



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

MAR 05 2018

The Honorable Ron Wyden
United States Senate
Washington, DC 20510

Dear Senator Wyden:

This responds to your letter to the Attorney General dated October 10, 2017, in which you seek information regarding the Department of Justice's (Department) use of law enforcement tools to gather evidence regarding communications by members of the news media in conducting investigations of leaks. You have also asked about changes to Department policy and procedures regarding obtaining information involving members of the news media.

The Department takes very seriously the important role of the free press in our nation. As you note, in 2015, the Department revised its policy to strike a balance among several vital interests: protecting national security, ensuring public safety, promoting effective law enforcement and the fair administration of justice, and safeguarding the essential role of the free press in fostering government accountability and an open society. The Department's policy is reflected in the Code of Federal Regulations, 28 C.F.R. § 50.10, and the United States Attorneys' Manual (USAM), USAM 9-13.400. As implemented, the policy has achieved a balance through centralized and vigorous internal review of requests for authorization to use law enforcement tools. Although the Department is currently reviewing our policies, there have been no revisions to the existing policy and procedures since January 20, 2017.

Your letter requests the number of instances over the past five years in which the Department has used law enforcement tools to obtain communications records, geolocation information, and the contents of communications. Below we provide responses to your specific requests for information from January 2012 to the present:

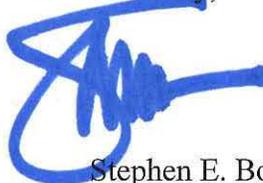
- In 2013, in an investigation concerning the unauthorized disclosure of national security information, the Attorney General authorized the issuance of subpoenas and the submission of an application for a court order, pursuant to 18 U.S.C. § 2703(d), for non-content communications records of members of the news media.¹ The subpoenas were issued; the 2703(d) order was vacated.

¹ Per the Department's policy, "communications records" include "the contents of electronic communications as well as source and destination information associated with communications, such as email transaction logs and local and long distance telephone connection records, stored

- In 2014, in connection with the prosecution of Jeffrey Sterling for offenses related to his unauthorized disclosure of national security information, the Attorney General authorized federal prosecutors to issue a subpoena to *New York Times* reporter James Risen for limited trial testimony. Risen testified at a pretrial hearing, but was not called to testify at trial. This subpoena is reflected in the 2014 Annual Report Regarding Department of Justice Use of Certain Law Enforcement Tools to Obtain Information from, or Records of, Members of the News Media; and Questioning, Arresting, or Charging Members of the News Media (copy enclosed). See USAM 9-13.400(L)(4)(providing that the Department will prepare on an annual basis a public report regarding the use of law enforcement tools covered by the policy).
- The Federal Bureau of Investigation does not currently use national security letters to advance media leak investigations.

We hope that this information is helpful. Please do not hesitate to contact me if we may provide additional assistance regarding this or any other matter.

Sincerely,



Stephen E. Boyd
Assistant Attorney General

Enclosure

or transmitted by a third-party communication service provider with which the member of the news media has a contractual relationship.” 28 C.F.R. § 50.10(b)(3)(i)(A).

**Department of Justice Use of Certain Law Enforcement Tools to Obtain
Information from, or Records of, Members of the News Media; and
Questioning, Arresting, or Charging Members of the News Media**

Annual Report: Calendar Year 2014

By memorandum dated February 21, 2014, the Attorney General committed to making public, on an annual basis, data regarding the Department's use of certain law enforcement tools to obtain information from, or records of, members of the news media; and regarding questioning, arresting, or charging members of the news media, pursuant to 28 C.F.R. § 50.10. This public report, which encompasses authorizations during calendar year 2014, is derived from information provided by Department Divisions and United States Attorneys' Offices (USAOs).

A. Subpoenas and applications for court orders or search warrants authorized by the Attorney General (28 C.F.R. §§ 50.10(c) and (d)):

1. In connection with the trial of former CIA officer Jeffrey Sterling, who was charged with, and convicted of, offenses related to his unauthorized disclosure of national security information, the Attorney General authorized the Criminal Division and the USAO for the Eastern District of Virginia to issue a subpoena to *New York Times* reporter James Risen. The authorization was limited to eliciting testimony at trial and/or pretrial hearings confirming (1) that Risen has a confidentiality agreement with a particular source, (2) that Risen authored a particular chapter in his book *State of War*, (3) that statements attributed to an unnamed source were, in fact, made by an unnamed source, (4) that statements attributed to an identified source were, in fact, made by an identified source, and (5) the existence of a prior non-confidential reporter-source relationship with Sterling.

Pursuant to the Department's policy, the Director of National Intelligence certified to the Attorney General "the significance of the harm raised by the unauthorized disclosure and that the information disclosed was properly classified" and reaffirm[ed] "the intelligence community's continued support for the . . . prosecution." 28 C.F.R. § 50.10(c)(4)(vi). In addition, the Attorney General considered the recommendations of both the Criminal Division and the News Media Review Committee.

The subpoena was issued, and Risen testified at a pretrial hearing. He was not called to testify at trial.

