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for purposes of identification.*

July 2015

Special Rapporteur on the promotion and protection
of the right to freedom of opinion and expression

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Re: The challenges faced by journalists' sources and U.S. laws and practices
that support their protection.

Dear Special Rapporteur Kaye:

The Reporters Committee for Freedom of the Press ("Reporters
Committee") appreciates the opportunity to submit the following
comments addressing legal challenges that face journalists' sources, as well
as existing laws and practices in the United States that support their
protection.

The Reporters Committee is an unincorporated nonprofit association of
reporters and editors dedicated to safeguarding the right to a free and
unfettered press guaranteed by the First Amendment to the United States
Constitution, and furthering the freedom of information interests of the
news media and the public. The Reporters Committee has provided
assistance, guidance, and research in free speech, free press, and freedom
of information litigation in the United States since 1970.

In this comment, we will 1) briefly explain why the protection of sources is
important to democracy; 2) discuss existing U.S. law and practices that help
to protect journalists and their sources; and 3) identify specific types of legal
challenges facing U.S. journalists and their sources today.

I. Sources are essential to journalism and, in turn, to democracy.

Sources provide journalists—and, through journalists, the public—with
information necessary to hold government entities and officials
accountable for their actions, and help to ensure that citizens have the
information they need to engage in the democratic process.
Journalists need confidential and non-confidential sources. Confidential
sources provide non-attributable content that is often critical for context to
a story, or which provides new sources. Although journalists generally do

not publish articles solely on the basis of information given to them via “off-the-record” discussions, journalists often rely on “off-the-record” discussions to vet or confirm what an “on-the-record” source has told them.

The compelled disclosure of a journalist’s confidential source information, whether through judicial or extrajudicial means, threatens the vital role the press plays in ensuring a transparent and open democracy, and creates a “chilling effect” that reduces sources’ willingness to provide information.¹

II. U.S. legal protections for journalists and their sources.

In the U.S., journalists have constitutional, statutory, common law, and regulatory protections that help to ensure their ability to gather and report the news without government interference. Two of the most important legal protections U.S. journalists have include the First Amendment and state shield laws.

Constitutional protection: The First Amendment.

The First Amendment to the U.S. Constitution guarantees freedom of expression by, among other things, prohibiting the making of any law that infringes the freedom of the press, or the rights of individuals to speak freely.² The First Amendment has been interpreted by U.S. courts as affording broad protection to journalists and news organizations engaged in the gathering and dissemination of news. For example, in *Bartnicki v. Vopper*, the U.S. Supreme Court held that the First Amendment—which has as a core purpose the fostering of robust and uninhibited debate on public issues—protected a news organization from liability for the publication of information of public interest that had been obtained unlawfully by a source.³

Statutory and common law protection: Shield laws and reporter’s privilege.

The majority of states recognize a reporter’s privilege based on state law.⁴ Thirty-nine states and the District of Columbia have shield laws, which give media varying degrees of protection for confidential source information.⁵ Some shield laws protect reporters from forced disclosure of their sources. Other shield laws provide qualified or absolute protection that varies depending on the type of legal proceeding (civil or criminal), the

¹ Reporters Committee for Freedom of the Press, *Chapter 4: Confidential sources and information. The First Amendment Handbook*, available at <https://www.rcfp.org/rcfp/orders/docs/FAHB.pdf> (2011).

² Cornell University Law School, Legal Information Institute, *First Amendment*, available at https://www.law.cornell.edu/constitution/first_amendment (2015).

³ Reporters Committee for Freedom of the Press, *Digital Journalists Legal Guide*, available at <https://www.rcfp.org/digital-journalists-legal-guide/sources-and-subpoenas-reporters-privilege>

⁴ *O’Neill v. Oakgrove Construction Inc.*, 71 N.Y.S.2d 521 (1988).

⁵ Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Washington and Wisconsin. New Mexico and Utah courts recognize a privilege through court rules, not state statutes.

scope of the statute's definition of "journalists," whether material is confidential and/or published, and whether the journalist is a defendant or an independent third party. No federal shield law exists, despite several efforts to enact such statutory protections by legislators at the national level.⁶

Regulatory protection: The Department of Justice's media subpoena guidelines.

