UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

TIMOTHY BURKE

v. CASE NO. 8:23-mc-00014-WFJ-SPF

UNITED STATES OF AMERICA

UNITED STATES OF AMERICA'S RESPONSE IN OPPOSITION TO BURKE'S MOTION TO UNSEAL PROBABLE CAUSE AFFIDAVIT AND FOR RETURN OF PROPERTY

The United States opposes Burke's motion to unseal the probable cause affidavit and for return of property ("Burke's Motion"). Doc. 25. Burke's Motion requests that this Court: (1) unseal the probable cause affidavit (the "PC Affidavit") submitted in support of a search warrant, signed by this Court, and executed on May 8, 2023, at 5914 N. Tampa Street, Tampa, Florida, 33604 (the "Burke address"); and (2) order the United States to return to Burke all of the items seized from that address, along with any copies of information and data therefrom.

This Court should deny Burke's Motion to unseal the PC Affidavit. As this Court recognized in denying, in part, The Times Publishing Company's ("The Times") motion, the PC Affidavit must remain sealed to protect and safeguard the integrity of an ongoing federal criminal investigation, the safety and security of law enforcement personnel, the privacy of unnamed and uncharged subjects of the investigation, and the privacy of third-party fact witnesses and potential victims.

This Court should dismiss Burke's motion for an order directing the United

States to return all property seized pursuant to the search warrant for lack of jurisdiction. The exercise of such jurisdiction over a pre-indictment criminal investigation is limited to exceptional cases. Under controlling precedent, it requires, at a minimum, a showing that the United States callously disregarded Burke's constitutional rights. Burke's Motion falls well short of making that showing. Instead, as demonstrated below, the United States' investigative team has proactively worked in good faith throughout this investigation, including during the execution of the lawful warrant and thereafter concerning any seized materials.

Burke also requested oral argument on his motion. Doc. 26. The United States does not object to his request for oral argument but does not believe that oral argument would be useful, given that the issues presented have been fully briefed and that, at this early juncture, the United States' compelling interest in protecting and safeguarding the integrity of its ongoing criminal investigation curtails the areas available for appropriate inquiry.

I. BACKGROUND

A. The Search and Seizures

On May 4, 2023, this Court found probable cause supported the United States' application for a warrant to search the Burke address for records and evidence relating to violations of 18 U.S.C. § 1030 (intentional unauthorized access of a computer), and 18 U.S.C. § 2511 (intentional interception and disclosure of wire, oral, or electronic communication), and issued the pertinent warrant. Doc.

18-1 at 1-19.[1] The application for that warrant specified the bases for the search as seeking: (1) evidence of a crime; (2) contraband, fruits of a crime, or other items illegally possessed; and (3) property designed for use, intended for use, or used in committing a crime. *Id.* at 13. On consideration of a motion filed by the United States and in the interests of justice, this Court sealed the warrant application, the warrant, the PC Affidavit, and other associated records. *Id.* at 20-24.

Prior to executing the warrant at the Burke address, a member of the FBI search team was designated to act as a filter-team agent in case the agents encountered potentially privileged materials, and an AUSA who was not part of the investigative team was identified to coordinate with that designated agent if needed. Additional protocols were developed concerning how the agents were to handle any material(s) that appeared to be pre-publication items containing work product materials or other documentary materials.

FBI agents executed the warrant at the Burke address on May 8, 2023. Doc. 1. In the secondary suite behind the primary residence, the agents located a workspace that contained hundreds of items that qualified as either a computer or storage medium,[2] as described in Attachment B to the warrant. The search team

[1] The underlying search warrant records were originally filed in the case styled *In the Matter of the Search of Premises Located at 5914 N. Tampa Street, Tampa, FL 33604*, No. 8:23-mj-1541-SPF.

[2] In accordance with Attachment B, paragraph 5, of the warrant, the term "COMPUTER" collectively referred to any computer or storage medium whose seizure was otherwise authorized by the warrant, and any computer or storage medium that contained or in which was stored records or information that were otherwise called for by the warrant.

left with approximately two dozen electronic devices and two hard copy items,[3] which are particularized in the Evidence Collected Item Log ("Evidence Log"), filed with this Court as part of the warrant return. Doc. 18-1 at 28-29.

B. The Times Publishing Company Proceedings

The Times moved to intervene in the proceedings and requested that this Court unseal all Court records related to the search at the Burke address, including the PC Affidavit. Doc. 1. The United States did not object to The Times's request to intervene in the matter and, except for some agreed-upon narrowly tailored redactions to certain search warrant records, the United States did not object to The Times's request to unseal five (of six) search warrant records. Doc. 17. This Court granted, in part, The Times's motion to intervene and unsealed the five court records (with redactions agreed to by the parties). Docs. 18, 18-1.

But the United States ***did oppose*** The Times's motion to unseal the PC Affidavit. The United States explained that PC Affidavit must remain sealed—to protect and safeguard the integrity of the ongoing federal criminal investigation, the safety and security of law enforcement personnel, and the privacy of others—and offered substantial legal authority supporting that position.[4] Doc. 17 at 5-9. The

[3] Whereas the electronic items represent only a small fraction of the total electronic devices in Burke's workspace, the associated information contained in those 21 items equals approximately 80 terabytes. Each item identified in the Evidence Log is identified here by its Item #__ (e.g., Item #1).

[4] *See United States v. Valenti,* 987 F.2d 708, 712-714 (11th Cir. 1993) (ongoing law enforcement investigation is a compelling government interest justifying denial of newspaper's access to transcripts of closed proceedings); *and see, e.g., In re: Search of WellCare Health Plans Inc.*, Case No.

United States also noted that, in addressing a pre-indictment challenge to grand jury proceedings, the Eleventh Circuit has specifically recognized the importance of maintaining secrecy during a federal criminal investigation.[5] *Id.* The United States also offered additional negative consequences that could result from unsealing the PC Affidavit at this early stage, including that it could: (1) unintentionally pollute the investigation by corroding the quality of recollections maintained by potential witnesses and victims with non-public information contained in the affidavit; and (2) have devastating consequences for persons who have been cleared of any misconduct, as well as those still under investigation.[6] *Id.* Finally, the United States explained that the conduct set forth in the PC Affidavit reveals an investigation that may, if properly safeguarded,

8:07-mj-01466-TGW, Doc. 7 (referencing *Valenti* and noting that the Eleventh Circuit has recognized prejudice to an ongoing investigation as compelling reason for closure); *In re Search of Office Suites For World & Islam Studies,* 925 F. Supp. 738, 741-743 (M.D. Fla. 1996) (the United States' reasons for sealing the search-warrant affidavit are compelling and far outweigh press's right of access where affidavit contains identifications of subjects, scope and direction of investigation, and references to witnesses); *Douglas Oil Co. v. United States*, 441 U.S. 211, 219 (1978) (premature disclosure of investigative information creates a risk that "persons who are accused but exonerated" may be "held up to public ridicule"); *see also, e.g., United States v. Steinger*, 626 F.Supp.2d 1231, 1235 (2009) (disclosure of names of subjects and of matters being investigated "could have devastating consequences for those persons who have been cleared of any misconduct, as well as for those still under investigation").

[5] *See Blalock v. United States*, 844 F.2d 1546, 1550 n.5 (11th Cir. 1988) ("The courts' concern for grand jury secrecy and for the grand jury's law enforcement function is generally greatest during the investigative phase of grand jury proceedings." Disclosure during investigation, "may frustrate the investigation by allowing the persons under investigation to escape, to suborn perjury, or to bribe or intimidate potential witnesses or members of the grand jury. Premature disclosure may also damage the reputations of persons the grand jury's final investigation may exonerate.").

[6] Protecting the identities of the uncharged is also consistent with government counsel's professional responsibilities. *See* Justice Manual § 9-27.760 ("Limitation on Identifying Uncharged Third-Parties Publicly").

extend well beyond the specific facts and events described therein. *Id*.

This Court, after weighing the parties' arguments and examining the PC Affidavit *in camera*, denied that aspect of The Times's motion, reasoning in part:

> Almost every paragraph of the affidavit, either explicitly or implicitly, reveals details of the investigation, including how and when the alleged incident(s) occurred, the private information intruded upon, the techniques the agent employed to investigate the intrusions, and/or who was carrying out the cyber intrusions and why. Put differently, each section of the affidavit builds on the one before it, and the sum of these parts equals the Government's probable cause. If disclosed – even in redacted form – there is the real and legitimate risk that the Government's ongoing investigation would be compromised by someone piecing together the timeline, scope, and direction of the investigation. …. Even information in the affidavit that is already publicized is "inextricably intertwined with the Government's argument for probable cause" and cannot be unsealed. Sealing the entire affidavit is necessary to protect the integrity of the United States' investigation.

Doc. 23 at 3-4 (internal citation omitted).

C. The United States' Continuing Efforts to Coordinate with Burke's Counsel Regarding the Processing and Return of Seized Material

The undersigned spoke with Burke's counsel on May 8, 2023, and arranged to meet with counsel the next day. From that conversation onward, the United States has repeatedly expressed its good-faith desire to avoid unintentionally accessing any potentially privileged or protected communications or materials associated with Burke or his spouse and to coordinate the return of any necessary work product materials. Consistent with that position, the undersigned wrote to Burke's counsel on June 2nd and explained:

> that it was not our intention to seize and maintain any potentially privileged communications (such as, attorney-client communications or spousal communications) concerning Mr. Burke or [his spouse], any materials

> relating to [his spouse's] political work as a City Council member, or any of Mr. Burke's work product or documentary materials, other than those items specified in the pertinent warrant. In that regard, we affirmatively invited you (and [Burke's spouse's] counsel) to provide any information you deemed appropriate to assist in that process. ... " As of this date, we have not received any specific information or input concerning any of the above—potentially privileged communications, political information or work product, or Mr. Burke's work product or documentary materials—from anyone associated with Mr. Burke or [his spouse], other than general statements that they would like their property returned as soon as possible (which is particularly challenging here given the volume of data that must be processed). … That said, to the extent you do have information or input you would like to provide to either expedite the process or ensure that Mr. Burke has access to any necessary work product materials, we will continue to make ourselves available.[7]

The United States also coordinated with Burke's counsel in attempts to assist Burke in gaining access to his Twitter account. But those efforts were temporarily unsuccessful because Burke had combined his Twitter credentials (password and authentication information) on his mobile phone, which had been seized on May 8th in accordance with the warrant, Attachment B, paragraph 4. To expedite the phone's processing (forensic imaging and review), the United States explained to counsel that, because the phone was password protected, the United States would be "better positioned to expedite the review of the device if [the United States could] secure the password." Burke's counsel replied that he would, "find out what he [could] about [Burke's] devices." Ultimately, counsel declined to voluntarily provide the password to Burke's phone and insisted that the phone be returned.[8]

[7] The United States will provide to the Court complete copies of any correspondence desired.

