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FOR FREEDOM OF THE PRESS

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May 14, 2013

Eric Holder, Attorney General
James M. Cole, Deputy Attorney General
U.S. Department of Justice
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via fax: (202) 307-6777

Dear Sirs:

The nation's news media were stunned to learn yesterday of the Department of Justice's broad subpoena of telephone records belonging to The Associated Press. In the thirty years since the Department issued guidelines governing its subpoena practice as it relates to phone records from journalists, none of us can remember an instance where such an overreaching dragnet for newsgathering materials was deployed by the Department, particularly without notice to the affected reporters or an opportunity to seek judicial review. The scope of this action calls into question the very integrity of Department of Justice policies toward the press and its ability to balance, on its own, its police powers against the First Amendment rights of the news media and the public's interest in reporting on all manner of government conduct, including matters touching on national security which lie at the heart of this case.

We understand after today's press conference by the Attorney General that this matter was handled by the Deputy Attorney General. We write to both of you, to express our displeasure with how this incident was handled and demand that any similar actions in the future be handled with greater consideration of the news media's First Amendment rights.

Subpoenas of the news media for testimony and evidence are governed by the Attorney General's guidelines found at 28 C.F.R. § 50.10 and incorporated into the U.S. Attorney's Manual. See § 9-13.400. These guidelines were enacted in 1972 and were expanded specifically to cover telephone records in 1980. They were developed to accommodate both the interests of the government in prosecuting crime *and* the First Amendment interests in reporting on issues of public concern. We know this to be true because the Reporters Committee played a role in their promulgation. In this instance, where the Department subpoenaed two months of records related to 20 telephone lines, including records from major AP bureaus and the home phone and cell phone records of individual journalists, the Department appears to have ignored or brushed aside almost every aspect of the guidelines. Each one merits specific review.

Narrow scope of the subpoena: Section 50.10(g)(1) requires that a subpoena “should be as narrowly drawn as possible; it should be directed at relevant information regarding a limited subject matter and should cover a reasonably limited time period.” The available evidence shows that no such constraints were applied here. Instead of being directed at relevant records on a limited topic for a closely circumscribed time period, the subpoena appears to have covered *all* records that *could* be relevant so that prosecutors could plunder two months of newsgathering materials to seek information that might interest them.

Seeking information from alternative sources: Sections 50.10(b) and 50.10(g)(1) require the Department to take “all reasonable alternative investigative steps” before subpoenaing phone records. Although the public is not in a position to know what alternatives were pursued, the sheer breadth of this subpoena suggests that it was an initial investigative step taken as part of a prosecutor’s desire to gather up even the most remote material when beginning an investigation.

Obligation to inform and negotiate: Section 50.10(d) requires federal prosecutors to disclose their intent to pursue a subpoena and negotiate with the news media in “all cases” involving telephone records. Only if prosecutors determine that such negotiations would “pose a substantial threat to the integrity of the investigation” are these obligations removed. The purpose of such an exception is to ensure, in the rare inquiry where there is a reason to be concerned about the preservation of evidence, that records are not lost or destroyed. By deciding in this case involving one of the nation’s oldest and most respected news organizations that a subpoena *would* pose such a threat, the Department has severely harmed its working relationship with the news media, which time and time again have undertaken good-faith efforts to cooperate with government lawyers in a way that protects the public’s interest both in law enforcement and in independent and autonomous newsgathering.

Attorney General approval: Section 50.10(e) requires the “express authorization of the Attorney General” before any subpoena to the news media may issue. This requirement serves as a final backstop to prevent abuses by making sure accountability for these actions is placed at the very top of the agency. It was anticipated that the fact that media subpoenas must go to the highest official of the Justice Department would ensure that government lawyers would take every precaution before asking for approval and that the Attorney General would serve as a check on abusive practices that would undermine the sensitive relationship between journalists and their sources, and between the press and the government. But the system failed here – either because your approval was not sought, or because it was given when it should not have been.

Balancing of interests: The very point of the guidelines is to ensure that the Department conforms its behavior to the understanding “the approach in every case must be to strike the proper balance between the public’s interest in the free dissemination of ideas and information and the public’s interest in effective law enforcement and the fair administration of justice.” *See* Section 50.10(a). By authorizing a subpoena with such an overly broad scope; by gathering journalists’ information apparently as a first resort, not a last resort; by refusing to negotiate with the media in an open and transparent exchange

of arguments after full disclosure by the government of the records sought; and by evidently obtaining the approval of the Attorney General when none of the protections has been met, it is plain that no such honest balancing of interests occurred in this instance.

The Department's actions demonstrate that a strong federal shield law is needed to protect reporters and their newsgathering materials in a court of law where the adversarial process ensures a fair weighing of the issues. While Congress should provide that remedial legislation, there is still much that this Department can do to mitigate the damage it has caused.

It should immediately return the telephone toll records obtained and destroy all copies, as requested by The Associated Press. If it refuses, it should at the very least segregate these records and prohibit any further use of them at this time. It should explain how government lawyers overreached so egregiously in this matter and describe what the Department will do to mitigate the impact of these actions. Additionally, the Department must also publicly disclose more information on who has had access to the records and what protections were taken to ensure that information unrelated to a specific criminal investigation was not utilized by any Department employees. This undertaking is consistent with § 50.10(g)(4) ("Any information obtained as a result of a subpoena issued for telephone toll records shall be closely held so as to prevent disclosure of the information to unauthorized persons or for improper purposes.")

And finally, the Department should announce whether it has served any other pending news media-related subpoenas that have not yet been disclosed.

We look forward to your prompt response.

Sincerely,

The Reporters Committee for Freedom of the Press

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