Office of the Attorney General
Washington, D. C. 20530

June 19, 2013

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

Dear Chairman Goodlatte:

This responds to your letter, dated June 6, 2013, requesting that I provide further explanation of my testimony before the Committee on May 15, 2013, regarding investigations of unauthorized disclosures of classified information involving members of the news media.

Consistent with that testimony, it remains my understanding that the Department has never prosecuted a journalist for publishing classified information. Your letter suggests, however, that Committee Members may have interpreted my statement to mean that the Department also has not taken certain investigative steps—such as seeking a search warrant for a reporter's emails from an internet service provider—during an investigation into the unauthorized disclosure of classified information. As the Department has explained—first in a letter from Principal Deputy Assistant Attorney General Peter J. Kadzik on June 3, 2013, and then again in my letter of June 5, 2013, confirming that Mr. Kadzik has set forth the Department's and my position—we have sought such a warrant for a reporter's emails, and in so doing, were required to meet the requirements of the Privacy Protection Act of 1980, 42 U.S.C. § 2000aa, et seq. (Privacy Protection Act).

As you know, in the course of the ongoing investigation into the unauthorized disclosure of classified information that appeared in a news article in June 2009, the Department, with my approval, sought a search warrant for a reporter's emails from an internet service provider. In order to proceed under the Privacy Protection Act, the government was required to establish that there was probable cause to believe that the reporter had committed or was committing a criminal offense to which the needed materials related. Based on the facts establishing probable cause in the warrant application, a federal judge granted the warrant. As explained in our prior letters, the government's decision to seek this search warrant was an investigative step, and at no time during this matter have prosecutors sought approval from me to bring criminal charges against the reporter. We also note that ultimately, a grand jury charged an individual for making the unauthorized disclosure, and the reporter was neither charged nor named as an unindicted co-conspirator in the indictment.

I believe that this information, as well as the enclosed answers to the enumerated questions in your and Chairman Sensenbrenner's letter of May 29, 2013, further clarifies my statements of May 15, 2013. The Department has a longstanding policy against the disclosure of non-public information relating to open criminal investigations and prosecutions in order to

protect the integrity of our law enforcement efforts. In this and our previous letters regarding this matter, we have attempted to answer your questions to the fullest extent possible while remaining faithful to this policy. The disclosure of additional information about this ongoing case at this time could risk harm both to our continuing law enforcement efforts, as well as the privacy and due process interests of those involved. For these reasons, I am not in a position to provide additional details or testimony on this matter.

I look forward to meeting with you and Chairman Sensenbrenner and Ranking Members Conyers and Scott to discuss these issues, as well as the Department's ongoing efforts to revise its policies for investigations involving members of the news media.

Sincerely,

Eric H. Holder, Jr.
Attorney General

Enclosure

cc: The Honorable John Conyers, Jr.
Ranking Member

1. **Please provide all regulations and internal Justice Department policies that govern the issuance of search warrants for the email communications of members of the media.**

   The Privacy Protection Act of 1980, 42 U.S.C. § 2000aa, et seq., governs the issuance of search warrants for materials, such as email communications, in the possession of a member of the news media. Under the Privacy Protection Act, the government may seek such materials where it has probable cause to believe that the member of the media has committed or is committing a criminal offense to which the materials relate. The United States Attorney's Manual reiterates that the Privacy Protection Act governs in such a situation. *See* USAM 9-19.240.

2. **28 CFR 50.10 states: "Because freedom of the press can be no broader than the freedom of reporters to investigate and report the news, the prosecutorial power of the government should not be used in such a way that it impairs a reporter's responsibility to cover as broadly as possible controversial public issues. This policy statement is thus intended to provide protection for the news media from forms of compulsory process, whether civil or criminal, which might impair the news gathering function." Is it the Department's position that, although not explicitly required by 28 CFR 50.10, the Attorney General must personally approve the use of a search warrant to obtain private emails belonging to a member of the media?**

   Neither the current guidelines nor the Privacy Protection Act require that the Attorney General approve the decision to apply for a search warrant to obtain emails belonging to a member of the media. Of course, any such application made by the government is ultimately reviewed by, and granted or denied by, a court. In the course of the investigation of the unauthorized disclosure of information that appeared in a news article in June 2009, even though my approval was not required by our regulations or otherwise, Department officials sought my approval before the government took the investigative step of seeking a reporter's emails from a service provider and I approved of that step. The government also sought telephone toll records, which required my approval under 28 CFR § 50.10, and I approved the government's issuance of subpoenas for telephone toll records.

3. **At the time the Justice Department requested the search warrant did the Department intend to prosecute Mr. Rosen under the Espionage Act? If the Department did not intend to prosecute Mr. Rosen, why did the Department refer to Mr. Rosen in its affidavit accompanying the search warrant affidavit as a "co-conspirator", and allege that "at the very least" Mr. Rosen was an aider and abettor?**

   In the affidavit in support of a warrant for a reporter's emails in relation to the June 2009 news article, the government was articulating the probable cause required by the Privacy Protection Act. The government sought the search warrant as an investigative step, and there was a factual basis for the assertions in its application. At no time did prosecutors seek my approval to charge the reporter in this matter. Furthermore, the government

neither charged the reporter nor did it name him as an unindicted co-conspirator in the indictment of the individual accused of making the unauthorized disclosure of classified material.