[8] As acknowledged in Burke's Motion, Doc. 25 at n.6, the United States did not (and has not) conditioned the return of Burke's phone upon his waiver of his rights under the Fifth Amendment.

On June 22nd, the undersigned again wrote to Burke's counsel and offered dates and time windows during which the undersigned was available to speak about the processing and return of materials to Burke. In that communication, the undersigned explained, in part:

> … I am not presently amenable to discussing the ongoing investigation and your client's role in the conduct under investigation. That should not be construed, however, as me agreeing with your assessment of the facts. …
>
> Further, it was my understanding based upon our conversations that, to the extent you [ ] felt the government had seized items that did not fall within Attachment B of the warrant, we were going to work collaboratively to resolve the issue(s). In that regard, you were going to review the inventory of seized items with your client and then contact me if you felt that was the case. I also explained during our previous conversation and in the attached email (dated June 6, 2023) that, to expedite the review of Mr. Burke's phone, we would need the password, which I understood you were going to discuss with him.
>
> In any event, if you [ ] and/or Mr. Burke needs to retrieve some information from Mr. Burke's phone to facilitate his ability to access and use his Twitter account (or to access some other account), the investigative team will make itself available to meet at the FBI and explore whether it is possible to facilitate that process without compromising the original evidence.
>
> Finally, I have also attached my email dated June 2, 2023. My communications and offers in that email remain.

Again, the defense declined to provide any actionable information in response to the United States' entreaties that could preemptively facilitate the protection of potentially privileged or protected communications or materials associated with Burke or his spouse and the return of any claimed work-product materials.

Still, the United States and Burke's counsel continued to discuss the return of materials to Burke. That discussion focused, in part, on how the United States

could copy and produce processed electronic materials while still preserving Burke's ability to use those materials during future legal proceedings. In a proactive effort to reach an agreement, the United States, on July 14th, sent an email to counsel and attached "a proposed stipulation addressing issues related to the copying and/or return of items seized (and parts of items seized) during the execution of the court-authorized search warrant at [Burke's address]." The United States further noted: "[T]o the extent you deem appropriate[,] please inquire of [Burke] whether there are any potential attorney-client communications in the materials so that we can ensure that we continue to avoid them."

On July 17th, Burke's counsel submitted a letter to the United States, stating that Burke had declined to provide his password to facilitate the United States' access to his phone for processing. Pursuant to follow-up discussions concerning the processing and return of materials, counsel also delivered seven hard drives to the United States. On the 20th, the United States informed counsel that the FBI had managed to gain access to and secure a forensic copy of Burke's phone (circumventing the need for a password) and that the FBI agents would make themselves available to Burke and counsel at the FBI Tampa office so that Burke could log on to his phone and address any issues with his Twitter account.

The next morning, July 21st, in yet another effort to avoid unnecessary motion practice, the United States—the undersigned and supervisor(s)—expressly offered to meet with Burke's counsel to discuss any outstanding issues, including concerns about the United States' process to protect potentially privileged

information and the United States' proposed stipulation concerning the copying and production to Burke of seized materials. That offer was made via an email that included language that further refined the United States' proposed stipulation. A copy of that proposed stipulation and refining email is attached as Attachment A. Around 1:30 pm, Burke and his counsel appeared at the FBI office where Burke was provided temporary possession of his phone to restore access to his Twitter account, after which the phone was returned to law enforcement for review and processing per the warrant. Thereafter, Burke's counsel notified the undersigned that counsel declined to meet with the United States and filed Burke's Motion. Burke's counsel ***has still not responded*** to the United States' proposed stipulation.

Regardless, per the United States' (refined) proposed stipulation, the United States recognizes its obligation to return to Burke any item seized determined to contain only information falling outside the authority to seize under Attachment B to the warrant, and to eliminate any image of that item in its systems. As to items that contain a mix of information falling inside and outside the authority to seize under Attachment B, the United States intends to produce to Burke copies of all folders and files contained in the items, withholding only those files that fall within the authority to seize that constitute contraband or fruits of the identified crimes. The United States is first segregating the folders/files that predate midnight, August 22, 2022,[9] and downloading copies of those folders/files onto the drives

[9] While the search warrant permitted the United States to seize material relating to the specified violations after August 1, 2022, the investigative team has determined that it can return originals or

provided by Burke (without review by the United States other than for production purposes). Folders/files dated midnight or after that date will be subjected to an internal filter review, after which approved unprotected folders/files will be made available to the investigative team for its review and continued production to Burke of folders/files that do not constitute contraband or fruits of the identified crimes.

To that end, on July 27th, the undersigned notified Burke's counsel that the initial return of property had been loaded onto one of the drives provided and was available for retrieval. That return involved the production to Burke of three websites: burke-communications.com, mocksession.com, and a website associated with Burke's spouse. As of today, the United States has made available for return to Burke original Item #19 and has produced copies of folders and files contained on Items #7 (partial return), #14, #17 (partial return), #20 (partial return), #21, #22, #23, and #24 (partial return) that predate midnight, August 22, 2022.

II. THE MOTION TO UNSEAL AND FOR RETURN OF PROPERTY

A. Generally

Burke's Motion is primarily premised on Burke's counsels' erroneous speculation about underlying case facts, circumstances, applicable law, the focus of the United States' ongoing criminal investigation, and the United States' underlying legal theories.[10] Burke's motion also repeats throughout that Burke is a

copies of all folders and files that predate midnight, August 22, 2022.

[10] As explained above at page 8, and noted in Burke's Motion, Doc. 25 at 12 and 18, the United States has declined at this stage to engage in discussions concerning the ongoing investigation.

"journalist" who "finds things" on the internet. *See, e.g.*, Doc. 25 at 6 and 8. As specific examples of Burke's working in this capacity, the motion notes that Burke was nominated for awards for his work exposing a catfishing hoax in 2013 against football player Manti Teo and for a video Burke created in 2018 about Sinclair Broadcast Group.[11] That information is consistent with Burke's resume, published by him on his ilovecitr.us website, which states that Burke previously worked for the Gizmodo Media Group and The Daily Beast from 2011 through 2019.

Although Burke at one time may have been a professional journalist, the United States has been unable to find any evidence that Burke has regularly published under his own byline after January 1, 2021, as a salaried employee of, or independent contractor for, any newspaper, news journal, news agency, press association, wire service, radio or television station, network, or news magazine.[12] Moreover, Burke has for some years primarily categorized his work as that of a consultant. On his burke-communications.com website, Burke describes his work as concerning "Social/Political/Media Consulting;" and on his ilovecitr.us website, Burke states that he is a "media + political communications consultant, broadcast monitor, archival technologist, and viral content visionary." Attachment B. Regardless of how Burke categorizes his work (as a "journalist" or a "consultant"), Burke is not immune from investigation and prosecution if, as part

[11] The motion also includes that Burke was featured in a 2022 Netflix documentary about his 2013 work concerning Teo, and refers to publication(s) of additional video. *Id*. at 6-8.

[12] *See* Florida Statute 90.5015(1)(a), Florida journalist privilege, defining "professional journalist."

of that work, he "finds things" through criminal acts, such as unlawfully accessing a computer or computer system (in violation of 18 U.S.C. § 1030) and/or by unlawful surveillance or wiretapping (in violation of 18 U.S.C. § 2511).

B. Department of Justice Policies

Burke's Motion includes multiple ***unsupported and baseless suggestions of wrongdoing*** by the United States' investigative team regarding the Department of Justice's (the "Department's") policy concerning the need to secure prior authorization for search warrants that may implicate the Privacy Protection Act ("PPA"),[13] and the Department's *Policy Regarding Obtaining Information from or Records of Members of the News Media; and Regarding Questioning, Arresting, or Charging Members of the News Media* (the "News Media Policy").[14, 15] Here, the government has fully complied with all aspects of its own PPA policy and its News Media Policy during the ongoing investigation.

The PPA generally prohibits the search for and seizure of "work product materials" or other "documentary materials"[16] that are "possessed by a person reasonably believed to have a purpose to disseminate to the public a newspaper,

[13] 42 U.S.C. § 2000aa, *et seq.*

[14] 28 CFR 50.10(i)(1) (revised, November 3, 2022). Attachment C.

[15] Burke's counsels' repeated use of the terms "journalist" and "newsroom" to describe Burke and his workspace, respectively, suggests a misguided strategy deployed to tilt Department policies and other authorities in his favor. Indeed, the facts and arguments raised in the motion and attached letter read as if they were crafted working backwards from Department policies to fabricate suggested wrongdoing by the United States and additional (nonexistent) protections for Burke.

[16] *See* 42 U.S.C. § 2000aa-7(b) and 2000aa-7(a), respectively.

book, broadcast, or other similar form of public communication." 42 U.S.C. § 2000aa(a) and (b). The PPA protects against "government searches for documents and materials that are intended for publication." *See Sennett v. United States*, 667 F.3d 531, 535 (4th Cir. 2012) (emphasis omitted). But, even where an individual intends to disseminate information to the public, the PPA does not prohibit the government from using a search warrant when: (1) the information sought, even if intended for publication, consists of materials that are contraband, fruits of a crime, items criminally possessed, or instrumentalities of a crime;[17] or (2) there is probable cause to believe the "person possessing the [PPA] materials has committed or is committing the criminal offense to which the materials relate."[18]

As to the News Media Policy, the Department has promulgated internal regulations relating to obtaining information from or records of members of the news media and questioning, arresting, or charging members of the news media.[19] *See* Attachment C. These regulations impose some internal limitations on investigative techniques that may be used to obtain information from or records of members of the news media and set forth internal Department approval

[17] *See* 42 U.S.C. § 2000aa-7.

[18] *See* 42 U.S.C. § 2000aa(a)(1) and (b)(1), commonly referred to as the "suspect exception."

