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9-13.001 - Electronic Recording of Statements

This policy establishes a presumption that the Federal Bureau of Investigation (FBI), the Drug Enforcement Administration (DEA), the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF), and the United States Marshall Service (USMS) will electronically records statements made by individuals in their custody in the circumstances set forth below.

This policy also encourages agents and prosecutors to consider electronic recording in investigative or other circumstances where the presumption does not apply. The policy encourages agents and prosecutors to consult with each other in such circumstances.

I. Presumption of Recording. There is a presumption that the custodial statement of an individual in a place of detention with suitable recording equipment, following arrest but prior to initial appearance, will be electronically recorded, subject to the exceptions defined below. Such custodial interviews will be recorded without the need for supervisory approval.

- Electronic recording. This policy strongly encourages the use of video recording to satisfy the presumption. When video recording equipment considered suitable under agency policy is not available, audio recording may be utilized.
- Custodial interviews. The presumption applies only to interviews of persons in FBI, DEA, ATF or USMS custody. Interviews in non-custodial settings are excluded from the presumption.
- Place of detention. A place of detention is any structure where persons are held in connection with federal criminal charges where those persons can be interviewed. This includes not only federal facilities, but also any state, local, or tribal law enforcement facility, office, correctional or detention facility, jail, police or sheriff=s station, holding cell, or other structure used for such purpose. Recording under this policy is not required while a person is waiting for transportation, or is en route, to a place of detention.

d. Suitable recording equipment. The presumption is limited to a place of detention that has suitable recording equipment. With respect to a place of detention owned or controlled by FBI, DEA, ATF, or USMS, suitable recording equipment means:

(i) an electronic recording device deemed suitable by the agency for the recording of interviews that,

(ii) is reasonably designed to capture electronically the entirety of the interview. Each agency will draft its own policy governing placement, maintenance and upkeep of such equipment, as well as requirements for preservation and transfer of recorded content.

With respect to an interview by FBI, DEA, ATF, or USMS in a place of detention they do not own or control, but which has recording equipment, FBI, DEA, ATF, or USMS will each determine on a case by case basis whether that recording equipment meets or is equivalent to that agency's own requirements or is otherwise suitable for use in recording interviews for purposes of this policy.

- e. Timing. The presumption applies to persons in custody in a place of detention with suitable recording equipment following arrest but who have not yet made an initial appearance before a judicial officer under Federal Rule of Criminal Procedure 5.
- f. Scope of offenses. The presumption applies to interviews in connection with all federal crimes.
- g. Scope of recording. Electronic recording will begin as soon as the subject enters the interview area or room and will continue until the interview is completed.
- h. Recording may be overt or covert. Recording under this policy may be covert or overt. Covert recording constitutes consensual monitoring, which is allowed by federal law. See 18 U.S.C. §2511(2)(c). Covert recording in fulfilling the requirement of this policy may be carried out without constraint by the procedures and approval requirements prescribed by other Department policies for consensual monitoring.

II. Exceptions to the Presumption. A decision not to record any interview that would otherwise presumptively be recorded under this policy must be documented by the agent as soon as practicable. Such documentation shall be made available to the United States Attorney and should be reviewed in connection with a periodic assessment of this policy by the United States Attorney and the Special Agent in Charge or their designees.

- a. Refusal by interviewee. If the interviewee is informed that the interview will be recorded and indicates that he or she is willing to give a statement but only if it is not electronically recorded, then a recording need not take place.
- b. Public Safety and National Security Exception. Recording is not prohibited in any of the circumstances covered by this exception and the decision whether or not to record should wherever possible be the subject of consultation between the agent and the prosecutor. There is no presumption of electronic recording where questioning is done for the purpose of gathering public safety information under *New York v. Quarles*. The presumption of recording likewise does not apply to those limited circumstances where questioning is undertaken to gather national security-related intelligence or questioning concerning intelligence, sources, or methods, the public disclosure of which would cause damage to national security.
- c. Recording is not reasonably practicable. Circumstances may prevent, or render not reasonably practicable, the electronic recording of an interview that would otherwise be presumptively recorded. Such circumstances may include equipment malfunction, an unexpected need to move the interview, or a need for multiple interviews in a limited timeframe exceeding the available number of recording devices.
- d. Residual exception. The presumption in favor of recording may be overcome where the Special Agent in Charge and the United States Attorney, or their designees, agree that a significant and articulable law enforcement purpose requires setting it aside. This exception is to be used sparingly.

III. Extraterritoriality. The presumption does not apply outside of the United States. However, recording may be appropriate outside the United States where it is not otherwise precluded or made infeasible by law, regulation, treaty, policy, or practical concerns such as the suitability of recording equipment. The decision whether to record an interview - whether the subject is in foreign custody, U.S. custody, or not in custody - outside the United States should be the subject of consultation between the agent and the prosecutor, in addition to other applicable requirements and authorities.

IV. Administrative Issues.

- a. Training. United States Attorneys' offices and field offices of each agency should consider collaborating if and as needed to provide periodic training for agents and prosecutors on best practices associated with electronic recording of interviews.
- b. Assignment of responsibilities. The investigative agencies will bear the cost of acquiring and maintaining, in places of detention they control where custodial interviews occur, recording equipment in sufficient numbers to meet expected needs for the recording of such interviews. Agencies will pay for electronic copies of recordings for distribution pre-indictment. Post-indictment, the United States Attorneys' offices will pay for transcripts of recordings, as necessary.

[added December 2017]

9-13.100 - Out of Court Identification Procedures

See the [Criminal Resource Manual](#) at 238 et seq. for a discussion of the law on lineups and showups, photographic lineups, fingerprinting, handwriting, voice exemplars and voice prints and other physical evidence issues.

[updated July 1998]

9-13.200 - Communications with Represented Persons

Department attorneys are governed in criminal and civil law enforcement investigations and proceedings by the relevant rule of professional conduct that deals with communications with represented persons. 28 U.S.C. Section 530B. In determining which rule of professional conduct is relevant, Department attorneys should be guided by 28 C.F.R. Part 77 (1999). Department attorneys are strongly encouraged to consult with

their Professional Responsibility Officers or supervisors—and, if appropriate, the individual Responsibility Advisory Office—when there is a question regarding which is the relevant rule or the interpretation or application of the relevant rule. See also the [Criminal Resource Manual at 296 through 298](#).

[updated May 2005] [cited in [Criminal Resource Manual 703](#)]

9-13.300 - Polygraphs—Department Policy

The Department opposes all attempts by defense counsel to admit polygraph evidence or to have an examiner appointed by the court to conduct a polygraph test. Government attorneys should refrain from seeking the admission of favorable examinations that may have been conducted during the investigatory stage for the following reasons.

Though certain physiological reactions such as a fast heart beat, muscle contraction, and sweaty palms are believed to be associated with deception attempts, they do not, by themselves, indicate deceit. Anger, fear, anxiety, surprise, shame, embarrassment, and resentment can also produce these same physiological reactions. S. Rep. No. 284, 100th Cong., 2d Sess. 3-5 (1988). Moreover, an individual is less likely to produce these physiological reactions if he is assured that the results of the examination will not be disclosed without his approval. Given the present theoretical and practical deficiencies of polygraphs, the government takes the position that polygraph results should not be introduced into evidence at trial. On the other hand, in respect to its use as an investigatory tool, the Department recognizes that in certain situations, as in testing the reliability of an informer, a polygraph can be of some value. Department policy therefore supports the limited use of the polygraph during investigations. This limited use should be effectuated by using the trained examiners of the federal investigative agencies, primarily the FBI, in accordance with internal procedures formulated by the agencies. *E.g.*, R. Ferguson, Polygraph Policy Model for Law Enforcement, *FBI Law Enforcement Bulletin*, pages 6-20 (June 1987). The case agent or prosecutor should make clear to the possible defendant or witness the limited purpose for which results are used and that the test results will be only one factor in making a prosecutive decision. If the subject is in custody, the test should be preceded by Miranda warnings. Subsequent admissions or confessions will then be admissible if the trial court determines that the statements were voluntary. *Wyrick v. Fields*, 459 U.S. 42 (1982); *Keiper v. Cupp*, 509 F.2d 238 (9th Cir. 1975).

See the [Criminal Resource Manual at 259](#) et seq. for a discussion of case law on polygraph examinations.

9-13.400 Obtaining Information From, or Records of, Members of the News Media; and Questioning, Arresting, or Charging Members of the News Media.

In January 2015, the Attorney General issued an updated policy, reflected in 28 C.F.R. 50.10, regarding obtaining information from, or records of, members of the news media; and regarding questioning, arresting, or charging members of the news media. The updated policy is intended to ensure that, in determining whether to seek information from, or records of, members of the news media, the Department strikes the proper 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. See Memorandum from the Attorney General to All Department Employees (Jan. 14, 2015); Memorandum from the Attorney General to All Department Employees (Feb. 21, 2014); Report on Review of News Media Policies (July 2013). To achieve this balance, the policy mandates robust review and evaluation by the Criminal Division of requests for authorization to use covered law enforcement tools, and oversight by senior Department officials.

This section provides guidance regarding the interpretation and application of the policy reflected in 28 C.F.R. 50.10; instruction regarding the process for securing the necessary approvals; and information regarding the **mandatory consultation requirements** that are noted where applicable throughout this section and summarized in subsection M herein. See Memorandum from the Attorney General to All Department Employees (Jan. 14, 2015). To satisfy the mandatory consultation requirement, members of the Department must submit to the Policy and Statutory Enforcement Unit (PSEU) at pseu@usdoj.gov a memorandum describing the relevant facts and addressing the relevant considerations. In addition to the PSEU email address, members of the Department may contact PSEU for any questions by calling (202) 305-4023. Members of the Department **may not employ** the use of the investigative tool at issue until the Criminal Division has responded in writing.