2. The Attorney General authorized the USAO for the Southern District of New York to issue a subpoena to a television news producer for testimony and the production of documents in connection with the trial of Khalid al Fawwaz, who was charged with, and convicted of, various offenses related to the August 7, 1998 bombings of the United States embassies in Kenya and Tanzania. The contemplated testimony related to allegedly anti-American and anti-Semitic

statements al Fawwaz made to the prospective witness while al Fawwaz was serving as Usama bin Laden's representative to the media around the time of the bombings of the embassies. After the prospective witness made clear that he would contest a subpoena, members of the Department engaged in further negotiations with counsel for the prospective witness and decided to hold the issuance of the subpoena in abeyance pending assessment of the evidence introduced at trial. Ultimately, the USAO did not issue the subpoena.

3. In an investigation regarding the theft of proprietary information, the Attorney General authorized a USAO to submit an application for a warrant to search the home and electronic media of an individual suspected of making an unauthorized intrusion into a protected database (i.e., hacking), but whom the Department treated as a member of the news media in an abundance of caution. The Attorney General took into consideration the recommendations of both the Criminal Division and the News Media Review Committee. Consistent with the Department's policy, the authorization directed the use of certain search and safeguarding protocols. Ultimately, federal investigators opted not to execute the warrant.

B. Questioning, arrests, or charges authorized by the Attorney General (28 C.F.R. § 50.10(f)):

1. In connection with a national security investigation, the Attorney General authorized federal investigators to question a member of the news media. Pursuant to the Department's policy, such questioning was voluntary, and was not compelled pursuant to a subpoena or other process.
2. In connection with an investigation, the Attorney General authorized federal agents to question an individual whom the Department treated as a member of the news media. Pursuant to the Department's policy, such questioning was voluntary, and was not compelled pursuant to a subpoena or other process.

C. Subpoenas, applications for court orders or search warrants, questioning, arrests, or charges authorized by a Deputy Assistant Attorney General for the Criminal Division (28 C.F.R. §§ 50.10(d)(4) and (g)):

None.

D. Subpoenas and applications for court orders authorized by Assistant Attorneys General or United States Attorneys (28 C.F.R. § 50.10(c)(3)):

1. In a civil investigation, the Assistant Attorney General for the Antitrust Division authorized the issuance of civil investigative demands (CIDs) to two news media entities for copies of the entities' organization charts, personnel directories, and related information; and information relating to the restructuring of the entities' joint ownership of a publishing entity. The information sought constitutes "purely

commercial, financial, administrative, technical, or other information unrelated to newsgathering activities” or “information or records relating to personnel not involved in newsgathering activities.” 28 C.F.R. § 50.10(c)(3)(ii)(A). The news media entities complied with the CIDs.

2. In a tax-related prosecution of an employee of a news media entity, a United States Attorney authorized the issuance of a subpoena to a news media entity for the defendant-employee’s employment records, tax records, and financial transaction records. The information sought constitutes “purely commercial, financial, administrative, technical, or other information unrelated to newsgathering activities” or “information or records relating to personnel not involved in newsgathering activities.” 28 C.F.R. § 50.10(c)(3)(ii)(A). The news media entity complied with the subpoena.
3. A United States Attorney authorized the issuance of a subpoena to a news media entity for audio and video recordings related to a broadcast report that contained information relevant to a criminal investigation of an individual who is not a member of the news media. The news media entity expressly agreed to provide the requested recordings in response to a subpoena. *See* 28 C.F.R. § 50.10(c)(3)(i)(A).
4. In connection with the prosecution of Dzhokhar Tsarnaev for offenses related to his role in the 2013 Boston Marathon bombings and the aftermath, the United States Attorney for the District of Massachusetts authorized the issuance of trial subpoenas to CNN and WBZ-TV for audio and video recordings of the finish line. CNN and WBZ-TV expressly agreed to provide the requested recordings in response to subpoenas. *See* 28 C.F.R. § 50.10(c)(3)(i)(A).
5. A United States Attorney authorized the issuance of a subpoena to a news media entity for a video recording of an interview of a target of a criminal investigation. The entity expressly agreed to provide the requested recording in response to a subpoena. *See* 28 C.F.R. § 50.10(c)(3)(i)(A).
6. In connection with the prosecution of Roger Key for conspiracy to commit murder-for-hire, attempted murder-for-hire, and aiding and abetting the unlawful discharge of a firearm, the United States Attorney for the Southern District of New York authorized the issuance of a subpoena to a news media entity for the broadcast footage of, and script for, a report concerning a related murder. The news media entity expressly agreed to provide the requested recordings in response to a subpoena. *See* 28 C.F.R. § 50.10(c)(3)(i)(A). Ultimately, the news media entity failed to respond to the subpoena. However, while the subpoena was pending, the USAO negotiated with the defense a stipulation regarding the admissibility of the publicly broadcast report.
7. In connection with the prosecution of William White for making threats to a reporter, the United States Attorney for the Middle District of Florida authorized

the issuance of a subpoena to the victim's employer for trial testimony authenticating materials (i.e., copies of the threats – some of which were posted on the news media entity's website) that the news media entity previously had provided to state law enforcement authorities voluntarily (i.e., without a subpoena), who then provided the materials to federal authorities. The information sought "related to public comments, messages, or postings by readers, viewers, customers, or subscribers, over which the member of the news media did not exercise editorial control prior to publication," and the news media entity expressly agreed to provide the requested information in response to a subpoena. 28 C.F.R. §§ 50.10(c)(3)(i)(A) and (B).