The Department of Justice has promulgated federal regulations governing the use of warrants, subpoenas, and court orders to obtain records of or pertaining to the news media.⁷ These guidelines require that the Department seek information from a member of the news media only when it is "essential," after the Department has sought the information from alternative sources, and after the Department has undertaken negotiations with the affected member of the news media.

When a member of the news media is the "subject or target of an investigation relating to an offense committed in the course of, or arising out of, newsgathering activities," however, the Department need not seek the same information from alternative sources nor negotiate with the affected member of the news media.⁸ Additionally, the Guidelines appear not to apply to communications or other records obtained through bulk surveillance or other national security process, discussed below.

III. Challenges facing U.S. journalists and their sources.

Journalists in the U.S. face numerous challenges when striving to protect their sources. These challenges include, but are not limited to, bulk collection and interception of communications by the U.S. government and the aggressive pursuit of government leaks. Combined, these factors greatly challenge journalists' ability to communicate securely and safely with sources, assure sensitive sources confidentiality, and gather news vital to the public interest.

A. Secretive bulk surveillance of communications by the U.S. government.

Both journalists and sources have stated that bulk surveillance and increased leak investigations make them more reluctant to communicate, even if the information at issue is not classified, because it is easier for the government to monitor contacts and

⁶ Reporters Committee for Freedom of the Press. *Shield laws and protection of sources by state*, available at <https://www.rcfp.org/browse-media-law-resources/guides/reporters-privilege/shield-laws>

⁷ 28 C.F.R. § 50.10.

⁸ Office of the Attorney General, *Updated policy regarding obtaining information from, or records of, members of the news media; and regarding questioning, arresting, or charging members of the news media*, available at <http://www.justice.gov/file/317831/download> (Jan. 14, 2015).

investigate their relationship.⁹ The “chilling effect” of mass surveillance has been documented in several reports by organizations including PEN America, Human Rights Watch, and the American Civil Liberties Union, among others.¹⁰

Communications surveillance activities by the U.S. government are conducted pursuant to a number of separate legal authorities. Some provisions of the USA PATRIOT Act, which was passed shortly after the September 11 attacks, amended the Foreign Intelligence Surveillance Act to permit mass communications tracking.¹¹ Section 702 of the Act authorizes the government to target and collect the communications of non-United States persons outside the U.S. for foreign intelligence purposes. Section 215 of the Patriot Act authorizes the government to make an application to the Foreign Intelligence Surveillance Court (FISC) for “an order requiring the production of any tangible things for an investigation...to protect against international terrorism or clandestine intelligence activities.”¹² The Section 215 program, which was recently amended, permits the government to collect books, records, papers, documents, and other items for investigation.

The United States also conducts other forms of bulk communications surveillance abroad, about which little is publicly known. Executive Order 12333 places constraints on the use of these surveillance programs to target communications of United States persons, but some have argued that collection activities are so broad and sweeping that any constraints are trivial.¹³ Many of the minimization procedures that constrain government use of information collected pursuant to EO 12333 remain classified, and the limited information that is publicly available only give vague guidance as to protections in place for First Amendment activity.¹⁴ Journalists and the public need more information about how and why information is acquired by intelligence agencies pursuant to EO 12333 in order for citizens to meaningfully evaluate the impact these programs have on the exercise of First Amendment rights, including freedom of the press.¹⁵

⁹ Leonard Downie Jr., *Leak investigations and surveillance in post 9-11 America*, available at <https://cpj.org/reports/2013/10/obama-and-the-press-us-leaks-surveillance-post-911.php> (Oct. 10, 2013);

¹⁰ PEN America, *Global Chilling: The Impact of Mass Surveillance on International Writers* <http://www.pen.org/global-chill> (Jan. 5, 2014); see also, Human Rights Watch and ACLU, *With Liberty To Monitor All: How Large-Scale US Surveillance is Harming Journalism, Law and American Democracy*, available at https://www.hrw.org/sites/default/files/reports/usnsao714_ForUpload_o.pdf (2014).

¹¹ ACLU, *Surveillance under the USA Patriot Act*, available at <https://www.aclu.org/surveillance-under-usa-patriot-act> (2015)

¹² 50 U.S.C. § 1861(a)(1).