Because obtaining information from, or records of, members of the news media; and questioning, arresting, or charging members of the news media, requires balancing critical law enforcement and free press-related interests, obtaining the Attorney General's authorization to use the law enforcement tools covered by this policy (or consulting with the Criminal Division, as required) often is time intensive. Accordingly, to ensure appropriate consideration, **members of the Department should submit requests for authorization or consultation pursuant to this policy at least 30 days before the anticipated use of the covered law enforcement tool.**

A. Statement of Principles.

1. The Department's policy is intended to provide protection to members of the news media from certain law enforcement tools, whether criminal or civil, that might unreasonably impair newsgathering. The policy is not intended to extend special protections to members of the news media who are the subject or targets of criminal investigations for conduct not based on, or within the scope of, newsgathering activities. 28 C.F.R. 50.10(a)(1). The policy also is not intended to inhibit the ability of law enforcement authorities to engage with members of the news media for the purpose of seeking the voluntary (i.e., without compulsion) production or disclosure of records, materials, or information; or to question or interview members of the news media on a voluntary basis when such questioning does not concern criminal conduct the member of the news media is suspected of having committed in the course of, or arising out of, newsgathering activities.

The policy does not define "member of the news media." Rather, whether an individual or an entity is a member of the news media is a fact-specific inquiry, and should be determined on a case-by-case basis. The policy also does not define "newsgathering activities," which determination affects whether the Attorney General, as opposed to the United States Attorney or the Assistant Attorney General responsible for the matter, must authorize the use of a particular law enforcement tool. See 28 C.F.R. 50.10(c)(3)(ii) and (d)(4).

When there is a question regarding whether an individual or entity is a member of the news media, members of the Department must consult with the PSEU before employing the use of a covered law enforcement tool. Members of the

Department must also consult with the PSEU regarding whether the conduct at issue of the affected member of the news media constitutes or relates to "newsgathering activities."

2. In determining whether to seek information from, or records of, members of the news media, the approach in every instance must be to strike the proper balance between 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. 28 C.F.R. 50.10(a)(2).
3. The Department views the use of certain law enforcement tools, including subpoenas, court orders issued pursuant to 18 U.S.C. 2703(d) or 3123, and search warrants to seek information from, or records of, non-consenting members of the news media as extraordinary measures, not standard investigatory practices. 28 C.F.R. 50.10(a)(3).
4. When the Attorney General has authorized the use of a subpoena, court order issued pursuant to 18 U.S.C. 2703(d) or 3123, or warrant to obtain from a third party the communications records or business records of a member of the news media, the affected member of the news media shall be given reasonable and timely notice of the Attorney General's determination before the use of the subpoena, court order, or warrant, unless the Attorney General determines that, for compelling reasons, such notice would pose a clear and substantial threat to the integrity of the investigation, risk grave harm to national security, or present an imminent risk of death or serious bodily harm. 28 C.F.R. 50.10(a)(4); *see also* 28 C.F.R. 50.10(e).

B. Scope.

1. Covered Individuals and Entities

- i. The policy governs the use of certain law enforcement tools to obtain information from, or records of, members of the news media; and the questioning, arresting, or charging of members of the news media.
- ii. The protections of the policy do not extend to any individual or entity where there are reasonable grounds to believe that the individual or entity is a foreign power or an agent of a foreign power; a member or an affiliate of a foreign terrorist organization; designated a specially designated global terrorist; a specially designated terrorist; a terrorist organization; committing or attempting to commit a crime of terrorism; committing or attempting to commit the crime of providing material support or resources to a terrorist organization; or aiding, abetting, or conspiring in illegal activity with such individuals or entities. 28 C.F.R. 50.10(b)(1)(ii).

Members of the Department must consult with the PSEU regarding whether an individual or entity is not covered by, and therefore not entitled to the protections of, the policy, pursuant to 28 C.F.R. 50.10(b)(1)(ii). The Criminal Division will consult with the National Security Division, as appropriate.

2. Covered Law Enforcement Tools and Records

- i. The policy governs the use by law enforcement authorities of subpoenas to obtain information from members of the news media, including documents, testimony, and other materials; and the use by law enforcement authorities of subpoenas, or court orders issued pursuant to 18 U.S.C. 2703(d) (2703(d) order) or 18 U.S.C. 3123 (3123 order), to obtain from third parties "communications records" or "business records" of members of the news media, as those terms are defined in 28 C.F.R. 50.10(b)(3). 28 C.F.R. 50.10(b). **Members of the Department shall consult with the PSEU regarding whether particular records sought constitute communications records or business records as defined by this policy.**
- ii. The policy governs applications for warrants to search the premises or property of members of the news media, pursuant to Federal Rule of Criminal Procedure 41; or to obtain from third-party "communication service providers" the communications records or business records of members of the news media, pursuant to 28 U.S.C. 2703(a) and (b). *Id.*
- iii. The policy governs questioning members of the news media about, arresting members of the news media for, or charging members of the news media with criminal conduct they are suspected of having committed in the course of, or arising out of, newsgathering activities.

3. *Subpoenas or Court Orders Issued or Obtained by Other Executive Branch Departments or Agencies.* Although not expressly addressed in 28 C.F.R. 50.10, members of the Department must consult with the Criminal Division before taking steps to enforce subpoenas issued to member of the news media, or to compel compliance with subpoenas or court orders issued to third parties for communications records or business records of member of the news media, which subpoenas were issued or court orders obtained in the first instance by other Executive Branch departments or agencies. To satisfy the consultation requirement, members of the Department shall submit to the PSEU a memorandum describing the factual and legal background of the matter. Members of the Department may not proceed with any efforts to enforce or compel compliance with any subpoenas or court orders until the Criminal Division has responded in writing to the request for consultation.

C. Issuing Subpoenas to Members of the News Media, or Using Subpoenas or Court Orders Issued Pursuant to 18 U.S.C. 2703 or 3123 to Obtain From Third Parties Communications Records or Business Records of Members of the News Media.

1. Except as set forth in 28 C.F.R. 50.10(c)(3), members of the Department must obtain the authorization of the Attorney General to issue a subpoena to a member of the news media; or to use a subpoena, 2703(d) order, or 3123 order to obtain from a third party communications records or business records of a member of the news media. 28 C.F.R. 50.10(c)(1).

2. Requests for the authorization of the Attorney General for the issuance of a subpoena to a member of the news media; or to use a subpoena, 2703(d) order, or 3123 order to obtain communications records or business records of a member of the news media, must be personally endorsed by the United States Attorney or Assistant Attorney General responsible for the matter. 28 C.F.R. 50.10(c)(2).
3. *Exceptions to the Attorney General Authorization Requirement*
 - i. **Consent of Member of the News Media.** The United States Attorney or Assistant Attorney General responsible for the matter may authorize the issuance of a subpoena to a member of the news media, if the member of the news media expressly agrees to provide the requested information in response to a subpoena. 28 C.F.R. 50.10(c)(3)(i). In such circumstances, the United States Attorney or Assistant Attorney General responsible for a matter shall provide notice to the Director of the Criminal Division's Office of Enforcement Operations within 10 business days of the authorization of the issuance of the subpoena. *Id.*
 - ii. **Information Sought Not Related to Newsgathering Activities**
 - a. The United States Attorney or Assistant Attorney General responsible for the matter may authorize the issuance of a subpoena to a member of the news media for purely commercial, financial, administrative, technical, or other information unrelated to newsgathering activities; or for information or records relating to personnel not involved in newsgathering activities. 28 C.F.R. 50.10(c)(3)(ii)(A). **Before issuing a subpoena to a member of the news media pursuant to this provision, members of the Department must consult with the PSEU.**
 - b. The United States Attorney or Assistant Attorney General responsible for the matter may authorize the issuance of a subpoena to a member of the news media for information related to public comments, messages, or postings by readers, viewers, customers, or subscribers, over which the member of the news media does not exercise editorial control prior to publication. 28 C.F.R. 50.10(c)(3)(ii)(B). **Before issuing a subpoena to a member of the news media pursuant to this provision, members of the Department must consult with the PSEU.**
 - c. The United States Attorney or Assistant Attorney General responsible for the matter may authorize the use of subpoenas to obtain information from, or the use of subpoenas, 2703(d) orders, or 3123 orders to obtain communications records or business records of, members of the news media who may be perpetrators or victims of, or witnesses to, crimes or other events, when such status (as a perpetrator, victim, or witness) is not based on, or within the scope of, newsgathering activities. 28 C.F.R. 50.10(c)(3)(ii)(C). **Before issuing a subpoena or applying for a court order pursuant to this provision, members of the Department must consult with the PSEU.**
 - d. **Criminal Division Consultation and Notice.** In the circumstances identified in 28 C.F.R. 50.10(c)(3)(ii), the United States Attorney or Assistant Attorney General responsible for the matter must consult with the Criminal Division regarding appropriate review and safeguarding protocols; and provide a copy of the subpoena or court order to the Director of the Office of Public Affairs and to the Director of the Criminal Division's Office of Enforcement Operations within 10 business days of the authorization. 28 C.F.R. 50.10(c)(3)(iii).
4. In seeking the authorization of the Attorney General to issue a subpoena to a member of the news media, members of the Department shall address the considerations identified in 28 C.F.R. 50.10(c)(4).
 - i. **Member of the news media as subject or target.** In matters in which a member of the Department determines that a member of the news media is a subject or target of an investigation relating to an offense committed in the course of, or arising out of, newsgathering activities, the member of the Department requesting Attorney General authorization to issue a subpoena to a member of the news media shall provide all facts necessary to a determination by the Attorney General regarding both whether the member of the news media is a subject or target of the investigation and whether to authorize the issuance of such subpoena. 28 C.F.R. 50.10(c)(4)(i). If the Attorney General determines that the member of the news media is a subject or target of an investigation relating to an offense committed in the course of, or arising out of, newsgathering activities, the Attorney General's determination should take into account the principles reflected in 28 C.F.R. 50.10(a), but need not take into account the considerations identified in 28 C.F.R. 50.10(c)(4)(ii) – (viii). *Id.* **Members of the Department must consult with the PSEU regarding whether a member of the news media is a subject or target of an investigation related to an offense committed in the course of, or arising out of, newsgathering activities.**
 - ii. **Director of National Intelligence Certification.** In investigations or prosecutions of unauthorized disclosures of national defense information or classified information, the member of the Department requesting Attorney General authorization to issue a subpoena to a member of the news media shall obtain from the Director of National Intelligence (DNI) a document certifying (1) the significance of the harm raised by the unauthorized disclosure, (2) that the information disclosed was properly classified, and (3) re-affirmance of the intelligence community's support for the investigation or prosecution. 28 C.F.R. 50.10(c)(4)(vi). **Because securing the necessary certification from the DNI may take considerable time, members of the Department are encouraged to initiate the process at least 30 days in advance of seeking the Attorney General's authorization, and must coordinate with the National Security Division in seeking the DNI certification.**
5. In seeking the authorization of the Attorney General to use a subpoena, 2703(d) order, or 3123 order to obtain from a third party the communications records or business records of a member of the news media, members of the Department shall address the considerations identified in 28 C.F.R. 50.10(c)(5).