4. **The Department sought and obtained a non-disclosure order pursuant to 18 U.S.C 2705(b). Please identify which of the statutory criteria for non-disclosure existed in this instance and why the Department believed Mr. Rosen met one or more of these criteria**?

   In accordance with 18 U.S.C. § 2705(b), the government's application for a search warrant states that the government had reason to believe that "subjects of criminal investigations will often destroy digital evidence if the subject learns of the investigation" and that if made aware of the warrant's existence, "targets of this investigation and other persons may further mask their identity and activity, flee, or otherwise obstruct this investigation." I note that these concerns would apply to the individuals who may have made the unauthorized disclosures, who were the targets of the investigation, in addition to the recipients of the disclosed materials.

5. **The Justice Department issued a statement that the search warrant for Mr. Rosen's emails was approved at the highest levels of the Department. Did this include you? If so, on what date did you approve the search warrant request? As part of any such approval, did you personally read the search warrant application and accompanying affidavit? How was your approval memorialized?**

   As stated above, although my approval was not required in order to seek a search warrant under the Privacy Protection Act, Department officials sought my approval before the government took the investigative step of seeking a reporter's emails from a service provider and I approved of that step. The approval occurred on May 28, 2010. Although Department attorneys described to me the factual basis for the search warrant affidavit, including how the requirements of the Privacy Protection Act were satisfied, I was not provided and did not review the actual affidavit in support of the search warrant. Of course, attorneys involved with the case reviewed the affidavit prior to its submission to the court, and ultimately, a federal judge reviewed and granted the warrant.

6. **The Department's statement seems to indicate that you may not have personally approved the use of a search warrant for Mr. Rosen's emails but were instead involved in "discussions" relating to the search warrant. Did these discussions involve Mr. Rosen's status as an aider/abettor or co-conspirator? Did these discussions involve the need for a non-disclosure order? Did these discussions include an explanation of all reasonable alternative investigation steps taken prior to the search warrant request?**

   As described above, I was involved in discussions about the investigative steps taken in this matter, which included both subpoenas for telephone toll records and an application for a search warrant. As required by 28 C.F.R. § 50.10, I approved of the issuance of subpoenas for telephone toll records. In addition, although my approval was not required

in order to seek a search warrant under the Privacy Protection Act, Department officials sought my approval before the government took the investigative step of seeking a reporter's emails from a service provider and I approved of that step. Ultimately, a federal judge granted a warrant. Consistent with longstanding Department policy, I am not in a position to provide more information about the Department's internal deliberations about prosecutorial decisions.

7. **Whether you personally approved the search warrant request or were merely part of "discussions" relating to a search warrant for Mr. Rosen's emails, it is clear now that you were aware that the Department was engaged in a criminal investigation of a member of the media as far back as 2010. This fact contradicts your testimony before the Committee in which you stated clearly that: "With regard to potential prosecution of the press for the disclosure of material, that is not something that I have ever been involved in, heard of, or would think would be a wise policy."**

    a. **How can you claim to have never "been involved" in the potential prosecution of a member of the media but you were admittedly involved in discussions regarding Mr. Rosen's emails?**

    b. **How can you claim to have never even "heard of" the potential prosecution of the press but were, at a minimum, involved in discussions regarding Mr. Rosen?**

    c. **Do you agree that characterizing a member of the media as an aider/abettor or co-conspirator in a sworn search warrant affidavit constitutes a "potential prosecution of the press for the disclosure of material"?**

    d. **Do you believe that the investigation of Mr. Rosen as a potential co-conspirator or aider/abettor to Mr. Kim was "wise policy"? Please explain.**

    As I have explained, the decision to seek a search warrant in this matter was an investigative step that is separate from charging decisions. When I testified before the Committee, I stated that I was unaware of the Department ever charging a reporter with a crime simply for publishing material, and that remains my understanding today. In the matter of the unauthorized disclosure of information that appeared in a June 2009 article, while I was aware of and approved the government's investigative step to seek a search warrant, prosecutors never sought my approval to charge a reporter. I do not agree that characterizations establishing probable cause for a search warrant for materials from a member of the news media during an ongoing investigation constitute an intent to prosecute that member of the news media. I do believe that a thorough investigation of the disclosure of classified information that threatened national security was necessary and appropriate.

8. **If you believe, as you testified, that prosecutions of members of the media "have not faired well in American history," why did you permit the Department to investigate Mr. Rosen as a co-conspirator or aider/abettor?**

The disclosure of classified information that appeared in a news article in June 2009 presented a serious threat to national security. I believe that under those circumstances, it was necessary to do as thorough and comprehensive an investigation as possible. As I noted previously, conducting a thorough investigation, including obtaining relevant evidence from a member of the news media, is not equivalent to the prosecution of a member of the news media.