¹³ John Napier Tye, *Meet Executive Order 12333: The Reagan rule that lets the NSA spy on Americans*, Wash. Post, available at <http://wapo.st/UgokLS> (July 18, 2014).

¹⁴ Privacy and Civil Liberties Oversight Board, *Status of Attorney General Approved U.S. Person Procedures Under E.O. 12333*, available at <http://bit.ly/17tYVI>. (Feb. 10, 2015).

¹⁵ Reporters Committee for Freedom of the Press, *Notice PCLOB-2015-01: Activities Under Executive Order 12333*, available at <https://www.rcfp.org/sites/default/files/2015-06-16-pclob-12333-comment.pdf> (June 16, 2015).

Bulk collection of communications implicates reporters' rights in myriad ways. These programs may collect information that can reveal details of confidential communications between reporters and their sources. Because this information is not gleaned directly from reporters, however, journalists are uncertain about whether their communications are under surveillance. The inability to know whether and to what extent communications are being collected or monitored creates fear and uncertainty concerning what the government considers authorized and lawful surveillance, chills speech, and impedes the exercise of First Amendment rights, including free association and free expression.

But bulk surveillance is not the only threat; other national security requests have also been directed at journalists without a warrant. National Security Letters ("NSLs") are warrantless requests issued by high-ranking FBI officials to third parties for non-content records relevant to national security investigations.¹⁶ They are often issued with a gag order, which prevents the recipient from publicly acknowledging they have received the request, or from notifying the subject of the request that a request has occurred. NSLs are most commonly issued pursuant to the Electronic Communications Privacy Act (ECPA), which enables the FBI to request "local and long distance toll billing records" from a "wire or electronic communication service provider" such as an Internet Service Provider, phone company, or email provider. According to the Presidential Review Group, 21,000 NSLs were issued in fiscal year 2012, or about 60 NSLs per day.¹⁷

Several incidents of abuse of NSLs implicating reporters' rights have come to light in recent years. In 2007, during the first review of NSL usage by the Office of the Inspector General for the Department of Justice ("OIG"), OIG found that the FBI had frequently sought telephone toll billing records or subscriber information by using an "exigent letter" rather than NSLs or grand jury subpoenas.¹⁸ Between 2003 and 2007, the Communications Analysis Unit of the FBI ("CAU") repeatedly requested phone records from three companies with only a letter instead of legal process, in essence asking the company for the records because of "exigent circumstances." The letters assured the recipients that subpoenas would be served "as expeditiously as possible."¹⁹

The OIG then identified three leak investigations in which journalists' records had been requested using methods that did not comply with Department of Justice guidelines

¹⁶ Hannah Bloch-Wehba, *Anatomy of a Brief: Merrill v. Holder et al.*, available at <https://www.rcfp.org/browse-media-law-resources/news-media-law/news-media-and-law-spring-2015/anatomy-brief-merrill-v-hol> (May 2015).

¹⁷ The President's Review Group on Intelligence and Communications Technologies, *Liberty and Security in a Changing World: Report and Recommendations* of the President's Review Group on Intelligence and Communications Technologies, available at https://www.whitehouse.gov/sites/default/files/docs/2013-12-12_rg_final_report.pdf (Dec. 12, 2013).

¹⁸ OIG, *A Review of the Federal Bureau of Investigation's Use of NSLs* 87 (Mar. 2007).

¹⁹ *Id.* at 90.

governing requests for information from the media.²⁰ In one instance, the FBI obtained phone records for Ellen Nakashima, Alan Sipress, Natasha Tampubolon, Raymond Bonner and Jane Perlez using an exigent letter that claimed a grand jury subpoena was forthcoming; none was. In response to the letter, the phone provider produced 22 months of records for Ellen Nakashima,²¹ and 22 months of records for the *Washington Post* bureau in Jakarta.²² The OIG report called this “a complete breakdown in the required Department [of Justice] procedures for approving the issuance of grand jury subpoenas for reporters’ toll billing records.”²³