- i. **Member of the news media as subject or target.** In matters in which a member of the Department determines that a member of the news media is a subject or target of an investigation relating to an offense committed in the course of, or arising out of, newsgathering activities, the member of the Department requesting Attorney General authorization to use a subpoena, 2703(d) order, or 3123 order to obtain from a third party the communications records or business records of a member of the news media shall provide all facts necessary to a determination by the Attorney General regarding both whether the member of the news media is a subject or target of the investigation and whether to authorize the use of such subpoena or court order. 28 C.F.R. 50.10(c)(5)(i). If the Attorney General determines that the member of the news media is a subject or target of an investigation relating to an offense committed in the course of, or arising out of, newsgathering activities, the Attorney General's determination should take into account the principles reflected in 28 C.F.R. 50.10(a), but need not take into account the considerations identified in 28 C.F.R. 50.10(c)(5)(ii) – (viii). ***Id.* Members of the Department must consult with the PSEU regarding whether a member of the news media is a subject or target of an investigation related to an offense committed in the course of, or arising out of, newsgathering activities.**
- ii. **Director of National Intelligence Certification.** In investigations or prosecutions of unauthorized disclosures of national defense information or classified information, the member of the Department requesting Attorney General authorization to use a subpoena, 2703(d) order, or 3123 order to obtain from a third party the communications records or business records of a member of the news media shall obtain from the Director of National Intelligence a document certifying (1) the significance of the harm raised by the unauthorized disclosure, (2) that the information disclosed was properly classified, and (3) re-affirmance of the intelligence community's support for the investigation or prosecution. 28 C.F.R. 50.10(c)(5)(v). **Because securing the necessary certification from the DNI may take considerable time, members of the Department are encouraged to initiate the process at least 30 days in advance of seeking the Attorney General's authorization, and must coordinate with the National Security Division in seeking the DNI certification.**

6. Consultation with Criminal Division before Moving to Compel.

- i. When the Attorney General has authorized the issuance of a subpoena to a member of the news media; or the use of a subpoena, 2703(d) order, or 3123 order to obtain from a third party communications records or business records of a member of the news media, members of the Department shall consult with the Criminal Division *before moving to compel compliance with any such subpoena or court order.* 28 C.F.R. 50.10(c)(6). To satisfy the consultation requirement, members of the Department shall submit to the PSEU a memorandum (2) describing the facts, including communications with the affected member of the news media and other events, that transpired since the Attorney General's authorization; and (2) explaining why compulsion is necessary.
- ii. Although not expressly addressed in 28 C.F.R. 50.10, members of the Department must consult with the Criminal Division before taking steps to enforce subpoenas issued to member of the news media, or to compel compliance with subpoenas or court orders issued to third parties for communications records or business records of member of the news media, which subpoenas were issued or court orders obtained in the first instance by other Executive Branch departments or agencies. To satisfy the consultation requirement, members of the Department shall submit to the PSEU a memorandum describing the factual and legal background of the matter. Members of the Department may not proceed with any efforts to enforce or compel compliance with any subpoenas or court orders until the Criminal Division has responded in writing to the request for consultation.

7. Non-Disclosure Orders Directed to News Media Entities or Third-Party Communication Service Providers

- i. In seeking authorization of the Attorney General, pursuant to 28 C.F.R.50.10(c), or a Deputy Assistant Attorney General for the Criminal Division, pursuant to 28 C.F.R. 50.10(g), to issue a subpoena to a news media entity; or to use of a subpoena, 2703(d) order, or 3123 order to obtain from a third party communications records or business records of a member of the news media, members of the Department must indicate whether they intend to seek an order directing the recipient of the subpoena or court order, if authorized, not to disclose the existence of the subpoena or court order to any other person or entity, and shall articulate the need for such non-disclosure order. Any authorization must expressly indicate whether a non-disclosure order may be sought.
- ii. **Consultation with Criminal Division before Seeking Non-Disclosure Orders Directed to News Media Entity when US Attorney or Assistant Attorney General Authorizes Issuance of Subpoena.** If an Assistant Attorney General or a United States Attorney authorizes the issuance of a subpoena to a news media entity pursuant to 28 C.F.R. 50.10(c)(3), before seeking an order directing the recipient of the subpoena not to disclose the existence of the subpoena to any other person or entity, the responsible Assistant Attorney General or United States Attorney must consult with the Criminal Division regarding the need for such order, and may not seek the non-disclosure order until or unless expressly authorized to do so in writing by the Attorney General, the Deputy Attorney General, the Assistant Attorney General for the Criminal Division, or a Deputy Assistant Attorney General for the Criminal Division.

8. **Notice to Criminal Division of Factual or Legal Developments.** When the Attorney General, an Assistant Attorney General, or a United States Attorney has authorized the use of a covered law enforcement tool to obtain information from, or records of, a member of the news media, members of the Department who requested and obtained such authorization shall immediately apprise the Criminal Division of any subsequent changes to or developments in the facts or circumstances relevant to the decision making process (e.g., considerations identified in 28 C.F.R. 50.10(c)(4), (c)(5), (d)(3), or (f)). When such disclosure of changed facts or circumstances is made, the member of the Department may not issue the subpoena or move to compel compliance with the same unless expressly authorized to do so in writing by the Attorney General, the Deputy Attorney General, the Assistant Attorney General for the Criminal Division, or a Deputy Assistant Attorney General for the Criminal Division.

D. Applying for Warrants to Search the Premises, Property, Communications Records, or Business Records of Members of the News Media. 1

1. Except as set forth in 28 C.F.R. 50.10(d)(4), members of the Department must obtain the authorization of the Attorney General to apply for a warrant to search the premises, property, communications records, or business records of a member of the news media. 28 C.F.R. 50.10(d)(1).
2. All requests for the authorization of the Attorney General to apply for a warrant to search the premises, property, communications records, or business records of a member of the news media must personally be endorsed by the United States Attorney or Assistant Attorney General responsible for the matter. 28 C.F.R. 50.10(d)(2).
3. In seeking the authorization of the Attorney General to apply for a warrant to search the premises, property, communications records, or business records of a member of the news media, members of the Department should address both the requirements of the Privacy Protection Act (PPA), 42 U.S.C. 2000aa – 2000aa- 7, and the considerations identified in 28 C.F.R. 50.10(c)(5). 28 C.F.R. 50.10(d)(3).

- i. **Member of the news media as subject or target.** In matters in which a member of the Department determines that a member of the news media is a subject or target of an investigation relating to an offense committed in the course of, or arising out of, newsgathering activities, the member of the Department requesting Attorney General authorization to apply for a warrant to search the premises, property, communications records, or business records of a member of the news media shall provide all facts necessary to a determination by the Attorney General regarding both whether the member of the news media is a subject or target of the investigation and whether to authorize the application for the warrant. *See* 28 C.F.R. 50.10(c)(5)(i). If the Attorney General determines that the member of the news media is a subject or target of an investigation relating to an offense committed in the course of, or arising out of, newsgathering activities, the Attorney General's determination should take into account both the requirements of the PPA and the principles reflected in 28 C.F.R. 50.10(a), but need not take into account the considerations identified in 28 C.F.R. 50.10(c)(5)(ii) – (viii). ***Id.* Members of the Department must consult with the PSEU regarding whether a member of the news media is a subject or target of an investigation related to an offense committed in the course of, or arising out of, newsgathering activities.**
- ii. **Director of National Intelligence Certification.** In investigations or prosecutions of unauthorized disclosures of national defense information or classified information, the member of the Department requesting Attorney General authorization to apply for a warrant to search the premises, property, communications records, or business records of a member of the news media shall obtain from the Director of National Intelligence a document certifying (1) the significance of the harm raised by the unauthorized disclosure, (2) that the information disclosed was properly classified, and (3) re-affirmance of the intelligence community's support for the investigation or prosecution. 28 C.F.R. 50.10(c)(5)(v). **Because securing the necessary certification from the DNI may take considerable time, members of the Department are encouraged to initiate the process at least 30 days in advance of seeking the Attorney General's authorization, and must coordinate with the National Security Division in seeking the DNI certification.**

4. Members of the Department may be authorized to apply for a warrant to obtain work product or other documentary materials of a member of the news media pursuant to the "suspect exception" of the Privacy Protection Act (PPA), 42 U.S.C. 2000aa(a)(1), (b)(1), when the member of the news media is a subject or target of a criminal investigation for conduct not based on, or within the scope of, newsgathering activities. In such instances, members of the Department must secure authorization from a Deputy Assistant Attorney General for the Criminal Division to apply for the warrant. 28 C.F.R. 50.10(d)(4). For example, if a member of the news media is the subject or target of a criminal investigation concerning the production or distribution of child pornography or an investigation concerning extortion, and the conduct is not based on, or within the scope of, such individual's newsgathering activities, an application for a warrant to search the individual's premises, property, communications records, or business records must be approved by a Deputy Assistant Attorney General for the Criminal Division.