[19] The Attorney General issued revised News Media Policy regulations on October 26, 2022. The specific changes to the regulations are not relevant here because neither version creates any enforceable rights for any defendant or members of the news media. Unless otherwise noted, citations to the regulations refer to the current version of the rule.

requirements before law enforcement may employ various investigative techniques in relation to members of the news media.

Even if the government had not complied with its policies (***which is not the case here***), those policies do not create any substantive or procedural right or benefit, much less a right enforceable at this early stage of an investigation through Burke's instant motion. The News Media Policy is explicit that it "is not intended to, and ***does not, create any right or benefit, substantive or procedural, enforceable at law or equity by any party against the United States***, its departments, agencies, or entities, its officers, employees, or agents, or any other person."[20] 28 C.F.R. § 50.10(t) (emphasis added). Moreover, the policy is clear from its opening paragraph that it "is not intended to shield from accountability members of the news media who are subjects or targets of a criminal investigation for conduct outside the scope of newsgathering." 28 C.F.R. § 50.10(a)(1). The policy specifically defines "newsgathering" to exclude from its scope criminal acts committed in the course of obtaining or using information, such as unlawfully accessing a computer or a computer system, and unlawful surveillance or wiretapping. 28 C.F.R. § 50.10(b)(2)(ii)(B). Burke's counsel have cited no law, statutory or otherwise, that required the Department to establish internal rules and

[20] The Fourth Circuit has explained that the Department's news media policy "is of the kind to be enforced internally by a governmental department, and not by courts through exclusion of evidence." *In re Shain*, 978 F.2d 850, 853 (4th Cir. 1992). Regardless, any internal administrative disciplinary action (not warranted here) is not available as a remedy for a subject seeking to upend an ongoing federal criminal investigation.

regulations relating to investigations of members of the news media. There is none.[21]

Further, Burke's complaint that the seizure of property identified in a search warrant has imposed burdens upon him and others is not extraordinary, or even unusual, in an ongoing federal criminal investigation, even in the context presented by Burke. As the Supreme Court stated: "It is clear that the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability. … [O]therwise valid laws serving substantial public interests may be enforced against the press as against others, despite the possible burden that may be imposed." *Branzburg v. Hayes*, 408 U.S. 665, 682–83 (1972). This principle is particularly applicable here, where any potential burden stems from an ongoing criminal investigation in which Burke is a subject and this Court has found probable cause supported the United States' application for the relevant warrant. Indeed, the Supreme Court has recognized that it would be "frivolous" to assert—much less hold—that a reporter or his sources would have a "license . . . to violate valid criminal laws." *Id.* at 691.

III. ARGUMENT

A. Burke's Request to Unseal the PC Affidavit Should be Denied.

Burke's request that this Court unseal the PC Affidavit at this early stage is

[21] *See, e.g., In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141, 1153 (D.C. Cir. 2006) (Department's news media guidelines were "not required by any constitutional or statutory provision" and "provide no enforceable rights to any individuals"); *In re Special Proceedings*, 373 F.3d 37, 44 n. 3 (1st Cir. 2004) (news media guidelines do not create legally enforceable rights).

meritless. This Court has already found that probable cause supported the United States' application for a warrant to search the Burke address and to seize the items described in Attachment B to that warrant. As explained above, courts have consistently opined that unsealing a search-warrant affidavit or otherwise making public details of an ongoing criminal investigation at this stage could undermine the United States' compelling interest in protecting and safeguarding the integrity of its investigation, the safety and security of law enforcement personnel, the privacy of unnamed and uncharged subjects of the investigation, and the privacy of third-party fact witnesses and potential victims.[22] *See, e.g.*, *In re: Search of WellCare Health Plans Inc.*, Doc. 7 (referencing *Valenti* and noting that the Eleventh Circuit has recognized prejudice to an ongoing investigation as compelling reason for closure); *In re Search of Office Suites For World & Islam Studies,* 925 F. Supp. at 741-43 (United States' reasons for sealing the search-warrant affidavit are compelling and far outweigh press's right of access where affidavit contains identifications of subjects, scope and direction of investigation, and references to witnesses).[23] In denying The Times's motion, this Court has already determined that "[s]ealing the entire affidavit is necessary to protect the integrity of the United States'

[22] Indeed, some of these concerns are heightened in an investigation concerning allegations against one or more subject(s) involved in computer-intrusion-related conduct.

[23] Moreover, unsealing the PC Affidavit now could also corrode the quality and recollection of potential witnesses and victims, and impose significant negative consequences on those who have or may be cleared of any misconduct. *See, e.g., Douglas Oil Co.,* 441 U.S. at 219; *Steinger*, 626 F.Supp.2d at 1235.

investigation." Doc. 23 at 4. The United States incorporates the arguments and authority from its response opposing The Times's motion. Doc. 17.

Although he acknowledges the lack of any supporting Eleventh Circuit authority, Doc. 25 at n.29, Burke nonetheless seeks to unseal the PC Affidavit—when only probable cause is at issue (and has been previously found)—in an effort to launch a fishing expedition into the United States' ongoing investigation. Burke's counsel is unabashed in attempting to review and challenge: (1) the United States' internal "legal considerations" and determinations regarding Department policies during the ongoing investigation; (2) the evidence secured against the subject(s); and (3) the United States working legal theories. Doc. 25 at 12-15, 18-19. Grasping to include some authority, the motion bootstraps *Franks v. Delaware*, 438 U.S. 154, 156, 165-71 (1978).[24] But *Franks* is unanalogous because it concerned a review of a probable cause affidavit ***after*** charges had been initiated against the defendant. That is not the case here: this matter concerns an ongoing investigation in the early stages where no charges have been brought against any defendant.

Finally, and again without any Eleventh Circuit support, Burke's motion argues that Burke, as a subject of an investigation, has a higher interest than The Times in disclosure of the PC Affidavit because Burke desires to (prematurely)

[24] Burke also cites to a discovery order from an extradition matter in the Northern District of California. Doc. 25 at 15 (citing *In re Extradition of Manrique*, Case No. 19-mj-71055-MAG-1 (TSH), 12-13 (N.D. Cal. Feb. 6, 2020)). And while Burke cherry picks language from that order, he neglects to mention that in that case, the magistrate judge ordered the redaction to prevent the disclosure of sensitive information. *Id*. at 13. But this Court has already determined that it is impossible to excise the sensitive information from the affidavit here through redactions.

challenge the search and seizures, and would be better positioned to do so if he could leverage this Court's authority to (improperly) pierce the United States' ongoing investigation and discover details about that investigation's progress, methods, techniques, focus, and theories. His motion includes an extended argument, Doc. 25 at 15-20, in which he (also prematurely) argues that probable cause could not properly have been found because, as Burke sees it—based upon attorney-proffered assertions of selected facts and assumed government theories—there was no violation of law. But Burke is not situated any differently than any other subject in an ongoing federal criminal investigation whose property has been searched for evidence of criminal conduct after the issuance of a warrant by a magistrate judge. There may come a time—e.g., following the filing of a complaint or indictment against Burke—when he is properly situated to challenge the PC Affidavit, but that time is not at this early stage of an ongoing complex criminal investigation. To the extent Burke is requesting that this Court enter an order unsealing any aspect of the PC Affidavit, that request should be rejected.

B. This Court Lacks Jurisdiction to Entertain Burke's Request for Return of Property and Should Dismiss it.

Burke, pursuant to Fed. R. Crim. P. 41(g), is attempting to use this Court's jurisdiction to block the United States from using lawfully seized records in a criminal investigation. Burke argues that "even if the initial seizure were lawful, this Court has the equitable power to order the materials to be returned where, as here, the continued retention of these documents is unlawful." Doc. 25 at 9. This

Court, however, lacks jurisdiction to order the United States to return Burke's property during its criminal investigation under the circumstances presented.

This Court has no general equitable authority to superintend federal criminal investigations. The basis of this Court's jurisdiction to order pre-indictment return of property is grounded in the Court's supervisory power over its officers and is equitable in nature. *See Hunsucker v. Phinney*, 497 F.2d 29, 34 (5th Cir. 1974). This Court's exercises of equitable jurisdiction "should be exceptional and anomalous." *Trump v. United States.*, 54 F.4th 689, 694 (11th Cir. 2022) (internal quotation marks omitted). Significantly, the burden of establishing jurisdiction rests on Burke—and "[o]nly the narrowest of circumstances permit a district court to invoke equitable jurisdiction." *Id*. at 697. Indeed, "[s]uch decisions must be exercised with caution and restraint, as equitable jurisdiction is appropriate only in exceptional cases where equity demands intervention." *Id*. (internal quotations and citations omitted).

Thus, to avoid "unnecessary interference with the executive branch's criminal enforcement authority" while maintaining the possibility of "relief in rare instances where a gross constitutional violation would otherwise leave [a] subject of a search without recourse[,]" courts should limit this jurisdiction using the four-factor test delineated in *Richey v. Smith*, 515 F.2d 1239, 1243–44 (5th Cir. 1975):

> (1) whether the government displayed a "callous disregard" for the plaintiff's constitutional rights; (2) "whether the plaintiff has an individual interest in and need for the material whose return he seeks"; (3) "whether the plaintiff would be irreparably injured by denial of the return of the property"; and (4) "whether the plaintiff has an adequate

remedy at law for the redress of his grievance."

Id.

But the four factors are not to be weighed equally. Instead, Burke must first establish through an "accurate allegation" the government's "callous disregard for his constitutional rights" before this Court intervenes in the United States' ongoing investigation. *Trump*, 54 F.4th at 698. "Otherwise, a flood of disruptive civil litigation would surely follow. This restraint guards against needless judicial intrusion into the course of criminal investigations—a sphere of power committed to the executive branch." *Id*. (internal quotation and citation omitted).

Burke has not met (cannot meet) the callous-disregard standard. First, Burke's prior-restraint argument fails. He has not identified any material seized by the United States which he intended to publish imminently, and therefore it is unclear how the seizure constitutes a prior restraint. Second, the United States is producing originals or copies of all folders/files that are not contraband or fruits of identified crimes so that Burke can have access to the material. It does not constitute a prior restraint for the United States to retain the materials that a magistrate judge found probable cause to believe Burke illegally obtained. *See Zurcher v. Stanford Daily*, 436 U.S. 547, 567 (1978) ("[P]resumptively protected materials are not necessarily immune from seizure under warrant for use at a criminal trial. Not every such seizure, and not even most, will impose a prior restraint.").

In *Zurcher*, the Supreme Court also rejected the argument raised by Burke here that a warranted search will have a chilling effect on sources. *See id.* at 566.