Because of the secrecy endemic to the NSL procedure, it is impossible for journalists to know that the FBI has obtained communications records until after the fact. Likewise, search warrants and subpoenas for journalists’ records are often accompanied by gag orders that prevent recipients from disclosing the request to the target of the subpoena, thereby preventing journalists from moving to quash a subpoena or otherwise assert their rights. For example, when Google received a search warrant related to email records for journalist and security researcher Jacob Applebaum, the organization was prohibited from disclosing the request for nearly three years.²⁴ The affidavits and applications underlying the search warrant are still sealed, although Google says it is seeking to unseal them.²⁵

Broad secrecy surrounding national security requests of this kind creates twin harms for free expression. When secret requests target the communications of journalists and their sources, the requests themselves can constitute a direct assault on the exercise of core First Amendment rights, with no opportunity to raise important defenses related to free expression and press freedom. But widespread secrecy also has the insidious effect of discouraging free expression and zealous journalism because it creates uncertainty regarding whether one’s communications are being monitored.

This uncertainty has led some journalists to adopt technical measures in an attempt to assure sources confidentiality. Unfortunately, the majority of information security tools available to journalists are not user-friendly, nor do they integrate well into the

²⁰ OIG, *A Review of the Federal Bureau of Investigation’s Use of Exigent Letters and Other Informal Requests for Telephone Records* 89 (Jan. 2010).

²¹ *Id.* at 95.

²² *Id.* at 101.

²³ *Id.* at 103.

²⁴ Ellen Nakashima and Julie Tate, *Google says it fought gag orders in WikiLeaks investigation*, available at https://www.washingtonpost.com/world/national-security/google-says-it-fought-gag-orders-in-wikileaks-investigation/2015/01/28/e62bfd04-a5c9-11e4-a06b-gdf2002b86ao_story.html (Jan. 28, 2015).

²⁵ *Ibid.*

journalistic process.²⁶ As a result, too few journalists adopt holistic security measures that provide confidentiality and anonymity to their communications.²⁷

B. Increased investigation of sources by the Obama Administration.

The Obama Administration has pursued more leak investigations than all other prior administrations combined. Since 2009, at least six government employees and two contractors have been subjects of felony criminal prosecutions under the Espionage Act of 1917.²⁸ In addition, two journalists, James Rosen and James Risen, and a news organization, the Associated Press, have been involved in leak investigations carried out by the U.S. Government.

These investigations have directly affected the press. In the Rosen case, the FBI identified Fox News journalist James Rosen as a “co-conspirator” in a search warrant application so that it could obtain his email in connection with a leak investigation of one of Rosen’s sources.²⁹ The use of the “co-conspirator” designation allowed the FBI to obtain a search warrant for Rosen’s private communications without giving him notice or an opportunity to oppose the search. The individual targeted by the FBI as Rosen’s source, Stephen Kim, pleaded guilty to charges related to revealing classified information to the reporter.³⁰

In another leak investigation, Pulitzer Prize-winning journalist and *New York Times* reporter James Risen was subpoenaed to testify against Jeffrey Sterling, who was suspected of leaking information to Risen, and charged with Espionage Act violations. The battle to compel Risen’s testimony endured for years, and Risen faced the threat of jail time for refusing to disclose the identity of any confidential source. Ultimately, the prosecution did not call Risen, averting a showdown that would have pitted the government against a journalist seeking to protect a source.³¹ Sterling nevertheless

²⁶ Susan McGregor, Polina Charters, Tobin Holliday, Franziska Roesner, *Investigating the Computer Security Practices and Needs of Journalists*, available at <http://www.franziroesner.com/pdf/journalism-sec15.pdf> (July 2015).

²⁷ Jesse Holcomb, Amy Mitchell, and Kristen Purcell, *Investigative Journalists and Digital Security*, available at <http://www.journalism.org/2015/02/05/investigative-journalists-and-digital-security/> (Feb. 5, 2015).

²⁸ Leonard Downie Jr., *Leak investigations and surveillance in post 9-11 America*, available at <https://cpj.org/reports/2013/10/obama-and-the-press-us-leaks-surveillance-post-911.php> (Oct. 10, 2013).

²⁹ See Application for Search Warrant for E-mail Account [redacted]@gmail.com, No. 1:10-mj-00291-AK (D.D.C., Affidavit in support of application for search warrant, unsealed Nov. 7, 2011).