Members of the Department must consult with the PSEU regarding whether the conduct at issue is based on, or within the scope of, newsgathering activities.

5. Members of the Department should not be authorized to apply for a warrant to obtain work product materials or other documentary materials of a member of the news media under the PPA suspect exception, *see* 42 U.S.C. 2000aa(a)(1) and (b)(1), if the sole purpose is to further the investigation of a person other than the member of the news media. 28 C.F.R. 50.10(d)(5).
6. **Searches of Non-Media Premises, Property, Communications Records, or Business Records. 2** A Deputy Assistant Attorney General (DAAG) for the Criminal Division may authorize an application for a warrant to search the premises, property, or communications records of an individual ***other than a member of the news media***, e.g., an academic, but who is reasonably believed to have "a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication." 42 U.S.C. 2000aa(a), (b). *See* 28 C.F.R. 50.10(d)(6).

- i. If the request involves the contemplated search of electronic or digital records, members of the Department shall submit a request to the Criminal Division's Computer Crime and Intellectual Property Section (CCIPS).
- ii. If the request involves only the contemplated search of physical premises, property, or records, members of the Department shall submit a request to the PSEU.
- iii. The Criminal Division DAAG will determine (1) whether the individual or entity whose premises, property, or records may be searched is protected by the PPA; and, if so, (2) whether the information sought constitutes "work product materials" or "other

documents" as defined by the PPA; and, if so, (3) whether the PPA's suspect exception or another exception to the general prohibition on the search and seizure of such materials is applicable.

7. In executing a warrant authorized by the Attorney General or by a Deputy Assistant Attorney General for the Criminal Division, investigators should use protocols designed to minimize intrusion into potentially protected materials or newsgathering activities unrelated to the investigation, including but not limited to keyword searches (for electronic searches) and filter teams. 28 C.F.R. 50.10(d)(7). Members of the Department should include proposed search and review protocols in their requests for authorization.

E. Notice to Affected Member of the News Media.

1. In matters in which the Attorney General has both determined that a member of the news media is a subject or target of an investigation relating to an offense committed in the course of, or arising out of, newsgathering activities, and authorized the use of a subpoena, court order, or warrant to obtain from a third party the communications records or business records of a members of the news media pursuant to 28 C.F.R. 50.10(c)(4)(i), (c)(5)(i), or (d)(1), members of the Department are not required to provide notice of the Attorney General's authorization to the member of the news media. See 28 C.F.R. 50.10(e)(1)(i). The Attorney General may, nevertheless, direct that notice be provided. If the Attorney General does not direct that notice be provided, the United States Attorney or Assistant Attorney General responsible for the matter shall provide to the Attorney General within 90 days of the authorization (and every 90 days thereafter) an update regarding the status of the investigation, which update shall include an assessment of any harm that would be caused to the investigation if notice were provided to the affected member of the news media. The Attorney General shall consider such updates in determining whether to direct that notice provided.
2. Except as provided in 28 C.F.R. 50.10(e)(1), when the Attorney General has authorized the use of a subpoena, court order, or warrant to obtain from a third party communications records or business records of a member of the news media, the affected member of the news media shall be given reasonable and timely notice of the Attorney General's determination before the use of the subpoena, court order, or warrant, unless the Attorney General determines that, for compelling reasons, such notice would pose a clear and substantial threat to the integrity of the investigation, risk grave harm to national security, or present an imminent risk of death or serious bodily harm. 28 C.F.R. 50.10(e)(2). The mere possibility that notice to the affected member of the news media, and potential judicial review, might delay the investigation is not, on its own, a compelling reason to delay notice. *Id.*
3. When the Attorney General has authorized the use of a subpoena, court order, or warrant to obtain communications records or business records of a member of the news media, and the affected member of the news media has not been given notice, pursuant to 28 C.F.R. 50.10(e)(2), of the Attorney General's determination before the use of the subpoena, court order, or warrant, the United States Attorney or Assistant Attorney General responsible for the matter **shall** provide to the affected member of the news media notice of the subpoena, court order, or warrant as soon as it is determined that such notice will no longer pose a clear and substantial threat to the integrity of the investigation, risk grave harm to national security, or present an imminent risk of death or serious bodily harm. 28 C.F.R. 50.10(e)(3). In any event, such notice shall occur within 45 days of the government's receipt of any return made pursuant to the subpoena, court order, or warrant, *except that* the Attorney General may authorize delay of notice for an additional 45 days if he or she determines that for compelling reasons, such notice would pose a clear and substantial threat to the integrity of the investigation, risk grave harm to national security, or present an imminent risk of death or serious bodily harm. *Id.* No further delays may be sought beyond the 90-day period. *Id.*
4. The United States Attorney or Assistant Attorney General responsible for the matter shall provide to the Director of the Office of Public Affairs and to the Director of the Criminal Division's Office of Enforcement Operations a copy of any notice to be provided to the affected member of the news media at least 10 business days before such notice is provided, *and* immediately after such notice is, in fact, provided to the affected member of the news media. 28 C.F.R. 50.10(e)(4).

F. Questioning, Arresting, or Charging Members of the News Media.

1. No member of the Department shall subject a member of the news media to questioning as to any offense which he or she is suspected of having committed in the course of, or arising out of, newsgathering activities without first providing notice to the Director of the Office of Public Affairs and obtaining the express authorization of the Attorney General. 28 C.F.R. 50.10(f)(1).

- i. The government need not view the member of the news media as a subject or target of an investigation, or have the intent to prosecute the member of the news media, to trigger the requirement that the Attorney General must authorize such questioning. *Id.* **Before questioning a member of the news media, members of the Department must consult with the PSEU whenever the proposed questioning may relate to an offense the member of the news media "is suspected of having committed in the course of, or arising out of, newsgathering activities" even if the government does not view the member of the news media as a subject or target of an investigation, or have the intent to prosecute the member of the news media.**
- ii. If law enforcement authorities intend to question the member of the news media about criminal conduct he or she is suspected of having committed in the course of, or arising out of, newsgathering activities, the Attorney General must authorize any such questioning. Conversely, if, at the time the request is made, law enforcement authorities do not intend to question the member of the news media about criminal conduct he or she is suspected of having committed in the course of, or arising out of, newsgathering activities, the Attorney General need not authorize such questioning. **Before questioning a member of the news media, members of the Department must consult with the PSEU whenever the proposed questioning may relate to an offense the member of the news media "is suspected of having committed in the course of, or arising out of,**

newsgathering activities."

- iii. This requirement is not intended to inhibit the ability of law enforcement authorities to question or interview members of the news media on a voluntary basis when such questioning does **not** concern criminal conduct the member of the news media is suspected of having committed in the course of, or arising out of, newsgathering activities. For example, members of the Department do not need authorization, pursuant to 28 C.F.R. 50.10, to contact a member of the news media for the purpose of alerting such person to their status as a victim of or witness to a crime, or to question on a voluntary basis such person about their status as a victim of or witness to a crime – even if such status as a victim or witness is related to newsgathering activities. **Before questioning or interviewing a member of the news media in connection with their status as a victim of or witness to a crime, members of the Department must consult with the PSEU to confirm such status.**
2. No member of the Department shall seek a warrant for an arrest, or conduct an arrest, of a member of the news media for any offense which he or she is suspected of having committed in the course of, or arising out of, newsgathering activities without first providing notice to the Director of the Office of Public Affairs and obtaining the express authorization of the Attorney General. 28 C.F.R. 50.10(f)(2). **Before seeking an arrest warrant for, or arresting, a member of the news media, members of the Department must consult with the PSEU regarding whether the member of the news media engaged in the conduct at issue "in the course of, or arising out of, newsgathering activities."**
3. No member of the Department shall present information to a grand jury seeking a bill of indictment, or file an information, against a member of the news media for any offense which he or she is suspected of having committed in the course of, or arising out of, newsgathering activities without first providing notice to the Director of the Office of Public Affairs and obtaining the express authorization of the Attorney General. 28 C.F.R. 50.10(f)(3). **Before charging a member of the news media, members of the Department must consult with the PSEU regarding whether the member of the news media engaged in the conduct at issue "in the course of, or arising out of, newsgathering activities."**
4. In requesting the Attorney General's authorization to question, to seek an arrest warrant for, or to arrest, or to present information to a grand jury seeking an indictment or to file an information against, a member of the news media as provided in 28 C.F.R. 50.10(f)(1) – (f)(3), a member of the Department shall provide all facts necessary for a determination by the Attorney General. 28 C.F.R. 50.10(f)(4). To do so, the member of the Department should submit to the PSEU a memorandum describing the offense under investigation, the status of the investigation, and the role of the member of the news media in the conduct at issue and the relationship to such person's newsgathering activities; and a discussion of the rationale for the proposed questioning, arrest, or charging of the member of the news media in light of the purposes of the policy as set forth in 28 C.F.R. 50.10(a).

G. Exigent Circumstances.

1. A Deputy Assistant Attorney General for the Criminal Division may authorize the use of a subpoena or court order, as described in 28 C.F.R. 50.10(c), or the questioning, arrest, or charging of a member of the news media, as described in 28 C.F.R. 50.10(f), if he or she determines that the exigent use of such law enforcement tool is necessary to prevent or mitigate an act of terrorism; other acts that are reasonably likely to cause significant and articulable harm to national security; death; kidnapping; substantial bodily harm; conduct that constitutes a specified offense against a minor (for example, as those terms are defined in section 111 of the Adam Walsh Child Protection and Safety Act of 2006, 42 U.S.C. 16911), or an attempt or conspiracy to commit such a criminal offense; or incapacitation or destruction of critical infrastructure (for example, as defined in section 1016(e) of the USA PATRIOT Act, 42 U.S.C. 5195c(e)). 28 C.F.R. 50.10(g)(1)(i). A Deputy Assistant Attorney General for the Criminal Division may authorize an application for a warrant, as described in 28 C.F.R. 50.10(d), if there is reason to believe that the immediate seizure of the materials at issue is necessary to prevent the death of, or serious bodily injury to, a human being, as provided in 42 U.S.C. 2000aa(a)(2) and (b)(2). 28 C.F.R. 50.10(g)(1)(ii).
2. Within 10 business days of the approval by a Deputy Assistant Attorney General for the Criminal Division of a request for the exigent use of a particular law enforcement tool pursuant to 28 C.F.R. 50.10(g)(1), the United States Attorney or Assistant Attorney General responsible for the matter shall provide to the Attorney General, to the Director of the Office of Public Affairs, and to the Director of the Criminal Division's Office of Enforcement Operations a statement containing the information that would have been provided in a request for prior authorization. 28 C.F.R. 50.10(g)(2).