("Nor are we convinced, any more than we were in [*Branzburg*] that confidential sources will disappear and that the press will suppress news because of fears of warranted searches."). And the Supreme Court also found it unpersuasive that such searches of journalist are rare: "The fact is that respondents and amici have pointed to only a very few instances in the entire United States since 1971 involving the issuance of warrants for searching newspaper premises. This reality hardly suggests abuse. … [T]he press is not only an important, critical, and valuable asset to society, but it is not easily intimidated—nor should it be." *Id.*

Simply put, in *Zurcher*, the Supreme Court held, "Properly administered, the preconditions for a warrant—probable cause, specificity with respect to the place to be searched and the things to be seized, and overall reasonableness—should afford sufficient protection against the harms that are assertedly threatened by warrants for searching newspaper offices." *Id*. at 565. And *Zurcher* concerned a search of a student newspaper, the Stanford Daily, that had created work product—articles and photographs—***in reporting on a demonstration*** that had erupted into violence ***but in no way involved any allegation of unlawful acts*** by Stanford Daily staff members.[25]

Moreover, Burke has premised his argument in this regard upon his erroneous suspicion that the investigative team has failed to comply with various internal Department policies and that the lawful warrant executed at his address resulted in

[25] Congress passed the PPA in response to *Zurcher*. And, although the PPA prohibits the search and seizures of materials intended for public dissemination, the statute has no effect on the constitutional analysis in *Zurcher*.

the seizure by the government of certain work-related materials. That argument could be raised by any subject of a lawful search warrant who was even tangentially involved in media. And mere failure to follow its own policies does not rise to a level of a callous disregard of a constitutional right.

And in any event, the United States has diligently followed its policies and procedures to safeguard Burke's First Amendment rights. As explained above, the United States has made proactive and repeated good-faith efforts to prevent the investigative team from unintentionally encountering any potentially privileged or protected communications or materials. In that regard, a search-team agent was designated prior to the search to act as a filter-team agent if any potentially privileged or protected materials were encountered at the Burke address, and additional protocols were developed prior to the search concerning how the agents were to handle any materials that appeared to potentially be pre-publication items containing work-product or other documentary materials. Once the search had been completed, the undersigned repeatedly encouraged Burke's counsel to provide any guidance they felt appropriate to facilitate the protection and/or segregation of any seized materials or communications. Until recently, July 17th—when counsel provided more specific information about Burke's potential attorney-client communications and additional work-related information—counsel had declined to provide any specific actionable information, instead only repeating overbroad and unhelpful assertions.

The undersigned also proactively provided to Burke's counsel a proposed stipulation addressing issues related to the copying and/or return of materials seized

during the execution of the search warrant, which counsel has ignored. And, the undersigned (and supervisors) offered to meet with counsel to discuss any issues or concerns about the United States' process to protect potentially privileged or protected information. Again, that offer was declined. Moreover, the United States has assisted Burke in reestablishing his social media account and is working to return to Burke either original or copies of seized materials. Indeed, the only electronic files seized during the execution of the warrant that will not be returned are files that constitute contraband or fruits of violations of 18 U.S.C. §§ 1030 and/or 2511, involving Burke and dated on or after midnight, August 22, 2022, in accordance with this Court's authorization under Attachment B to the warrant.

Finally, there is no merit to Burke's argument that the United States acted in callous disregard of his Fourth Amendment rights by unlawfully seizing his property. The United States obtained a search warrant from this Court which it supported with a probable cause affidavit. While Burke speculates about the United States' theory of the case and argues that he did not commit a crime, this Court has already found that the United States had probable cause to seize the property. This is not the juncture to litigate the ultimate merits of his case. Because Burke has failed to establish his general allegation of "callous disregard," this Court need not entertain the other *Richey* factors, *Trump*, 54 F.4th at 698, and the Court lacks jurisdiction to intervene in the ongoing investigation as Burke requests. That said, the other factors weigh in United States' favor. The second *Richey* factor—whether Burke has an individual interest in and need for the material he

seeks—is a non-issue. As discussed above, the United States is producing to Burke originals or copies of all folders/files not considered contraband or fruits. The third factor—whether Burke will be irreparably injured by denial of return of the property—also favors the United States. Since the United States is producing to Burke originals or copies of all folders/files that are not contraband or fruits of crime, Burke cannot identify any irreparable injury that would not also apply to nearly every subject of a like search warrant. *See, e.g., id.* at 700. The fourth factor—whether Burke has an adequate remedy at law for the redress of his grievance—also falls in favor of the United States. As in *Trump*, the only argument available to Burke is that files retained by the United States as contraband are not within the scope of the warrant. *See, e.g., id*. There is no record evidence that the United States exceeded the scope of the warrant authorized by this Court after the finding of probable cause and ample evidence demonstrating that the United States is making good-faith efforts to return originals and copies of all folders/files not considered contraband. And again, as in *Trump*, "[Burke's] argument would apply universally; presumably any subject of a search warrant would like all of his property back before the government has a chance to use it." *Id.*

IV. CONCLUSION

WHEREFORE, this Court should deny Burke's Motion to unseal the PC Affidavit, and should dismiss his Motion for Return of Property for lack of jurisdiction.

Respectfully submitted,

ROGER B. HANDBERG
United States Attorney

By: */s/Jay G. Trezevant*
Jay G. Trezevant
Assistant United States Attorney
Florida Bar No. 0802093
400 N. Tampa Street, Suite 3200
Tampa, Florida 33602-4798
Telephone: (813) 274-6000
Facsimile: (813) 274-6358
E-mail: jay.trezevant@usdoj.gov

Times Publishing Company v. U.S. **Case No. 8:23-mc-00014-WFJ-SPF**

CERTIFICATE OF SERVICE

I hereby certify that on August 9, 2023, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to the following:

Michael Maddux, Esq.

Mark Rasch, Esq.

Jon M. Philipson, Esq.

/s/ Jay G. Trezevant
Jay G. Trezevant
Assistant United States Attorney

Attachment A

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

In the Matter of the Search of
Timothy Burke's Residence at
5914 N. Tampa Street
Tampa, FL 33604

Case No. 8:23-mj-1541SPF

STIPULATION REGARDING
CERTAIN SEIZED ELECTRONIC EVIDENCE

The United States of America, by Roger B. Handberg, United States Attorney for the Middle District of Florida, and Timothy Burke and his counsel, Michael P. Maddux and Mark Rasch (collectively, "Burke"), hereby agree and stipulate as follows:

RECITALS

1. On May 8, 2023, a court-authorized search warrant (the "warrant") was executed by Special Agents with the Federal Bureau of Investigation ("FBI") at the residence of Timothy Burke, 5914 N. Tampa Street, Tampa, FL, 33604.

2. Pursuant to the execution of that warrant, the FBI Special Agents seized certain electronic items (hereinafter, the "items") containing data and information (the "information"), which items are more particularly described in the *Evidence Collected Item Log* (dated May 8, 2023), attached hereto as Attachment A, and incorporated into this Stipulation.

3. The United States intends to use the items seized, and their contents, as evidence in the ongoing investigation and any resulting prosecution

including, possibly, introducing those items and/or their contents into evidence in a future legal proceeding.

4. The United States has agreed, to the extent possible,[1] to create and produce to Burke copies of folders and files contained in the items seized using reliable methods (hereinafter, the "copy(ies)"), withholding only the information believed by the United States to fall within its authority to seize under Attachment B (Particular Things to be Seized) to the warrant or authorized by further agreement with Burke or subsequent court order.

5. Burke has requested the return of the items seized, and in the interest of expediting the return of the seized items and/or their contents, has agreed to the following terms.

STIPULATION

6. Other than accessing the items to create complete, exact, and accurate duplicates of the items for use by the United States during its investigation and any resulting prosecution in accordance with paragraph 3 above and/or to produce to Burke copies in accordance with paragraph 4 above, the FBI will maintain the original items in evidence, absent further agreement with Burke or subsequent court

[1] Should the United States be unable to access and forensically image an item, it will not be possible to produce to Burke copies contained in that item.

order authorizing the removal and/or destruction of a particular item, or some part thereof.

7. A duplicate of an item, and any copy that has been extracted from an item and produced by the United States to Burke pursuant to this Stipulation, "is admissible [into evidence] to the same extent as the original," within the meaning of Fed. R. Evid. 1003, and may be admitted into evidence in any legal proceedings where the item and/or any copy that has been extracted from an item would be admissible.

8. Further, a duplicate of an item, and any copy that has been extracted from an item and produced by the United States to Burke pursuant to this Stipulation, satisfies the requirements of authentication and identification, and the parties to this Stipulation waive any and all objections, and will not object, to the admissibility of the items (and/or any parts thereof) on the grounds of foundation, authentication, and/or that the items (and/or any parts thereof) are duplicates of or are not the original items or images, and/or any other objection under Articles IX and X of the Federal Rules of Evidence.

9. Other than the above agreements in this Stipulation concerning the applicability or inapplicability of certain identified Federal Rules of Evidence, the parties reserve and preserve all other objections to the admissibility into evidence in any legal proceedings of an item and/or any copy that has been extracted from an item on all other grounds.

10. Burke also retains the right to move to suppress any of the items and/or their contents pursuant to Fed. R. Crim. P. 41.

DATE:

Signatures:

_____
Jay G. Trezevant
Assistant U.S. Attorney

_____
Timothy Burke

_____
Michael P. Maddux
Attorney for Timothy Burke

_____
Mark Rasch
Attorney for Timothy Burke

From: [redacted] on behalf of Trezevant, Jay (USAFLM)
To: Michael Maddux [redacted]; Mark Rasch
Cc: Trezevant, Jay (USAFLM)
Subject: Burke return of property and disclosure of SW affidavit
Date: Friday, July 21, 2023 11:24:52 AM

Michael and Mark,

Good morning. This email is to follow-up on your below email and our phone call earlier today.

Having read over some of your earlier correspondence/messages and considering our related discussions, I want to ensure there is no confusion about what is being proposed by the stipulation, particularly the language in paragraph 4.

