

THE
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FOR
FREEDOM
OF THE
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June 8, 2005

The Honorable Michael Chertoff
Secretary
Department of Homeland Security
Washington, D.C. 20528

Dear Secretary Chertoff:

You have an enormous challenge ahead of you as you continue to shape the development of a major new department with a broad and important mandate. But while the policies and regulations that define the department continue to develop, we are writing to ask that you take one simple step to ensure that agents of your department respect the First Amendment rights of journalists: adopt a policy similar to the Attorney General's guidelines concerning subpoenas to and official interaction with the news media.

As you well know from your tenure at the Department of Justice, all agents of that department have been subject to these guidelines. *See* POLICY WITH REGARD TO THE ISSUANCE OF SUBPOENAS TO MEMBERS OF THE NEWS MEDIA, 28 C.F.R. § 50.10 (2005). And while, from our perspective, they do not fully protect the important First Amendment interests of journalists, they have nonetheless provided a very effective first line of defense for the news media.

The guidelines stress negotiations with the media over demands for information and emphasize the need to use alternative sources of information when possible, thereby negating the tendency to make questioning of reporters, who seek to serve the public in an independent fashion, the first step in an investigation.

The guidelines stress that members of the department must show that they have considered the imposition their work can place on "the free dissemination of ideas and information," § 50.10(a), which discourages those who might reflexively or casually demand information from reporters without fully considering the constitutional implications. This, along with approval from superiors in Washington, will help address situations in which officials appear at a reporter's home or office and question individuals in a manner which can easily be perceived as intimidating. *See, e.g.,* "Dept of Homeland Security Pursues Online Journalist," *Secrecy News*, FAS Project on Government Secrecy, May 31, 2005, available at <<http://www.fas.org/sgp/news/secrecy/2005/05/053105.html>>.

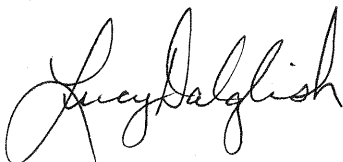
We recognize that terrorism-related investigations will not always allow for the

kind of review from Washington that the guidelines stress. However, the guidelines themselves address the needs of those rare situations, by specifying that “exigent circumstances” allow for notification to the Attorney General after the fact, rather than requiring prior approval. § 50.10(h). While the definition of what constitutes such circumstances is something that may be impossible to articulate, it is nonetheless clear that such action would be the exception, rather than the rule.

In recent years, the Reporters Committee has, with a coalition of other journalism organizations, worked with counsel from the FBI to propose changes to the guidelines to, among other things, apply the same standards to electronic communications and other newsgathering records, such as credit card statements held by third parties. We would be very receptive to the possibility of working with designated members of your department to both better tailor the Justice guidelines to Homeland Security and to address newsgathering concerns of the 21st century (the Justice guidelines were last amended in 1980 to address telephone toll records, well before reporters came to rely on email communications). If such an undertaking is acceptable to your department, we are confident that we can organize a coalition that would represent a broad and diverse range of news media interests, yet would be sufficiently manageable to accomplish the objective. Such coalitions have worked well with the FBI, as mentioned above, and on current efforts in the Congress to enact a reporter's shield law.

We are confident that adoption of the guidelines would not significantly interfere with the functioning of the department, as the 30-plus years of experience with the policy at Justice attests. In short, it seems that there is no downside to adopting this policy, and much — in the way of earning the public trust and serving the public interest — to be gained.

Sincerely,



Lucy A. Dalglish
Executive Director



Gregg P. Leslie
Legal Defense Director