H. Safeguarding

1. Any information obtained pursuant to a subpoena, court order, or warrant pursuant to 28 C.F.R. 50.10 shall be closely held so as to prevent disclosure of the information to unauthorized persons or for improper purposes. 28 C.F.R. 50.10(h). Specifically,
 - i. Access to information or records obtained from members of the news media or from third parties pursuant to 28 C.F.R. 50.10 shall be limited to personnel who are working on the investigation or related judicial or administrative proceedings and who have a direct need to know.
 - ii. Information or records obtained from members of the news media or from third parties pursuant to 28 C.F.R. 50.10 shall be used solely in connection with the investigation in which it was obtained, or related judicial or administrative proceedings; or for other purposes with the written consent of the affected member of the news media.
 - iii. Information or records obtained from members of the news media or from third parties pursuant to 28 C.F.R. 50.10 may not be shared with any other organization or individual inside or outside of the federal government, except as part of the investigation or as required in the course of judicial proceedings.

iv. At the conclusion of all proceedings related to or arising from the investigation, other than information or records disclosed in the course of judicial proceedings, or as required by law, the Department shall retain only one copy of any records obtained from members of the news media or from third parties pursuant to 28 C.F.R. 50.10, which copy shall be maintained in a secure and segregated repository.

2. If the Attorney General or Deputy Attorney General finds that specific, identifiable records or information constitute evidence of a separate past or imminent crime involving (i) death; (ii) kidnapping; (iii) substantial bodily harm; (iv) conduct that constitutes a criminal offense that is a specified offense against a minor, as defined by 42 U.S.C. § 16911(7); or (v) incapacitation or destruction of critical infrastructure, as defined by 42 U.S.C. § 5195c(e), the Attorney General or Deputy Attorney General may authorize broader use of the information.

I. **Failure to Comply with Policy.** Failure to obtain the prior approval of the Attorney General, as required by 28 C.F.R. 50.10, may constitute grounds for an administrative reprimand or other appropriate disciplinary action. 28 C.F.R. 50.10(i).

J. **General Provision.** The policy is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person. 28 C.F.R. 50.10(j).

K. Review and Approval Process

1. **Issuing Subpoenas to Members of the News Media, or Using Subpoenas or Court Orders Issued Pursuant to 18 U.S.C. 2703 or 3123 to Obtain From Third Parties Communications Records or Business Records of Members of the News Media.** The Criminal Division shall review and evaluate all requests for the authorization of the Attorney General to issue subpoenas to members of the news media, or to use subpoenas or court orders issued pursuant to 18 U.S.C. 2703 or 3123 to obtain from third parties communications records or business records of a member of the news media, pursuant to 28 C.F.R. 50.10(c). Such requests should be submitted to the PSEU at least 30 business days before the anticipated use of the law enforcement tool, and shall address all applicable considerations identified in 28 C.F.R. 50.10(c)(4) and (c)(5).

2. **Applying for Warrants to Search the Premises, Property, Communications Records, or Business Records of Members of the News Media.** The Criminal Division shall review and evaluate all requests for authorization to apply for warrants to search the premises, property, communications records, or business records of members of the news media (or a person or entity that has "a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication."). See 42 U.S.C. § 2000aa(a) and (b); 28 C.F.R. 50.10(d); and USAM 9-19.240. Such requests shall be submitted to the PSEU at least 30 business days before the anticipated application for a warrant, and shall address all applicable considerations identified in 28 C.F.R. 50.10(d) and USAM 9-19.240.

3. **Questioning, Charging, or arresting Members of the News Media.** The Criminal Division shall review and evaluate all requests for the authorization of the Attorney General to question, arrest, or charge a member of the news media. Such requests should be submitted to the PSEU at least 30 business days before the anticipated questioning, charging, or arrest, and shall address all applicable considerations identified in 28 C.F.R. 50.10(f).

4. **Review by the Director of the Office of Public Affairs.** Unless a Deputy Assistant Attorney General for the Criminal Division has authorized the exigent use of a covered law enforcement tool pursuant to 28 C.F.R. 50.10(g), or unless directed otherwise by the Attorney General, the Assistant Attorney General for the Criminal Division shall forward to the Director of the Office of Public Affairs for review and comment the Criminal Division's recommendation regarding any requests requiring a decision by the Attorney General.

5. **News Media Review Committee.** In February 2014, the Department created the News Media Review Committee to assist in balancing the investigative imperatives with the protection of the public's interest in the freedom of the press. See Memorandum from Attorney General to All Department Employees (Feb. 21, 2014); Memorandum from Deputy Attorney General James M. Cole to Heads of Department Components (Feb. 28, 2014). The News Media Review Committee is comprised of the Department's Chief Privacy and Civil Liberties Officer, the Director of the Office of Public Affairs, and Associate Deputy Attorney General, and two senior career Assistant United States Attorneys with relevant expertise and experience but no involvement (supervisory or otherwise) in the matter under consideration.

i. Unless a Deputy Assistant Attorney General for the Criminal Division has authorized the exigent use of a covered law enforcement tool pursuant to 28 C.F.R. 50.10(g), or unless directed otherwise by the Attorney General or the Deputy Attorney General, the Assistant Attorney General for the Criminal Division shall, in the following circumstances, forward to the News Media Review Committee for its review and comment the Criminal Division's recommendation:

- a. If the request relates to the investigation of unauthorized disclosure of sensitive law enforcement or national defense information;
- b. If Department attorneys request authorization to seek communications records or business records of a member of the news media without first negotiating with, or providing notice to, the affected member of the news media;
- c. If Department attorneys request authorization to seek information from, or records of, a member of the news media that would reveal the identity of a confidential source; or

d. At the request of the Attorney General or Deputy Attorney General.

- ii. After reviewing the relevant materials, and consulting with Department personnel, as necessary, the News Media Review Committee will communicate its recommendation in writing to the Attorney General and Deputy Attorney General.

6. **Notice to Criminal Division of Factual or Legal Developments.** When the Attorney General, an Assistant Attorney General, or a United States Attorney has authorized the use of a covered law enforcement tool to obtain information from, or records of, a member of the news media, members of the Department who requested and obtained such authorization shall immediately apprise the Criminal Division of any subsequent changes to or developments in the facts or circumstances relevant to the decision making process (e.g., considerations identified in 28 C.F.R. 50.10(c)(4), (c)(5), (d)(3), or (f)). When such disclosure of changed facts or circumstances is made, the member of the Department may not issue the subpoena or move to compel compliance with the same unless expressly authorized to do so in writing by the Attorney General, the Deputy Attorney General, the Assistant Attorney General for the Criminal Division, or a Deputy Assistant Attorney General for the Criminal Division.

L. Reporting Requirements

1. When a United States Attorney or Assistant Attorney General has authorized the issuance of a subpoena to a member of the news media when the member of the news media expressly agrees to provide the requested information in response to a subpoena, pursuant to 28 C.F.R. 50.10(c)(3)(i); or has authorized the issuance of a subpoena to a member of the news media, or the use of a subpoena or court order to obtain from a third party the communications records or business records of a member of the news media, pursuant to 28 C.F.R. 50.10(c)(3)(ii), the United States Attorney or Assistant Attorney General shall provide written notice to the Director of Office of Public Affairs and the Director of the Criminal Division's Office of Enforcement Operations within 10 business days of the authorization of the issuance of the subpoena.
2. When the Attorney General has authorized the use of a subpoena, court order, or warrant to obtain from a third party the communications records or business records of a member of the news media, the United States Attorney or Assistant Attorney General responsible for the matter shall provide to the Director of the Office of Public Affairs and to the Director of the Criminal Division's Office of Enforcement Operations a copy of any notice to be provided to the affected member of the news media at least 10 business days before such notice is provided, *and* immediately after such notice is, in fact, provided to the affected member of the news media.
3. Within 10 business days of a Deputy Assistant Attorney General for the Criminal Division authorizing the exigent use of a particular law enforcement tool, pursuant to 28 C.F.R. 50.10(g), the United States Attorney or Assistant Attorney General responsible for the matter shall submit to the Attorney General, to the Director of the Office of Public Affairs, and to the Director of the Criminal Division's Office of Enforcement Operations a statement containing the information that would have been provided in requesting prior authorization.
4. All Department Divisions and United States Attorneys' Offices shall report to the Director of the Office of Public Affairs and to the Director of the Criminal Division's Office of Enforcement Operations by January 31 of each year whether a subpoena, § 2703(d) order, § 3123 order, or warrant, authorized by the Attorney General, or by a Deputy Assistant Attorney General for the Criminal Division, during the preceding calendar year was issued, served, or executed, and whether the affected member of the news media or third-party recipient of the subpoena, court order, or warrant complied with or challenged the same, and the outcome of any such challenge. This information will be used to prepare a public annual report regarding the Department's use of these law enforcement tools.