As you know, the warrant application submitted by the agent to the magistrate judge identified the basis for the search as including: (1) evidence of a crime; (2) contraband, fruits of crime, and other items illegally possessed ("fruits/contraband of crime"); and (3) property designed for use, intended for use, or used in committing a crime. That warrant application can be found in Case No. 8:23-mc-00014-WFJ-SPF, doc. 18-1 at 13-19. The language in paragraph 4 of the proposed stipulation specifies that the United States would produce to you copies of the folders and files contained in the items seized, "withholding only the information believed by the United States to fall within its authority to seize under Attachment B to the warrant or authorized by further agreement with Burke or subsequent court order." That language, read broadly, could suggest that the United States intends to withhold all information that falls within its authority to seize under Attachment B to the warrant. To clarify, that is not what is intended. Instead, the proposal is that the United States, in producing material to your team under paragraph 4, would provide copies of all folders and files contained in the items seized, withholding only the information believed by the United States to fall within its authority to seize that would constitute fruits/contraband of crime. In that regard, the language of paragraph 4 could be modified to clarify what would be considered by the United States to constitute fruits/contraband, and we are amenable to discussing that with you.

In addition, it is also worth noting that the United States is proposing a stipulation that would apply only to items seized that contain some information falling within its authority to seize under Attachment B. You have explained during our discussions that you believe some items seized fall completely outside the authority to seize under Attachment B. To that end, you have now provided a list to us of items that you believe might easily be determined to fall outside Attachment B. That list was provided to the FBI for use in triaging its review and production/return of material. So that there is no misunderstanding, please know that any item(s) seized that are determined to contain only information that falls outside Attachment B, will be returned and the United States will eliminate any image of the item(s) from its systems.

I previously forwarded your recent (and previous) correspondence to Rachelle Bedke and Carlton Gammons, the Chief and Deputy Chief of the Economic Crimes Section, and have provided them both with additional information and material. To the extent you are amenable, and to address the above and/or refine issues that might unnecessarily be raised in motion practice, Chief Bedke and I (and possibly Deputy Chief Gammons) are available to meet with you in person or via WebEx, as

preferred, to discuss the above and any other directly related issues, such as your concerns about our process to protect potentially privileged information (about which you have now provided some additional detail that is helpful). The best available times to meet are Tuesday after 1 pm and Wednesday any time other than 2-3 pm.

Thank you,

Jay G. Trezevant
Assistant U.S. Attorney
Middle District of Florida
400 N. Tampa Street
Suite 3200
Tampa, FL 33602
Phone: [redacted]

From: [redacted] **On Behalf Of** Trezevant, Jay (USAFLM)
Sent: Wednesday, July 19, 2023 5:46 PM
To: Michael Maddux [redacted]; Trezevant, Jay (USAFLM) [redacted]
Cc: [redacted]; Mark Rasch [redacted]
Subject: RE: Burke return of property and disclosure of SW affidavit

Michael,

Thank you. I believe that the meeting at the FBI on Friday should work. I will confirm tomorrow morning one way or the other and let you know.

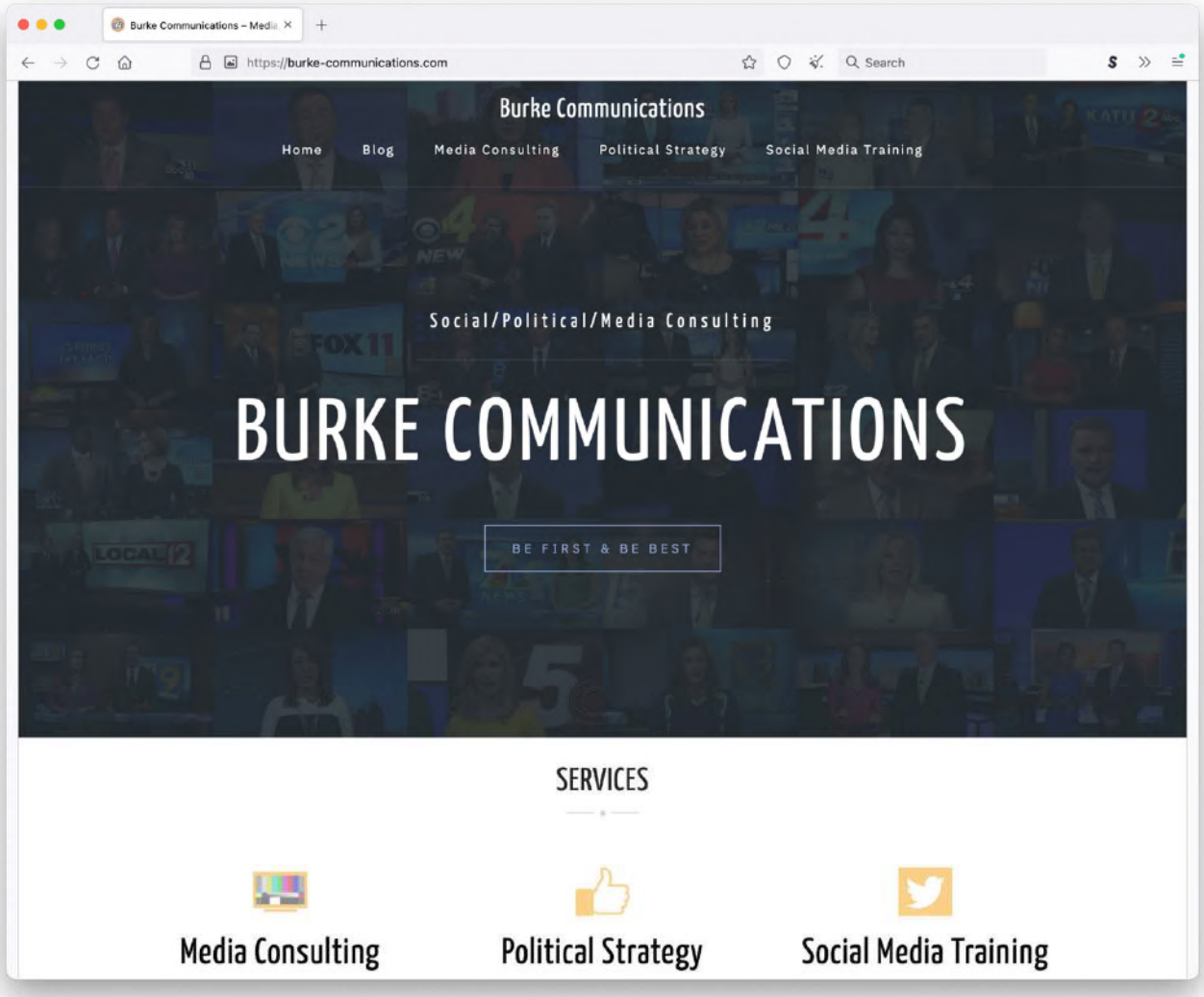
Have a good evening.

Thank you,

Jay G. Trezevant
Assistant U.S. Attorney
Middle District of Florida
400 N. Tampa Street
Suite 3200
Tampa, FL 33602
Phone: [redacted]

From: Michael Maddux [redacted]
Sent: Wednesday, July 19, 2023 3:08 PM
To: Trezevant, Jay (USAFLM) [redacted]
Cc: [redacted] Mark Rasch [redacted]
Subject: [EXTERNAL] Re: Burke return of property and disclosure of SW affidavit

