U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

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The Honorable Bob Goodlatte
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

The Honorable F. James Sensenbrenner, Jr.
Chairman
Subcommittee on Crime, Terrorism
Homeland Security, and Investigations
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairman Goodlatte and Chairman Sensenbrenner:

This responds to your letter to the Attorney General, dated May 29, 2013, requesting information about the Department's policies with respect to investigations involving members of the media and the Attorney General's knowledge of an investigation into the unauthorized disclosure of classified information that was then published in a news article in June 2009.

The Attorney General takes the unauthorized disclosure of classified information by those who have committed to protecting it very seriously, especially as such disclosures can cause grave damage to our national security. The Attorney General also has the utmost respect for the vital role the media plays in an open society. To ensure the proper balance of these important interests, the President has directed the Attorney General to conduct a review of Department policies regarding investigations involving the media, and as part of that process, the Attorney General has initiated a dialogue with news media representatives and other interested parties. Furthermore, as the Attorney General explained in the hearing before you on May 15, 2013, he supports the media shield legislation currently under consideration by the Senate, which provides robust judicial protection for journalists' confidential sources while also enabling the Department to continue to protect national security and enforce criminal laws. We look forward to working with Congress on this measure.

The Department's current policies provide separate processes for subpoenas and search warrants in the course of investigations involving members of the news media. As you know, 28 C.F.R § 50.10 governs the issuance of subpoenas to members of the news media, including subpoenas seeking their telephone toll records. This regulation requires the Department in every case to consider the balance between the public's interest in the flow of information and the public's interest in effective law enforcement and the fair administration of justice. Thus, the regulation requires the government to take all reasonable alternative investigative steps before considering issuing a subpoena to a member of the news media or for the telephone toll records of a member of the news media. The regulation also requires the authorization of the Attorney General before issuing a subpoena to a member of the news media or for telephone toll records of a member of the news media. This regulation has not been substantively amended in more than 30 years, and is a subject of the review process currently being undertaken by the Attorney General at the President's direction. Search warrants for materials in the possession of a journalist whose purpose is to disseminate information to the public are governed by the Privacy Protection Act of 1980, 42 U.S.C. § 2000aa, et seq. That law outlines the limited circumstances under which the Department may seek Court approval for a search warrant. Specifically, under the Privacy Protection Act, the government may seek work product materials or documents in the possession of a journalist only where there is probable cause to believe that the journalist has committed or is committing a criminal offense to which the materials relate, including the crime of unlawfully disclosing national defense or classified information.

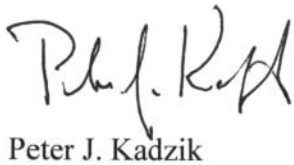
Your letter also asks for additional information about the investigation of the unauthorized disclosure of classified information to a reporter in 2009. At the outset, it is important to note the difference between an investigation and a prosecution. When the Department has initiated a criminal investigation into the unauthorized disclosure of classified information, the Department must, as it does in all criminal investigations, conduct a thorough investigation and follow the facts where they lead. Seeking a search warrant is part of an investigation of potential criminal activity, which typically comes before any final decision about prosecution. Probable cause sufficient to justify a search warrant for evidence of a crime is far different from a decision to bring charges for that crime; probable cause is a significantly lower burden of proof than beyond a reasonable doubt, which is required to obtain a conviction on criminal charges. Prior to seeking charges in a matter, prosecutors evaluate the facts and the law and make decisions about who should be prosecuted. The regulation governing the issuance of subpoenas to the news media described above, which provides for consideration of the public's various interests, also requires that the Attorney General must approve any charges against a member of the news media. We are unaware of an instance when the Department has prosecuted a journalist for the mere publication of classified information.

The unauthorized disclosure of classified information that appeared in a June 2009 news article was a serious breach that compromised national security. The Federal Bureau of Investigation conducted a comprehensive inquiry into that unauthorized disclosure, and after exhausting all other reasonable options, the government applied for a search warrant for information in the reporter's email account believed to be related to the source of the unauthorized disclosure. The affidavit in support of the search warrant satisfied the requirements

of the Privacy Protection Act, based on the facts alleged, and a federal judge granted that warrant. The Attorney General was consulted and approved the application for the search warrant during the course of the investigation. Ultimately, as you know, although a Grand Jury has charged a government employee with the unauthorized disclosure of classified information, prosecutors have not pursued charges against the reporter. At no time during the pendency of this matter—before or after seeking the search warrant—have prosecutors sought approval to bring criminal charges against the reporter. The Attorney General's testimony before the Committee on May 15, 2013, with respect to the Department's prosecutions of the unauthorized disclosure of classified information was accurate and consistent with these facts. As the Attorney General explained, these prosecutions focus on those who "break their oath and put the American people at risk, not reporters who gather this information."

We hope that this information is helpful. Please do not hesitate to contact this office if we may be of additional assistance in this or any other matter.

Sincerely,



Peter J. Kadzik
Principal Deputy Assistant Attorney General

cc: The Honorable John Conyers, Jr.
Ranking Minority Member
Committee on the Judiciary

The Honorable Bobby Scott
Ranking Minority Member
Subcommittee on Crime, Terrorism
Homeland Security, and Investigations
Committee on the Judiciary