M. Mandatory Consultations.

1. To ensure the consistent interpretation and application of the policy, members of the Department must consult with the Criminal Division in the following circumstances, or regarding the following determinations:
 - i. When there is a question regarding whether an individual or entity is a member of the news media.
 - ii. Whether an individual or entity is not covered by, and therefore not entitled to the protections of, the policy, pursuant to 28 C.F.R. 50.10(b)(1)(ii), which expressly provides that the protections of the policy do not extend to any individual or entity in certain circumstances (e.g., where there are reasonable grounds to believe that the individual or entity is a foreign power or agent of a foreign power).
 - iii. Whether the conduct at issue of the affected member of the news media constitutes or relates to "newsgathering activities."
 - iv. Whether the records sought constitute "communications records" or "business records." See 28 C.F.R. 50.10(b)(3).
 - v. Whether a proposed subpoena or court order falls within one of the exceptions to the Attorney General authorization requirement and, therefore, may be authorized by the United States Attorney or Assistant Attorney General responsible for the matter. See 28 C.F.R. 50.10(c)(3)(ii).
 - vi. Whether a member of the news media is a subject or target of an investigation relating to an offense committed in the course of, or arising out of, newsgathering activities, see 28 C.F.R. 50.10(c)(4)(i), (c)(5)(i), (d)(3), and (e).

- vii. Whether proposed questioning of a member of the news media may relate to criminal conduct the member of the news media is suspected of having committed an offense in the course of, or arising out of, newsgathering activities, see 28 C.F.R. 50.101(f).
- viii. Before moving to compel compliance with a subpoena, 2703(d) order, or 3123 order authorized by the Attorney General. 28 C.F.R. 50.10(c)(6).
- ix. Although not expressly addressed in 28 C.F.R. 50.10, members of the Department must consult with the Criminal Division before taking steps to enforce subpoenas issued to member of the news media, or to compel compliance with subpoenas or court orders issued to third parties for communications records or business records of member of the news media, which subpoenas were issued or court orders obtained in the first instance by other Executive Branch departments or agencies.
- x. Before seeking an order directing a news media entity-recipient of a subpoena authorized by an Assistant Attorney General or a United States Attorney pursuant to 28 C.F.R. 50.10(c)(3) not to disclose the existence of the subpoena to any other person or entity.

2. To satisfy the consultation requirement, members of the Department must submit to the PSEU a memorandum describing the relevant facts and addressing the relevant considerations. **Members of the Department may not employ the use of the law enforcement tool at issue until the Criminal Division has responded in writing.**

N. **Questions.** Any questions regarding the use of subpoenas, court orders issued pursuant to 18 U.S.C. 2703(d) or 3123, or search warrants to obtain information from, or records of, members of the news media; or regarding questioning, arresting, or charging members of the news media should be directed to the PSEU at pseu@usdoj.gov or (202) 305-4023.

Footnotes

1. In *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978), the Supreme Court held that a search of the offices of the Stanford newspaper for photographs that might help a police investigation of violent protests, which the paper had covered, did not violate either the Fourth or the First Amendments. In response, in 1980, Congress enacted the Privacy Protection Act (PPA), 42 U.S.C. 2000aa – 2000aa-7, to provide "the press and certain other persons not suspected of committing a crime with protections not provided currently by the Fourth Amendment." S. Rep. No. 96-874, at 4 (1980), *reprinted in* 1980 U.S.C.C.A.N. 3950. The statute was intended "to limit searches for materials held by persons involved in First Amendment activities who are themselves not suspected of participation in the criminal activity for which the materials are sought, and not to limit the ability of law enforcement officers to search for and seize materials held by those suspected of committing the crime under investigation." *Id.* at 11. The protections of the PPA apply not only to members of the news media, but also to a broader class of persons reasonably believed to have a purpose to disseminate information to the public. For additional guidance, see [Searching & Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations](#), Computer Crime and Intellectual Property Section (CCIPS), Criminal Division, pp. 101-109.

2. The PPA generally prohibits the search or seizure of "work product materials" or "other documents" possessed by a person, or entity in connection with, "a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication." Because such materials or documents may be found in the premises, property, communications records, or business records of an individual or entity protected by the PPA, *any* search of those places may implicate the PPA. Therefore, members of the Department must obtain authorization from a Deputy Assistant Attorney General for the Criminal Division to apply for a warrant to search the premises, property, or communications records of an individual *other than a member of the news media and who is reasonably believed to have a purpose to disseminate to the public a form of public communication*. See 28 C.F.R. 50.10(d)(6).

[updated October 2016] [cited in [USAM 9-11.140](#); [USAM 9-11.255](#)]

9-13.410 - Guidelines for Issuing Subpoenas to Attorneys for Information Relating to the Representation of Clients

A. **Authorization of the Criminal Division.** Because of the potential effects upon an attorney-client relationship that may result from the issuance of a subpoena to an attorney for information relating to the attorney's representation of a client, the Department exercises close control over such subpoenas. Such subpoenas (for both criminal and civil matters) must first be authorized by the Assistant Attorney General or a Deputy Assistant Attorney General for the Criminal Division before they may issue, *unless* the circumstances warrant application of one of the exceptions set forth in subsection D below. **However, any subpoena to be issued to an attorney in a civil or criminal matter arising principally under the internal revenue laws must be submitted to the Tax Division for authorization pursuant to Tax Division policies and procedures.** In instances requiring Department approval in which the matter arises under both the internal revenue and non-tax laws, the submission must be made to the Criminal Division for authorization, which will consult with the Tax Division *unless* the circumstances warrant application of one of the exceptions set forth in subsection D below.

This policy extends to proposed subpoenas to paralegals, investigators, or other employees or agents of attorneys, if the information sought relates to the attorney's representation of a client, including information that the employee or the agent of the attorney, rather than the attorney personally, acquired.

The authorization requirement applies only to subpoenas for information related to the representation of a client. It does not apply to all subpoenas involving attorneys or their employees or agents. For example, Criminal Division authorization is *not* required to issue:

- o A subpoena to a bank for the records of an attorney's trust account, because trust accounts tend to hold the pooled funds of numerous clients, and records related to such accounts ordinarily do not relate to individual clients, and do not contain or reflect

privileged or confidential attorney-client communications.

- A subpoena for internal law office business documents (pay records of law office employees, law firm tax returns, etc.), because it relates to the day-to-day business operations of the law firm, and not to the representation of a client. Subpoenas for billing and payment records related to the representation of a client, however, must be authorized by the Criminal Division.
- A subpoena seeking information regarding the attorney's personal activities, and not regarding his/her representation of a client.
- A subpoena seeking corporate business information, and which is directed to an attorney who serves as a corporate officer. To make clear that the attorney is being subpoenaed in his/her capacity as a corporate officer, and that no attorney-client information is being sought, the subpoena should be addressed to "John Doe, in his capacity as secretary of the XYZ Corporation."

B. Preliminary Steps. When determining whether to issue a subpoena to an attorney for information relating to the attorney's representation of a client, Department personnel must strike a balance between an individual's right to the effective assistance of counsel and the public's interest in the fair administration of justice and effective law enforcement. To that end, all reasonable attempts shall be made to obtain the information from alternative sources before issuing the subpoena to the attorney, unless such efforts would compromise the investigation or case. These attempts shall include reasonable efforts to first obtain the information voluntarily from the attorney, unless such efforts would compromise the investigation or case, or would impair the ability to subpoena the information from the attorney in the event that the attempt to obtain the information voluntarily proves unsuccessful.

C. Evaluation of the Request. In considering a request to approve the issuance of a subpoena to an attorney for information relating to the representation of a client, the Assistant Attorney General or a Deputy Assistant Attorney General for the Criminal Division applies the following principles:

1. The information sought shall not be protected by a valid claim of privilege.
2. All reasonable attempts to obtain the information from alternative sources shall have proved to be unsuccessful.
3. In a criminal investigation or prosecution, there must be reasonable grounds to believe that a crime has been or is being committed, and that the information sought is reasonably needed for the successful completion of the investigation or prosecution. The subpoena must not be used to obtain peripheral or speculative information.
4. In a civil case, there must be reasonable grounds to believe that the information sought is reasonably necessary to the successful completion of the litigation.
5. The need for the information must outweigh the potential adverse effects upon the attorney-client relationship. In particular, the need for the information must outweigh the risk that the attorney may be disqualified from representation of the client as a result of having to testify against the client.
6. The subpoena shall be narrowly drawn and directed at material information regarding a limited subject matter and shall cover a reasonable, limited period of time.

D. Exceptions to Criminal Division Authorization

1. **Friendly Subpoenas for Client-Related Information.** The United States Attorney or Assistant Attorney General responsible for a matter may authorize the issuance of a "friendly subpoena" for client-related information, that is, in a situation in which an attorney witness expressly agrees in writing (including by email) to provide the information, but requests the formality of a subpoena. Before issuing any such subpoena, the responsible United States Attorney or Assistant Attorney General must evaluate the request consistent with subsection C of this policy. If the friendly subpoena seeks testimony, information, or materials identified in Items (D) (2)(a)-(h) below, the federal prosecutor handling the case may authorize the issuance of the subpoena.

2. **Information Not Protected by Privilege or Circumstances Not Offending Attorney-Client Relationship.** In addition, authorization by the Criminal Division is not required where the contemplated subpoena is limited to seeking one or more of the following categories of information, since such subpoenas do not raise concerns regarding the potential application of the attorney-client privilege or the potential for negative impact upon the attorney-client relationship:

- a. Records of property transactions, including real estate closing statements, sales contracts, and payment records.
- b. Information or materials provided by a client to an attorney for the purpose of disclosure to third parties, including information or materials provided for disclosure in bankruptcy proceedings, tax filings, immigration proceedings, or similar matters and transactions.
- c. Publicly filed documents not reasonably available from other sources.
- d. Testimony or materials necessary to respond to a claim of ineffective assistance of counsel, including, but not limited to, petitions filed pursuant to 28 U.S.C. § 2255 and D.C. Code § 23-110.
- e. Testimony or materials necessary to probe the viability of, or respond to, a formal, written claim or assertion by a civil litigant or a criminal defendant that he or she reasonably relied on the advice of counsel in engaging in the conduct at issue in the specific matter in which the information is sought. This exception does not apply to subpoenas intended to probe the possibility or viability of an advice-of-counsel defense that has not formally been claimed or asserted by a civil litigant or criminal defendant.
- f. Testimony or materials within the scope of an explicit and unchallenged waiver, or other express form of consent by the attorney's client to disclosure of the subject information.
- g. Information or materials produced or created in discovery, including deposition testimony, if such information or materials are not subject to a protective order.
- h. Testimony or materials that the court presiding over the underlying proceeding has ordered a party to produce or provide.