Attachment B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Blog
Media Consulting
Political Strategy
Social Media Training
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BE FIRST & BE BEST
SERVICES
Media Consulting
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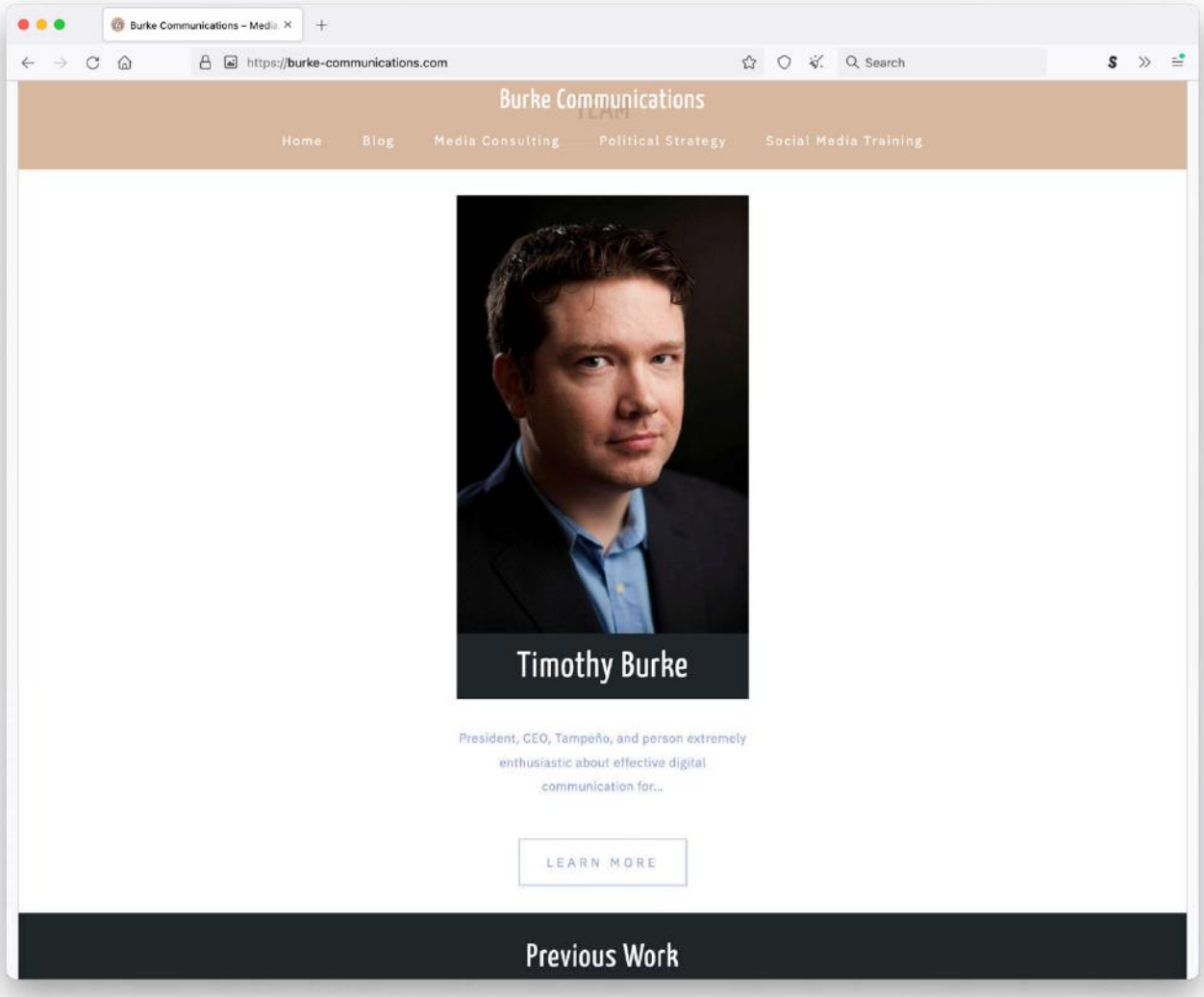
Burke Communications – Media
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Burke Communications
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Blog
Media Consulting
Political Strategy
Social Media Training
Timothy Burke
President, CEO, Tampeño, and person extremely enthusiastic about effective digital communication for...
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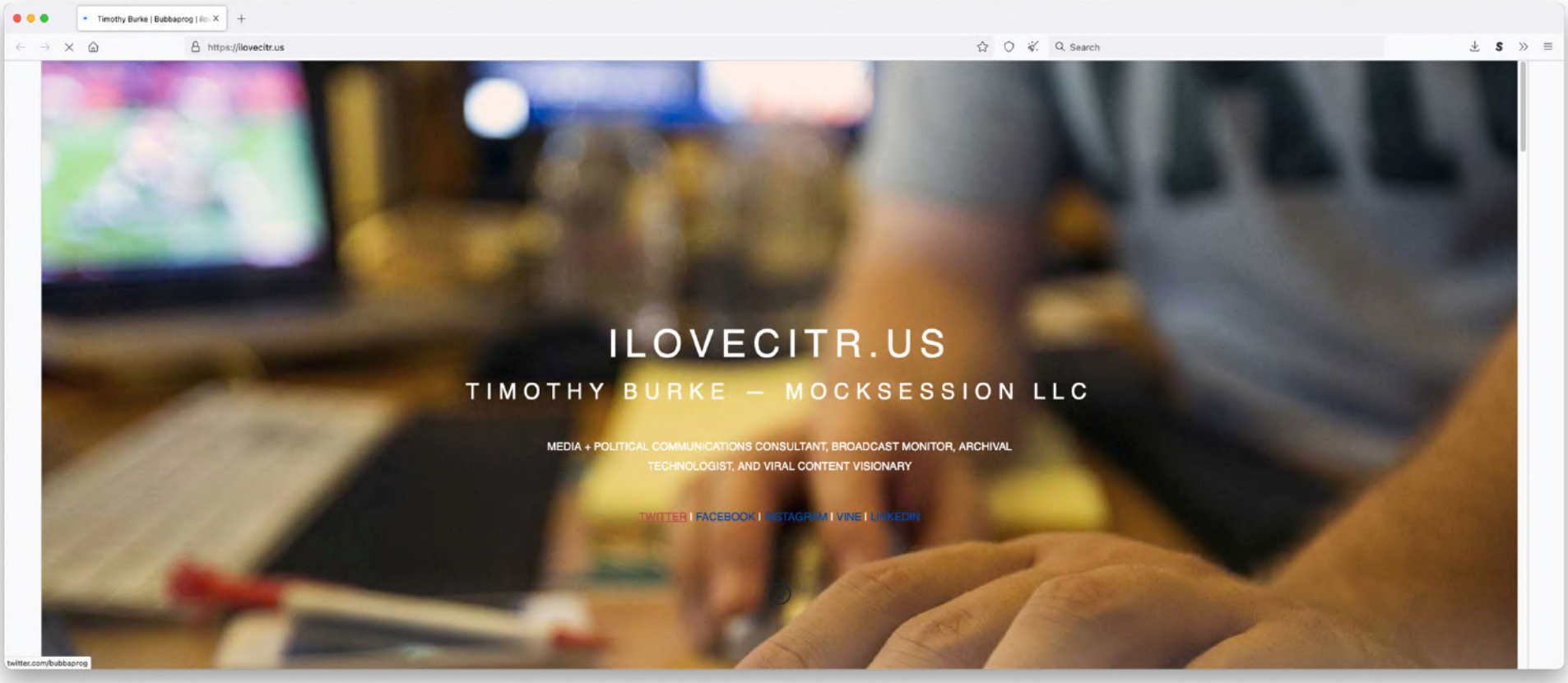
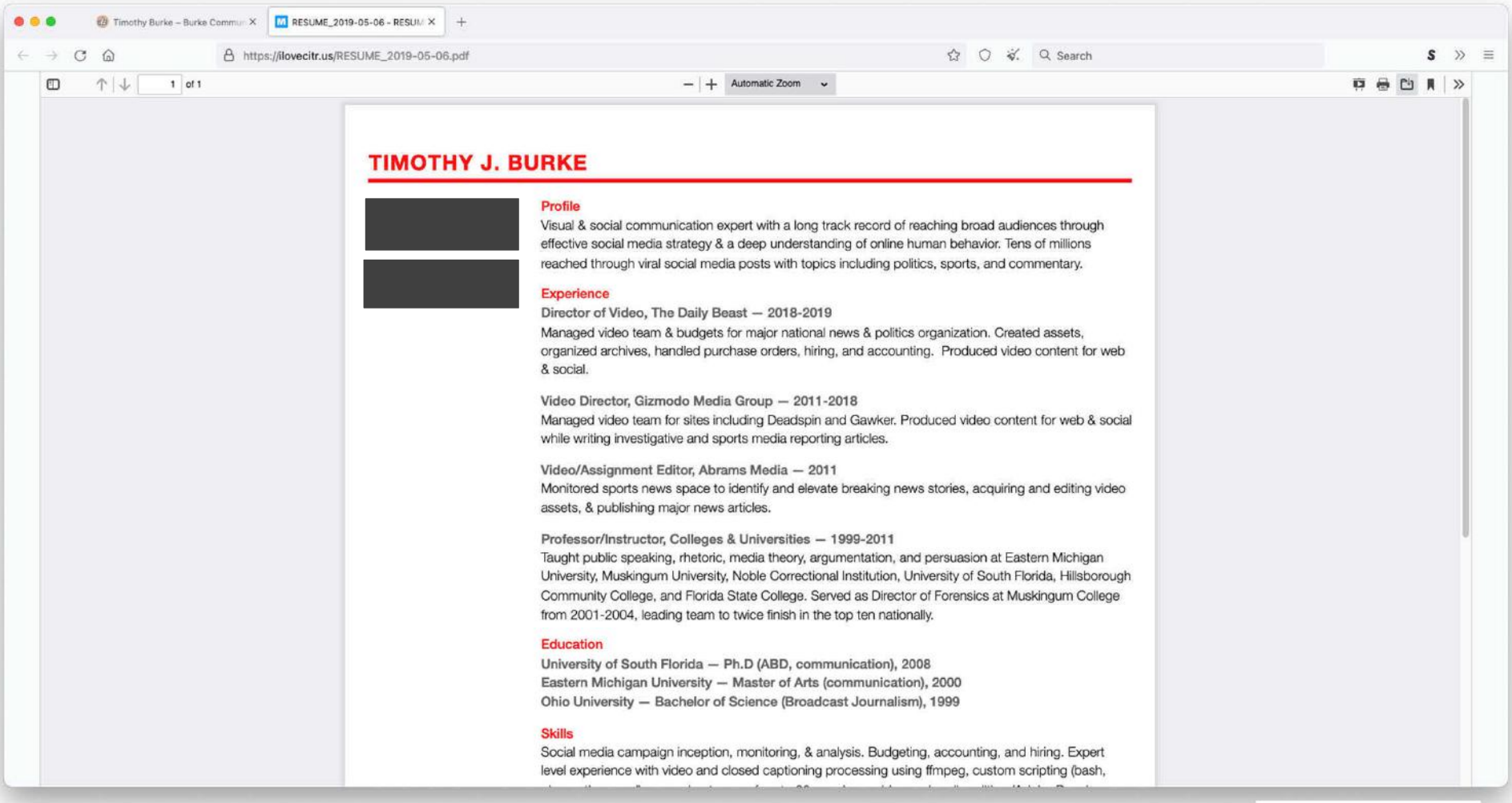
Previous Work


Timothy Burke | Bubbaprog
https://ilovecitr.us
Search
ILOVECITR.US
TIMOTHY BURKE — MOCKSESSION LLC
MEDIA + POLITICAL COMMUNICATIONS CONSULTANT, BROADCAST MONITOR, ARCHIVAL TECHNOLOGIST, AND VIRAL CONTENT VISIONARY
TWITTER | FACEBOOK | INSTAGRAM | VINE | LINKEDIN
twitter.com/bubbaprog


Timothy Burke – Burke Commun
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Search
1 of 1
Automatic Zoom
TIMOTHY J. BURKE
[redacted]
Profile
Visual & social communication expert with a long track record of reaching broad audiences through effective social media strategy & a deep understanding of online human behavior. Tens of millions reached through viral social media posts with topics including politics, sports, and commentary.
Experience
Director of Video, The Daily Beast — 2018-2019
Managed video team & budgets for major national news & politics organization. Created assets, organized archives, handled purchase orders, hiring, and accounting. Produced video content for web & social.
Video Director, Gizmodo Media Group — 2011-2018
Managed video team for sites including Deadspin and Gawker. Produced video content for web & social while writing investigative and sports media reporting articles.
Video/Assignment Editor, Abrams Media — 2011
Monitored sports news space to identify and elevate breaking news stories, acquiring and editing video assets, & publishing major news articles.
Professor/Instructor, Colleges & Universities — 1999-2011
Taught public speaking, rhetoric, media theory, argumentation, and persuasion at Eastern Michigan University, Muskingum University, Noble Correctional Institution, University of South Florida, Hillsborough Community College, and Florida State College. Served as Director of Forensics at Muskingum College from 2001-2004, leading team to twice finish in the top ten nationally.
Education
University of South Florida — Ph.D (ABD, communication), 2008
Eastern Michigan University — Master of Arts (communication), 2000
Ohio University — Bachelor of Science (Broadcast Journalism), 1999
Skills
Social media campaign inception, monitoring, & analysis. Budgeting, accounting, and hiring. Expert level experience with video and closed captioning processing using ffmpeg, custom scripting (bash,

Attachment C

28 CFR § 50.10 - Policy regarding obtaining information from or records of members of the news media; and regarding questioning, arresting, or charging members of the news media.