³⁰ Josh Gerstein, *Stephen Kim pleads guilty in Fox News leak case*, Politico, available at http://www.politico.com/story/2014/02/stephen-kim-james-risen-state-department-fox-news-103265.html?utm_source=dvr.it&utm_medium=twitter (Feb. 7, 2014).

³¹ Matt Apuzzo, *Times Reporter Will Not Be Called to Testify in Leak Case*, available at <http://www.nytimes.com/2015/01/13/us/times-reporter-james-risen-will-not-be-called-to-testify-in-leak-case-lawyers-say.html> (Jan. 12, 2015).

was convicted of violating the Espionage Act, based in part on evidence relating to metadata of his communications with Risen.³²

In another Espionage Act investigation in 2013, U.S. law enforcement officials secretly subpoenaed and seized toll billing records of more than 20 telephone lines belonging to Associated Press offices and journalists, including cell and home telephone numbers.³³ In response, the Reporters Committee for Freedom of the Press, joined by 50 news organizations, demanded changes to internal Department of Justice guidelines on subpoenas to the news media.³⁴

While the new guidelines have strengthened legal protections for journalists against unrestricted searches and subpoenas of their confidential communications,³⁵ leak investigations have had a palpable chilling effect on reporter-source communications. Government officials are often afraid to talk to the press about even non-classified information for fear of possible retribution.³⁶

IV. Conclusion and Recommendations.

Journalists and their sources face significant challenges to ensuring the confidentiality of their communications. Greater transparency and declassification of secret guidelines governing bulk surveillance and other national security requests would improve the landscape significantly. But only meaningful legal constraints on government surveillance of journalists will adequately protect reporters' confidential relationships with their sources and foster free expression and freedom of the press.

³² *United States of America v. Jeffrey Alexander Sterling*, available at <https://www.documentcloud.org/documents/229733-judge-leonie-brinkemas-ruling-quashing-subpoena.html> (July 29, 2011.); see also, Adam Liptak, A High-Tech War on Leaks, NY Times, available at http://www.nytimes.com/2012/02/12/sunday-review/a-high-tech-war-on-leaks.html?hpw=&pagewanted=all&_r=0 (Feb. 11, 2012); see also Department of Justice, *CIA Officer Convicted For Unauthorized Disclosure of National Defense Information and Obstruction of Justice*, DOJ, available at <http://www.justice.gov/opa/pr/former-cia-officer-convicted-unauthorized-disclosure-national-defense-information-and> (Jan. 26, 2015); and see Greg Miller, *Former CIA officer Jeffrey A. Sterling charged in leak probe*, The Washington Post, available at http://www.washingtonpost.com/wp-dyn/content/article/2011/01/06/AR2011010604001_2.html?sid=ST2011010604303 (Jan. 6, 2011).

³³ Charlie Savage, *Phone Records of Journalists Seized by U.S.*, available at http://www.nytimes.com/2013/05/14/us/phone-records-of-journalists-of-the-associated-press-seized-by-us.html?pagewanted=all&_r=0 (May 13, 2013).

³⁴ Reporters Committee for Freedom of the Press, *Media Coalition Letter Regarding AP Subpoena*, available at, <https://www.rcfp.org/sites/default/files/Media%20coalition%20letter%20re%20AP%20subpoena.pdf> (May 14, 2013).

³⁵ See generally 28 C.F.R. § 50.10.

³⁶ Leonard Downie Jr., *Leak investigations and surveillance in post 9-11 America*, available at <https://cpj.org/reports/2013/10/obama-and-the-press-us-leaks-surveillance-post-911.php> (Oct. 10, 2013); see also, Aliya Sternstein, *Obama Administration Aims to Create 'Insider Threat' Job Specialty to Plug Leaks*, Nextgov, available at <http://www.nextgov.com/cybersecurity/2014/12/administrations-plan-stopping-leaks-includes-boosting-insider-threat-teams/101763/> (Dec. 22, 2014)

Sincerely,

A handwritten signature in blue ink, appearing to read "Bruce D. Brown". The signature is written in a cursive style with a large initial "B" and "D".

Bruce Brown
Executive Director
The Reporters Committee for Freedom of the Press