E. Submitting the Request. Requests for authorization should be submitted to the Policy and Statutory Enforcement Unit (PSEU), Office of Enforcement Operations, Criminal Division. When documents are sought in addition to the testimony of the attorney witness, a draft of the

subpoena duces tecum, listing the documents sought, must accompany the submission.

- F. **No Rights Created by Guidelines.** These guidelines are set forth solely for the purpose of internal Department of Justice guidance. They are not intended to, do not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter, civil or criminal, nor do they place any limitations on otherwise lawful investigative or litigative prerogatives of the Department of Justice.
- G. **Questions.** Questions regarding the applicability of the authorization requirement or any of its exceptions should be directed to the Policy and Statutory Enforcement Unit, Office of Enforcement Operations at 202-305-4023 or pseu@usdoj.gov.

[updated March 2016] [cited in [USAM 9-11.255](#); [USAM 9-13.420](#)]

9-13.420 - Searches of Premises of Subject Attorneys

NOTE: For purposes of this policy only, "subject" includes an attorney who is a "suspect, subject or target," or an attorney who is related by blood or marriage to a suspect, or who is believed to be in possession of contraband or the fruits or instrumentalities of a crime. This policy also applies to searches of business organizations where such searches involve materials in the possession of individuals serving in the capacity of legal advisor to the organization. Search warrants for "documentary materials" held by an attorney who is a "disinterested third party" (that is, any attorney who is not a subject) are governed by 28 C.F.R. 59.4 and [USAM 9-19.221](#) *et seq.* See also 42 U.S.C. Section 2000aa-11(a)(3).

There are occasions when effective law enforcement may require the issuance of a search warrant for the premises of an attorney who is a subject of an investigation, and who also is or may be engaged in the practice of law on behalf of clients. Because of the potential effects of this type of search on legitimate attorney-client relationships and because of the possibility that, during such a search, the government may encounter material protected by a legitimate claim of privilege, it is important that close control be exercised over this type of search. Therefore, the following guidelines should be followed with respect to such searches:

- A. **Alternatives to Search Warrants.** In order to avoid impinging on valid attorney-client relationships, prosecutors are expected to take the least intrusive approach consistent with vigorous and effective law enforcement when evidence is sought from an attorney actively engaged in the practice of law. Consideration should be given to obtaining information from other sources or through the use of a subpoena, unless such efforts could compromise the criminal investigation or prosecution, or could result in the obstruction or destruction of evidence, or would otherwise be ineffective.

NOTE: Prior approval must be obtained from the Assistant Attorney General for the Criminal Division to issue a subpoena to an attorney relating to the representation of a client. See [USAM 9-13.410](#).

- B. **Authorization by United States Attorney or Assistant Attorney General.** No application for such a search warrant may be made to a court without the express approval of the United States Attorney or pertinent Assistant Attorney General. Ordinarily, authorization of an application for such a search warrant is appropriate when there is a strong need for the information or material and less intrusive means have been considered and rejected.
- C. **Prior Consultation.** In addition to obtaining approval from the United States Attorney or the pertinent Assistant Attorney General, and before seeking judicial authorization for the search warrant, the federal prosecutor must consult with the Criminal Division.

NOTE: Attorneys are encouraged to consult with the Criminal Division as early as possible regarding a possible search of an attorney's office. Telephone No. (202) 305-4023; Fax No. (202) 305-0562.

To facilitate the consultation, the prosecutor should submit the attached form (see [Criminal Resource Manual at 265](#)) containing relevant information about the proposed search along with a draft copy of the proposed search warrant, affidavit in support thereof, and any special instructions to the searching agents regarding search procedures and procedures to be followed to ensure that the prosecution team is not "tainted" by any privileged material inadvertently seized during the search. This information should be submitted to the Criminal Division through the Office of Enforcement Operations. This procedure does not preclude any United States Attorney or Assistant Attorney General from discussing the matter personally with the Assistant Attorney General of the Criminal Division.

If exigent circumstances prevent such prior consultation, the Criminal Division should be notified of the search as promptly as possible. In all cases, the Criminal Division should be provided as promptly as possible with a copy of the judicially authorized search warrant, search warrant affidavit, and any special instructions to the searching agents.

The Criminal Division is committed to ensuring that consultation regarding attorney search warrant requests will not delay investigations. Timely processing will be assisted if the Criminal Division is provided as much information about the search as early as possible. The Criminal Division should also be informed of any deadlines.

- D. **Safeguarding Procedures and Contents of the Affidavit.** Procedures should be designed to ensure that privileged materials are not improperly viewed, seized or retained during the course of the search. While the procedures to be followed should be tailored to the facts of each case and the requirements and judicial preferences and precedents of each district, in all cases a prosecutor must employ adequate precautions to ensure that the materials are reviewed for privilege claims and that any privileged documents are returned to the attorney from whom they were seized.
- E. **Conducting the Search.** The search warrant should be drawn as specifically as possible, consistent with the requirements of the investigation, to minimize the need to search and review privileged material to which no exception applies. While every effort should be made to avoid viewing privileged material, the search may require limited review of arguably privileged material to ascertain whether the material is covered by the warrant. Therefore, to protect the attorney-client privilege and to ensure that the investigation is not compromised by exposure to privileged material relating to the investigation or to defense strategy, a "privilege team" should be designated, consisting of agents and lawyers not involved in the underlying investigation.

Instructions should be given and thoroughly discussed with the privilege team prior to the search. The instructions should set forth procedures designed to minimize the intrusion into privileged material, and should ensure that the privilege team does not disclose any information to the investigation/prosecution team unless and until so instructed by the attorney in charge of the privilege team. Privilege team lawyers should be available either on or off-site, to advise the agents during the course of the search, but should not participate in the search itself.

The affidavit in support of the search warrant may attach any written instructions or, at a minimum, should generally state the government's intention to employ procedures designed to ensure that attorney-client privileges are not violated.

If it is anticipated that computers will be searched or seized, prosecutors are expected to follow the procedures set forth in the current edition of *Searching and Seizing Computers*, published by CCIPS.

F. **Review Procedures.** The following review procedures should be discussed prior to approval of any warrant, consistent with the practice in your district, the circumstances of the investigation and the volume of materials seized.

- Who will conduct the review, i.e., a privilege team, a judicial officer, or a special master.
- Whether all documents will be submitted to a judicial officer or special master or only those which a privilege team has determined to be arguably privileged or arguably subject to an exception to the privilege.
- Whether copies of all seized materials will be provided to the subject attorney (or a legal representative) in order that: a) disruption of the law firm's operation is minimized; and b) the subject is afforded an opportunity to participate in the process of submitting disputed documents to the court by raising specific claims of privilege. To the extent possible, providing copies of seized records is encouraged, where such disclosure will not impede or obstruct the investigation.
- Whether appropriate arrangements have been made for storage and handling of electronic evidence and procedures developed for searching computer data (i.e., procedures which recognize the universal nature of computer seizure and are designed to avoid review of materials implicating the privilege of innocent clients).

These guidelines are set forth solely for the purpose of internal Department of Justice guidance. They are not intended to, do not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter, civil or criminal, nor do they place any limitations on otherwise lawful investigative or litigative prerogatives of the Department of Justice.

See the [Criminal Resource Manual at 265](#), for an attorney office search warrant form.

[updated October 2012] [cited in [Criminal Resource Manual 265](#)]

9-13.500 - International Legal Assistance

The Criminal Division's Office of International Affairs (514-0000) must be consulted before contacting any foreign or State Department official in matters relating to extradition of a fugitive or the obtaining of evidence in a criminal investigation or prosecution.

Any proposed contact with persons, other than United States investigative agents, in a foreign country for the purpose of obtaining the extradition of a fugitive or evidence should first be discussed with the Office of International Affairs, Criminal Division.

Before attempting to do any act outside the United States relating to a criminal investigation or prosecution, including contacting a witness by telephone or mail, prior approval must be obtained from the Office of International Affairs.

See the [Criminal Resource Manual at 266](#), for additional background regarding the Office of International Affairs.

[cited in [USAM 9-11.140](#)]

9-13.510 - Obtaining Evidence Abroad—General Considerations

Because virtually every nation enacts laws to protect its sovereignty and can react adversely to American law enforcement efforts to gather evidence within its borders as a violation of that sovereignty, contact the Office of International Affairs initially to evaluate methods for securing assistance from abroad and to select an appropriate one. See the [Criminal Resource Manual at 267](#) et seq.

9-13.512 - Intended Use of the Evidence

When a country grants assistance for a particular purpose, contact the Office of International Affairs (OIA) before using it for a different purpose. OIA will determine whether it can be used for a different purpose without the express permission of the country that provided it and, if not, for guidance in securing such permission. See the [Criminal Resource Manual at 269](#).

9-13.514 - Time Required

Contact the Office of International Affairs as soon as it appears that assistance from overseas will be needed. See the [Criminal Resource Manual at 271- 272](#).

9-13.516 - Cost of Obtaining Evidence

Be sure funds are available before making a costly request. See the [Criminal Resource Manual at 273](#).

9-13.520 - Methods of Obtaining Evidence from Abroad

There are many different methods of obtaining evidence from abroad, including the use of letters rogatory, treaty requests, executive agreements and memoranda of understanding, subpoenas (see [USAM 9-13.525](#)), and other informal means. Contact the Office of International Affairs before choosing a method. See the [Criminal Resource Manual at 274- 279](#).