§ 50.10 Policy regarding obtaining information from or records of members of the news media; and regarding questioning, arresting, or charging members of the news media.

(a) ***Statement of principles.***

(1) A free and independent press is vital to the functioning of our democracy. Because freedom of the press can be no broader than the freedom of members of the news media to investigate and report the news, the Department's policy is intended to provide protection to members of the news media from certain law enforcement tools and actions, whether criminal or civil, that might unreasonably impair newsgathering. The policy is not intended to shield from accountability members of the news media who are subjects or targets of a criminal investigation for conduct outside the scope of newsgathering.

(2) The Department recognizes the important national interest in protecting journalists from compelled disclosure of information revealing their sources, sources they need to apprise the American people of the workings of their Government. For this reason, with the exception of certain circumstances set out in this section, the Department of Justice will not use compulsory legal process for the purpose of obtaining information from or records of members of the news media acting within the scope of newsgathering.

(3) In determining whether to seek, when permitted by this policy, information from or records of members of the news media, the Department must consider 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 a free press in fostering Government accountability and an open society, including by protecting members of the news media from compelled disclosure of information revealing their sources. These interests have long informed the Department's view that the use of compulsory legal process to seek information from or records of non-consenting members of the news media constitutes an extraordinary measure, not a standard investigatory practice.

(b) ***Scope and definitions*** -

(1) ***Covered persons and entities.*** The policy in this section governs the use of certain law enforcement tools and actions, whether criminal or civil, to obtain information from or records of members of the news media.

(2) ***Definitions.***

(i) ***Compulsory legal process*** consists of subpoenas, search warrants, court orders issued pursuant to 18 U.S.C. 2703(d) and 3123, interception orders issued pursuant to 18 U.S.C. 2518, civil investigative demands, and mutual legal assistance treaty requests - regardless of whether issued to members of the news media directly, to their publishers or employers, or to others, including third-party service providers of any of the forgoing, for the purpose of obtaining information from or records of members of the news media, and regardless of whether the compulsory legal process seeks testimony, physical or electronic documents, telephone toll or other communications records, metadata, or digital content.

(ii) ***Newsgathering*** is the process by which a member of the news media collects, pursues, or obtains information or records for purposes of producing content intended for public dissemination.

(A) Newsgathering includes the mere receipt, possession, or publication by a member of the news media of Government information, including classified information, as well as establishing a

means of receiving such information, including from an anonymous or confidential source.

(B) Except as provided in paragraph (b)(2)(ii)(A) of this section, newsgathering does not include criminal acts committed in the course of obtaining information or using information, such as: breaking and entering; theft; unlawfully accessing a computer or computer system; unlawful surveillance or wiretapping; bribery; extortion; fraud; insider trading; or aiding or abetting or conspiring to engage in such criminal activities, with the requisite criminal intent.

(3) ***Exclusions.***

(i) The protections of the policy in this section do not extend to any person or entity where there is a reasonable ground to believe the person or entity is:

(A) A foreign power or agent of a foreign power, as those terms are defined in section 101 of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801);

(B) A member or affiliate of a foreign terrorist organization designated under section 219(a) of the Immigration and Nationality Act (8 U.S.C. 1189(a));

(C) Designated as a Specially Designated Global Terrorist by the Department of the Treasury under Executive Order 13224 of September 23, 2001, 3 CFR, 2001 Comp., p. 786;

(D) A specially designated terrorist as that term is defined in 31 CFR 595.311;

(E) A terrorist organization as that term is defined in section 212(a)(3)(B)(vi) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(3)(B)(vi));

(F) Committing or attempting to commit a crime of terrorism, as that offense is described in 18 U.S.C. 2331(5) or 2332b(g)(5);

(G) Committing or attempting to commit the crimes of providing material support or resources to terrorists or designated foreign terrorist organizations, providing or collecting funds to finance acts of

terrorism, or receiving military-type training from a foreign terrorist organization, as those offenses are defined in 18 U.S.C. 2339A, 2339B, 2339C, and 2339D; or

(H) Aiding, abetting, or conspiring in illegal activity with a person or organization described in paragraphs (b)(3)(i)(A) through (G) of this section.

(ii) The determination that an exclusion in paragraph (b)(3)(i) of this section applies must be made by the Assistant Attorney General for National Security.

(c) ***Compulsory legal process for the purpose of obtaining information from or records of a member of the news media acting within the scope of newsgathering.*** Compulsory legal process for the purpose of obtaining information from or records of a member of the news media acting within the scope of newsgathering is prohibited except under the circumstances set forth in paragraphs (c)(1) through (3) of this section. (Note that the prohibition in this paragraph (c) on using compulsory legal process applies when a member of the news media has, in the course of newsgathering, only received, possessed, or published government information, including classified information, or has established a means of receiving such information, including from an anonymous or confidential source.) The Department may only use compulsory legal process for the purpose of obtaining information from or records of a member of the news media acting within the scope of newsgathering, as follows:

(1) To authenticate for evidentiary purposes information or records that have already been published, in which case the authorization of a Deputy Assistant Attorney General for the Criminal Division is required;

(2) To obtain information or records after a member of the news media agrees to provide or consents to the provision of the requested records or information in response to the proposed compulsory legal process, in which case authorization as described in paragraph (i) of this section is required; or

(3) When necessary to prevent an imminent or concrete risk of death or serious bodily harm, including terrorist acts, kidnappings, specified offenses against a minor (as defined in 34 U.S.C. 20911(7)), or

incapacitation or destruction of critical infrastructure (as defined in 42 U.S.C. 5195c(e)), in which case the authorization of the Attorney General is required.

(d) ***Compulsory legal process for the purpose of obtaining information from or records of a member of the news media not acting within the scope of newsgathering.***

(1) The Department may only use compulsory legal process for the purpose of obtaining information from or records of a member of the news media who is not acting within the scope of newsgathering:

(i) When the member of the news media is the subject or target of an investigation and suspected of having committed an offense;

(ii) To obtain information or records of a non-member of the news media, when the non-member is the subject or target of an investigation and the information or records are in a physical space, device, or account shared with a member of the news media;

(iii) To obtain purely commercial, financial, administrative, technical, or other information or records unrelated to newsgathering; or for information or records relating to personnel not involved in newsgathering;

(iv) To obtain information or records related to public comments, messages, or postings by readers, viewers, customers, or subscribers, over which a member of the news media does not exercise editorial control prior to publication;

(v) To obtain information or records of a member of the news media who may be a victim of or witness to crimes or other events, or whose premises may be the scene of a crime, when such status (as a victim or witness or crime scene) is not based on or within the scope of newsgathering; or

(vi) To obtain only subscriber and other information described in 18 U.S.C. 2703(c)(2)(A), (B), (D), (E), and (F).

(2) Compulsory legal process under paragraph (d)(1) of this section requires the authorization of a Deputy Assistant Attorney General for the Criminal Division, except that:

(i) To obtain information or records after a member of the news media agrees to provide or consents to the provision of the requested records or information in response to the proposed compulsory legal process, such compulsory legal process requires authorization as described in paragraph (i) of this section governing voluntary questioning and compulsory legal process following consent by a member of the news media; and

(ii) To seek a search warrant for the premises of a news media entity requires authorization by the Attorney General.

(e) ***Matters where there is a close or novel question as to the person's or entity's status as a member of the news media or whether the member of the news media is acting within the scope of newsgathering.***

(1) When there is a close or novel question as to the person's or entity's status as a member of the news media, the determination of such status must be approved by the Assistant Attorney General for the Criminal Division.

(2) When there is a close or novel question as to whether the member of the news media is acting within the scope of newsgathering, the determination of such status must be approved by the Assistant Attorney General for the Criminal Division. When the Assistant Attorney General finds that there is genuine uncertainty as to whether the member of the news media is acting within the scope of newsgathering, the determination of such status must be approved by the Attorney General.

(f) ***Compelled testimony.***

(1) Except as provided in paragraph (f)(2) of this section, members of the Department must obtain the authorization of the Deputy Attorney General when seeking to compel grand jury or trial testimony otherwise permitted by this section from any member of the news media.

(2) When the compelled testimony under paragraph (f)(1) of this section has no nexus to the person's or entity's activities as a member of the news media, members of the Department must obtain the authorization of a Deputy Assistant Attorney General for the Criminal Division and provide prior notice to the Deputy Attorney General.

(3) Such authorization may only be granted when all other requirements of this policy regarding compulsory legal process have been satisfied.

(g) ***Exhaustion.***

(1) Except as provided in paragraph (g)(2) of this section, the official authorizing the compulsory legal process must find the following exhaustion conditions are met:

(i) The Government has exhausted all reasonable avenues to obtain the information from alternative, non-news-media sources.

(ii) The Government has pursued negotiations with the member of the news media in an attempt to secure the member of the news media's consent to the production of the information or records to be sought through compulsory legal process, unless the authorizing official determines that, for compelling reasons, such negotiations would pose a clear and substantial threat to the integrity of the investigation or pose the risks described in paragraph (c)(3) of this section. Where the nature of the investigation permits, the Government must have explained to the member of the news media the Government's need for the information sought in a particular investigation or prosecution, as well as its willingness or ability to address the concerns of the member of the news media.

(iii) The proposed compulsory legal process is narrowly drawn. It must be directed at material and relevant information regarding a limited subject matter, avoid interference with unrelated newsgathering, cover a reasonably limited period of time, avoid requiring production of a large volume of material, and give reasonable and timely notice of the demand as required by paragraph (j) of this section.

(2) When the process is sought pursuant to paragraph (d)(1), (i), or (l) of this section, the authorizing official is not required to find that the exhaustion conditions in paragraphs (g)(1)(i) and (ii) of this section have been satisfied, but should consider requiring those conditions as appropriate.

(h) ***Standards for authorizing compulsory legal process.***

(1) In all matters covered by this section, the official authorizing the compulsory legal process must take into account the principles set forth in paragraph (a) of this section.

(2) Except as provided in paragraph (h)(3) of this section, when the member of the news media is not the subject or target of an investigation and suspected of having committed an offense, the official authorizing the compulsory legal process must take into account the following considerations:

(i) In criminal matters, there must be reasonable grounds to believe, based on public information or information from non-news-media sources, that a crime has occurred, and that the information sought is essential to a successful investigation or prosecution. The compulsory legal process may not be used to obtain peripheral, nonessential, or speculative information.

