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By email

Eric Holder, Attorney General
U.S. Department of Justice

June 21, 2013

Dear Attorney General Holder:

The enclosed comments are submitted jointly by a coalition of media organizations in response to your invitation for ways to improve and update the Department's policies governing media-related subpoenas contained in 28 C.F.R. § 50.10. A list of the members of this coalition who endorse the enclosed proposals is set out below.

This coalition is comprised of journalism and media groups and national and local news organizations whose journalists regularly engage in newsgathering and reporting that involves the use of confidential sources. These organizations have a unique stake in the regulations and laws that govern the use of subpoenas and other demands for the records or testimony of journalists that can undermine and defeat constitutionally protected newsgathering activities. We therefore appreciate your efforts to strengthen the existing Department guidelines in light of the significant changes in both technology and the law that have taken place over the many years since they were first promulgated.

We would like to provide a brief overview of the proposed changes contained in the attachment (which is redlined against the current regulations). The three main concepts we address are notice to the affected media party, the range of records covered by the guidelines, and the types of instruments used by the government. Our proposed revisions also include a new statement of governing principles and a procedure for regular feedback and review.

Statement of principles. At the outset, we encourage you to add a set of controlling principles as an introduction to the guidelines. Articulating such principles would provide in the regulations themselves a clear expression of the purpose and goals behind the guidelines to inform members of the Department in the field as they approach the sensitive area of media-related demands.

Notice and opportunity to be heard. For more than 40 years, the Department's media subpoena guidelines have played an essential role in the conduct of federal investigations by recognizing that while the government and the news media may not be able to resolve all of their conflicts over the use of evidence from journalists or related to their newsgathering, the public interest is best served by requiring them to have the chance to engage with each other or take their disputes to the neutral territory of the courts. As is appropriate, the guidelines do not exist to determine the outcome of these disputes but to establish a fair set of rules.

Based on publicly available information, we believe that there have been relatively few instances where the Department has obtained a journalist's records from a third party without first approaching the affected news organization and giving timely notice of a subpoena if legal process becomes necessary. That is a sign that the presumptions of disclosure and negotiation in the guidelines are largely working as the default directive to prosecutors and that the areas of difference are manageable in scope. The current exemption permitting delayed notice to the news media of some third-party requests, however, excludes too many important cases from a balancing process that has worked to the benefit of the public for decades.

While we advance a number of proposals to improve the guidelines, the primary objective we ask you to embrace is a commitment to providing advance notice to the affected news media organization or reporter *in all cases* where the Department seeks to use legal process to obtain from a third party records disclosing the newsgathering activities of a journalist. In the context of a third-party request, the affected media party is, after all, the only party likely to assert the public's interests in the confidentiality of these materials. The guidelines presently do not adopt this definitive standard.

Thus, the telephone records of Associated Press reporters and the email communications of a Fox News journalist were obtained from a phone company and an Internet service provider, respectively, without any prior notice to these news organizations that would have enabled them to negotiate over the information sought and, if necessary, file a timely challenge to the government's actions in court. The absence of such prior notice means there is no opportunity for an independent judicial arbiter to assess whether the law enforcement needs of the Department outweigh the public interest in preserving a fully functioning and *autonomous* press – a serious shortcoming that should be corrected.

Without timely notice and an opportunity to be heard in leaks investigations, for example, important interests relating to the flow of information to the public will never be properly evaluated. As Judge Tatel has articulated, the “dynamics of leak inquiries afford a particularly compelling reason for judicial scrutiny of prosecutorial judgments regarding a leak's harm and news value.” *In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141, 1176 (D.C. Cir. 2006) (Tatel, J., concurring). He further explains that acting on its own the Department has no external check on its intrusions into newsgathering activities that may shed light on topics of critical public interest:

[T]he executive branch possesses no special expertise that would justify judicial deference to prosecutors' judgments about the relative magnitude of First Amendment interests. Assessing those interests traditionally falls within the competence of courts. Indeed, while the criminality of a leak and the government's decision to press charges might well indicate the leak's harmfulness . . . once prosecutors commit to pursuing a case they naturally seek all useful evidence.

Id. at 1175 (internal citations omitted).

In all cases, we advocate advance notice sufficient to permit a court challenge to any media party whose records are subject to subpoena or seizure. We realize that there may be multiple ways to achieve this goal while protecting the sensitivity of pending investigations. Our proposal thus speaks in broad principles, and we have suggested language that establishes notice as the government's obligation in all instances, recognizing at the same time that the mechanics of how these commitments are to be implemented lies within the expertise of the Department.

In meetings over the past few weeks, the Department has expressed the view that there may be some narrow subset of cases where, due to the facts or the type of instrument envisioned, providing advance notice could create a substantial and immediate risk of jeopardizing an ongoing investigation. In that event, the Department should explore options to address only those extraordinary circumstances. These options should include tightening the standards under which a failure to give public notice might be considered and incorporating meaningful judicial oversight in advance of the Department's seizure of press-related information.

Range of records requested and types of instruments used. Two other interrelated reforms are needed to achieve what we hope is a shared understanding of the importance of notice to safeguard properly the public's interest in the free flow of information about the actions of its government: First, the guidelines must be revised to cover all newsgathering-related materials stored with third parties – not just telephone toll records – and, second, they must reach all types of instruments utilized to demand records – not just subpoenas.

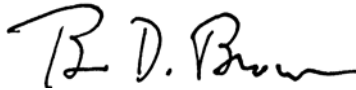
It is essential that journalists' records maintained by a third party – whether a telephone or credit card company, an Internet-based email service, an airline, a courier service, or anything similar – be governed by the same standards that the Department has long applied to direct interactions with reporters and media organizations over their notes, newsgathering materials, and other work product. Reporters always have an opportunity to oppose a subpoena for their work product and should have the same opportunity to oppose demands to third parties that seek to expose the newsgathering process in the same way. As the Second Circuit has held, “[S]o long as the third party plays an ‘integral role’ in reporters’ work, the records of third parties detailing that work are, when sought by the government, covered by the same privileges afforded to the reporters themselves and their personal records.” *New York Times Co. v. Gonzales*, 459 F.3d 160, 168 (2d Cir. 2006).

The guidelines must also evolve with the times to cover the variety of instruments that the Department may use today to demand information from reporters or related to their newsgathering. We have thus defined media-related demands to include subpoenas, search warrants, and national security letters, among others. National security letters were not even in existence when the guidelines were adopted, and now their use has been expanded through the enactment of the USA PATRIOT Act and amendments to the Foreign Intelligence Surveillance Act. Search warrants are perhaps rarely used against journalists, but recent events suggest that these too should now be subject to the notice, heightened review, and approval process required by the guidelines.

Annual report and meeting. You have expressed an interest in encouraging more dialogue between the press and the government and in reviewing with journalists the use of the guidelines in the future with the aim of making sure the interests in a free, unfettered press are accommodated while the Department enforces the law. To that end, we have added sections to the guidelines requiring the release to the public of a simple annual report of statistics about the service of media-related demands and establishing an annual meeting between journalists and members of the Department. We also hope that you will convene the review that has been discussed for an interim assessment six months after the Department submits a proposal to the President.

The entire coalition thanks you for your ongoing attention to these issues and for your willingness to solicit input from news organizations as it revisits the guidelines.

Sincerely,



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Enclosure

cc: Margaret Richardson (w/encl.)