[cited in [Criminal Resource Manual 267](#)]

9-13.525 - Subpoenas

Since the use of unilateral compulsory measures can adversely affect United States law enforcement relationship with a foreign country, all Federal prosecutors must obtain written approval through the Office of International Affairs (OIA) before issuing any subpoenas to persons or

entities in the United States for records located abroad. See the [Criminal Resource Manual at 279](#), for a description of the requirements of requesting such approval. OIA must also be consulted prior to initiating enforcement proceedings relating to such subpoenas.

OIA's approval must be obtained prior to serving a subpoena ad testificandum on an officer of, or attorney for, a foreign bank or corporation who is temporarily in or passing through the United States when the testimony sought relates to the officer's or attorney's duties in connection with the operation of the bank or corporation.

[cited in [USAM 9-13.520](#); [Criminal Resource Manual 285](#)]

9-13.526 - Forfeiture of Assets Located in Foreign Countries

International and domestic coordination are needed in matters relating to the forfeiture of assets located in foreign countries. See the [Criminal Resource Manual at 280](#). Consequently, any attorney for the Federal government who plans to file a civil forfeiture action for assets located in another country pursuant to 28 U.S.C. § 1355(b)(2) is directed to notify the Office of International Affairs (OIA) of the Criminal Division before taking such action. Notification to OIA should be in writing and include the information listed in the [Criminal Resource Manual at 280](#).

Within ten days of receipt of such notification, OIA, in consultation with the Asset Forfeiture and Money Laundering Section, will review the notification information, consult with foreign and U.S. authorities as appropriate to the facts and circumstances of the specific proposal, and communicate its findings to the attorney for the Federal government who submitted the notification.

Attorneys for the Federal government are also directed to consult with the OIA before taking steps to present to a foreign government, for enforcement or recognition, any civil or criminal forfeiture order entered in the United States for property located within the foreign jurisdiction.

In cases where it appears that the property in question is likely to be removed, destroyed, or dissipated so as to defeat the possibility of the forfeiture under U.S. law, the attorney for the Federal government may, of course, request the OIA to seek the assistance of the authorities of the foreign government where the property is located in seizing or taking whatever action is necessary and appropriate to preserve the property for forfeiture.

[cited in [USAM 9-119.010](#)]

9-13.530 - Special Considerations—Translations

In every case requiring a translation, prosecutors must reach a clear understanding with the Office of International Affairs (OIA) about who will secure the translation and send it overseas. Generally, arrangements for translation must be made and paid for by the United States Attorney's Office. See the [Criminal Resource Manual at 282](#).

9-13.534 - Foreign Travel by Prosecutors

Foreign travel must be authorized in advance either by the Executive Office for United States Attorneys (EOUSA) (travel involving Assistant United States Attorneys) or by the Office of International Affairs (OIA) (travel involving Departmental prosecutors). EOUSA will not authorize the travel unless the prosecutor has obtained the approvals required in [USAM 3-8.730](#). Prosecutors should contact EOUSA and OIA well in advance of their intended departure date because foreign clearances take time. See also the [Criminal Resource Manual at 284](#).

[updated October 1999] [cited in [Criminal Resource Manual 284](#)]

9-13.535 - Depositions

If an essential witness who is not subject to a subpoena (unwilling to come to the United States to testify, the prosecutor may attempt to proceed by means of a deposition. See Fed. R. Crim. P. 15 and 18 U.S.C. § 3503. See the [Criminal Resource Manual at 285](#) for additional discussion regarding depositions and for the procedures which should be followed.

9-13.540 - Assisting Foreign Prosecutors

To avoid undercutting Departmental policy, when prosecutors receive requests for assistance from foreign prosecutors, prosecutors should discuss all such requests with the Office of International Affairs before executing. See the [Criminal Resource Manual at 286](#).

Costs of executing foreign requests (including court reporter's fees) are the responsibility of the country making the request unless an applicable treaty requires the United States to pay; in that event, the United States Attorney's Office pays the costs.

9-13.600 - Use of Hypnosis

For a discussion of the law relating to the use of hypnosis, see the [Criminal Resource Manual at 287- 294](#).

9-13.700 - Applications for Protective Orders Pursuant to 18 U.S.C. § 2705(b)

The Stored Communications Act (SCA) permits the government to obtain certain records and information from providers of electronic communications services or remote computing services relating to their customers or subscribers. Under the SCA, the government may compel the disclosure of different categories of information via subpoena, a court order under 18 U.S.C. § 2703(d), or a search warrant. The SCA does not by default forbid a provider from notifying anyone. Providers will be prohibited from voluntarily notifying their users of the receipt of legal process under the SCA only if the government obtains a protective order under 18 U.S.C. § 2705(b), based on a need for protection from disclosure.

Each § 2705(b) order should have an appropriate factual basis and each order should extend only as long as necessary to satisfy the government's interest. Prosecutors who are applying for § 2705(b) orders must follow the steps outlined below:

1. Prosecutors must conduct an individualized and meaningful assessment regarding the need for protection from disclosure prior to seeking a § 2705(b) order and only seek an order when circumstances require.
2. In applying for a § 2705(b) order, prosecutors should tailor the application to include the available facts of the specific case and/or concerns attendant to the particular type of investigation. The prosecutor should identify which of the factors set forth in § 2705(b)(1)–(5) apply and explain why. For example, prosecutors might choose to include information about the relationship of the data sought to the subject(s) of the investigation or describe the potential for related accounts or data to be destroyed or otherwise made inaccessible to investigators. Similarly, prosecutors may identify concerns attendant to the risk of flight or harm to public safety in that particular investigation, including those concerns based on experience with similar types of investigations. The factors justifying protection from disclosure may be similar in many cases, particularly at the outset of an investigation. As appropriate, prosecutors may state the extent to which the stage of the investigation limits the availability of specific facts justifying the § 2705(b) order.

When applying for a § 2705(b) order to accompany a subpoena seeking basic subscriber information in an ongoing investigation that is not public or known to the subject(s) of the investigation, stating the reasons for protection from disclosure under § 2705(b)—such as the risk that subject(s) will flee, destroy or tamper with evidence, change patterns of behavior, or notify confederates—usually will suffice. At a later stage of the investigation, for example, when a search warrant is being sought, the prosecutor should include more specific facts, as available, in support of the protective order.

3. Prosecutors may seek a single protective order that covers multiple grand jury subpoenas issued as part of the same investigation, or a single protective order that covers other sets of nearly-identical legal process in a discrete investigation. A single protective order for multiple items of process should be sought only if the facts justifying protection from disclosure are the same for all items of process covered by the order. Prosecutors should ensure that a copy of the protective order is served with each item of process covered by the order.
4. Barring exceptional circumstances, prosecutors filing § 2705(b) applications may only seek to delay notice for one year or less. There may be exceptional circumstances in which orders of longer duration are necessary, such as in certain national security investigations that materially differ from routine criminal investigations. Orders seeking to delay notice beyond one year shall be sought only with the written concurrence of a supervisor designated by the United States Attorney or the appropriate Assistant Attorney General, based upon facts and concerns that support a longer delay (e.g., the suspect is an overseas fugitive who may travel internationally at some future time, if not alerted to the investigation).
5. The Department recognizes that judges may direct shorter or longer periods for orders, consistent with the language of § 2705(b).
6. If factors justifying protection from disclosure continue to exist at the expiration of the original order, subsequent extensions of equal or less duration may be sought. Requests should be supported with such additional, specific facts as may have been developed through the investigation.

This policy does not impact or alter existing procedures governing protective orders pursuant to any other authority, including 18 U.S.C. § 2709(c) or the Termination Procedures for National Security Letter Nondisclosure Requirement, Federal Bureau of Investigation (Nov. 24, 2015). Questions related to the interpretation or recommended implementation of this guidance should contact the Computer Crime and Intellectual Property Section of the Criminal Division.

[added December 2017]

9-13.800 - Access to and Disclosure of Financial Records

The Right to Financial Privacy Act of 1978, 12 U.S.C. § 3401 et seq., governs federal agencies' access to and disclosure of all "financial records" of any "customer" from a "financial institution." This statute sets forth a complex set of procedures which United States Attorneys (along with other federal officials) must follow in obtaining the records covered by the Act. These procedures must be followed by law enforcement officials if they are to obtain records needed in an investigation without alerting the target(s) of that investigation.

For additional information, see the *Treatise on the Right to Financial Privacy Act* in the [Criminal Resource Manual at 400](#), or contact the Policy and Statutory Enforcement Unit of the Office of Enforcement Operations.

[cited in [USAM 9-11.141](#); [USAM 9-11.142](#)]

9-13.900 - Access to and Disclosures of Tax Returns in a Non-tax Criminal Case

Title 26 U.S.C. § 6103 prohibits disclosure of tax returns and tax return information except as specifically provided in § 6103, or other sections of the Code. Among the disclosures authorized are those in 26 U.S.C. § 6103(i) concerning access to returns and return information by certain Department of Justice personnel for use in the investigation and prosecution of federal criminal statutory violations and related civil forfeitures not involving tax administration. The access procedures and use restrictions in such a case are set forth in the [Criminal Resource Manual at 501](#) et seq.

Applications for the ex parte order authorized by this paragraph may be authorized by: the Attorney General, the Deputy Attorney General, the Associate Attorney General, any Assistant Attorney General, a United States Attorney, any special prosecutor appointed under 28 U.S.C. § 593, or any attorney in charge of a Criminal Division organized crime strike force established pursuant to 28 U.S.C. § 510. It is anticipated that most applications will be authorized by United States Attorneys or Strike Force Chiefs.

It is the Department's policy that an Ex Parte Application For Returns and Return Information be filed under seal. Prosecutors should file the

motion to seal simultaneously with the Application. The motion should request the court to seal the application and its order granting or denying the application. United States Attorneys should notify Internal Revenue Service whenever a motion to seal is granted, and whenever the records are subsequently unsealed.

[< 9-12.000 - Indictments And Informations](#)

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