthouse News Service	Radio Television Digital News Association
First Amendment Coalition	The Seattle Times Company
Freedom of the Press Foundation	Stephens Media LLC
Gannett Co., Inc.	Tribune Publishing Company
Investigative Reporting Workshop at American University	Tully Center for Free Speech
The McClatchy Company	The Washington Post
Media Consortium	

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<sup>12</sup> *Id.*

<sup>13</sup> AGG-UCO, 7 (“A significant risk that a third party will enter into a professional or confidential relationship with a person participating in an undercover operation who is acting as . . . [a] member of the news media”).