(ii) In civil matters, there must be reasonable grounds to believe, based on public information or information from non-news-media sources, that the information sought is essential to the successful completion of the investigation or litigation in a case of substantial importance. The compulsory legal process may not be used to obtain peripheral, nonessential, cumulative, or speculative information.

(3) When paragraph (h)(2) of this section would otherwise apply, but the compulsory legal process is sought pursuant to paragraph (i) or (l) of this section, the authorizing official is not required to, but should, take into account whether the information sought is essential to a successful investigation, prosecution, or litigation as described in paragraphs (h)(2)(i) and (ii) of this section.

(4) When the member of the news media is the subject or target of an investigation and suspected of having committed an offense, before authorizing compulsory legal process, the authorizing official is not required to, but should, take into account the considerations set forth in paragraphs (h)(2)(i) and (ii) of this section as appropriate.

(i) ***Voluntary questioning and compulsory legal process following consent by a member of the news media.***

(1) When the member of the news media is not the subject or target of an investigation and suspected of having committed an offense, authorization

by a United States Attorney or Assistant Attorney General responsible for the matter must be obtained in order to question a member of the news media on a voluntary basis, or to use compulsory legal process if the member of the news media agrees to provide or consents to the provision of the requested records or information in response to the proposed process. When there is any nexus to the person's activities as a member of the news media, such authorization must be preceded by consultation with the Criminal Division.

(2) When the member of the news media is the subject or target of an investigation and suspected of having committed an offense, authorization by a Deputy Assistant Attorney General for the Criminal Division must be obtained in order to question a member of the news media on a voluntary basis, or to use compulsory legal process if the member of the news media agrees to provide or consents to the provision of the requested records or information in response to the proposed process.

(j) ***Notice of compulsory legal process to the affected member of the news media.***

(1) Members of the Department must provide notice to the affected member of the news media prior to the execution of authorized compulsory legal process under paragraph (c) of this section unless the authorizing official determines that, for compelling reasons, such notice would pose the risks described in paragraph (c)(3) of this section.

(2) Members of the Department must provide notice prior to the execution of compulsory legal process authorized under paragraphs (d)(1)(ii) through (vi) of this section to a member of the news media that is not the subject or target of an investigation and suspected of having committed an offense, unless the authorizing official determines that, for compelling reasons, such notice would pose a clear and substantial threat to the integrity of the investigation or would pose the risks described in paragraph (c)(3) of this section and so informs the Deputy Attorney General in advance.

(3) If the member of the news media has not been given notice under paragraph (j)(1) or (2) of this section, the United States Attorney or Assistant Attorney General responsible for the matter must provide notice to the member of the news media as soon as it is determined that such

notice would no longer pose the concerns described in paragraph (j)(1) or (2) of this section, as applicable.

(4) In any event, such notice must be given to the affected member of the news media within 45 days of the Government's receipt of a complete return made pursuant to all forms of compulsory legal process included in the same authorizing official's authorization under paragraph (c) or (d)(1)(ii) through (vi) of this section, except that the authorizing official may authorize delay of notice for one additional 45-day period if the official determines that, for compelling reasons, such notice continues to pose the same concerns described in paragraph (j)(1) or (2) of this section, as applicable.

(5) Members of the Department are not required to provide notice to the affected member of the news media of compulsory legal process that was authorized under paragraph (d)(1)(i) of this section if the affected member of the news media is the subject or target of an investigation and suspected of having committed an offense.

(i) The authorizing official may nevertheless direct that notice be provided to the affected member of the news media.

(ii) If the authorizing official does not direct that such notice be provided, the official must so inform the Deputy Attorney General, and members of the Department who are responsible for the matter must provide the authorizing official with an update every 90 days regarding the status of the investigation. That update must include an assessment of any harm to the investigation that would be caused by providing notice to the member of the news media. The authorizing official will consider such update in determining whether to direct that notice be provided.

(6) Notice under the policy in this section may be given to the affected member of the news media or a current employer of that member if that employer is also a member of the news media.

(7) A copy of any notice to be provided to a member of the news media shall be provided to the Director of the Office of Public Affairs and to the Director of the Criminal Division's Office of Enforcement Operations at least 10 business days before such notice is provided, and immediately after such notice is provided to the member of the news media.

(k) ***Non-disclosure orders.***

(1) In seeking authorization to use compulsory legal process to obtain information from or the 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 compulsory legal process not to disclose the existence of the compulsory legal process to any other person or entity and shall articulate the need for such non-disclosure order.

(2) An application for a non-disclosure order sought in connection with compulsory legal process under paragraph (c) of this section may only be authorized if the authorizing official determines that, for compelling reasons, disclosure would pose the risks described in paragraph (c)(3) of this section and the application otherwise complies with applicable statutory standards and Department policies.

(3) An application for a non-disclosure order sought in connection with compulsory legal process under paragraphs (d)(1)(ii) through (vi) of this section regarding a member of the news media that is not the subject or target of an investigation and suspected of having committed an offense may only be authorized if the authorizing official determines that, for compelling reasons, disclosure would pose a clear and substantial threat to the integrity of the investigation or would pose the risks described in paragraph (c)(3) of this section and the application otherwise complies with applicable statutory standards and Department policies.

(4) An application for a non-disclosure order sought in connection with compulsory legal process under paragraph (d)(1)(i) of this section regarding a member of the news media that is a subject or target of an investigation and suspected of having committed an offense may be authorized if the application otherwise complies with applicable statutory standards and Department policies.

(5) Members of the Department must move to vacate any non-disclosure order when notice of compulsory legal process to the affected member of media is required (after any extensions permitted) by paragraph (j) of this section.

(l) ***Exigent circumstances involving risk of death or serious bodily harm.***

(1) A Deputy Assistant Attorney General for the Criminal Division may authorize the use of compulsory legal process that would otherwise require authorization from the Attorney General or the Deputy Attorney General if the Deputy Assistant Attorney General for the Criminal Division determines that:

(i) The exigent use of such compulsory legal process is necessary to prevent the risks described in paragraph (c)(3) of this section; and

(ii) Those exigent circumstances require the use of such compulsory legal process before the authorization of the Attorney General or the Deputy Attorney General can, with due diligence, be obtained.

(2) In authorizing the exigent use of compulsory legal process, a Deputy Assistant Attorney General for the Criminal Division should take into account the principles set forth in paragraph (a) of this section; ensure that the proposed process is narrowly tailored to retrieve information or records required to prevent or mitigate the associated imminent risk; and require members of the Department to comply with the safeguarding protocols described in paragraph (p) of this section.

(3) As soon as possible after the approval by a Deputy Assistant Attorney General for the Criminal Division of a request under paragraph (l)(1) of this section, the Deputy Assistant Attorney General must provide notice to the designated authorizing official, the Deputy Attorney General, and the Director of the Office of Public Affairs. Within 10 business days of the authorization under paragraph (l)(1) of this section, the United States Attorney or Assistant Attorney General responsible for the matter shall provide a statement to the designated authorizing official containing the information that would have been provided in a request for prior authorization.

(m) ***Arresting or charging a member of the news media.***

(1) Except as provided in paragraph (m)(2) of this section or in circumstances in which prior authorization is not possible, members of the Department must obtain the authorization of the Deputy Attorney General to seek a warrant for an arrest, conduct an arrest, present information to a grand jury seeking a bill of indictment, or file an information against a member of the news media.

(2) Except in circumstances in which prior authorization is not possible, when the arrest or charging of a member of the news media under paragraph (m)(1) of this section has no nexus to the person's or entity's activities as a member of the news media, members of the Department must obtain the authorization of a Deputy Assistant Attorney General for the Criminal Division and provide prior notice to the Deputy Attorney General.

(3) When prior authorization was not possible, the member of the Department must ensure that the designated authorizing official is notified as soon as possible.

(n) ***Applications for authorizations under this section.***

(1) Whenever any authorization is required under this section, the application must be personally approved in writing by the United States Attorney or Assistant Attorney General responsible for the matter.

(2) Whenever the authorizing official under this section is the Attorney General or the Deputy Attorney General, the application must also be personally approved in a memorandum by the Assistant Attorney General for the Criminal Division.

(3) The member of the Department requesting authorization must provide all facts and applicable legal authority necessary for the authorizing official to make the necessary determinations, as well as copies of the proposed compulsory legal process and any other related filings.

(4) Whenever an application for any authorization is made to the Attorney General or the Deputy Attorney General under this section, the application must also be provided to the Director of the Office of Public Affairs for consultation.

(o) ***Filter protocols.***

(1) In conjunction with the use of compulsory legal process, the use of filter protocols, including but not limited to keyword searches and filter teams, may be necessary to minimize the potential intrusion into newsgathering-related materials that are unrelated to the conduct under investigation.

(2) While the use of filter protocols should be considered in all matters involving a member of the news media, the use of such protocols must be

balanced against the need for prosecutorial flexibility and the recognition that investigations evolve, and should be tailored to the facts of each investigation.

(3) Unless compulsory legal process is sought pursuant to paragraph (i) or (l) of this section, members of the Department must use filter protocols when the compulsory legal process relates to a member of the news media acting within the scope of newsgathering or the compulsory legal process could potentially encompass newsgathering-related materials that are unrelated to the conduct under investigation. The Attorney General or the Deputy Attorney General may waive the use of filter protocols only upon an express finding that there is a ***de minimis*** risk that newsgathering-related materials that are unrelated to the conduct under investigation would be obtained pursuant to the compulsory legal process and that any filter protocol would pose a substantial and unwarranted investigative burden.

(4) Members of the Department should consult the Justice Manual for guidance regarding the use of filter protocols to protect newsgathering-related materials that are unrelated to the conduct under investigation.

(p) ***Safeguarding.*** Any information or records that might include newsgathering-related materials obtained from a member of the news media or from third parties pursuant to the policy in this section must be closely held so as to prevent disclosure of the information to unauthorized persons or for improper purposes. Members of the Department must consult the Justice Manual for specific guidance regarding the safeguarding of information or records obtained from a member of the news media or from third parties pursuant to this section and regarding the destruction and return of information or records as permitted by law.

(q) ***Privacy Protection Act.*** All authorizations pursuant to this section must comply with the provisions of the Privacy Protection Act (PPA), 42 U.S.C. 2000aa(a) *et seq.* Members of the Department must consult the Justice Manual for specific guidance on complying with the PPA. Among other things, members of the Department are not 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.

(r) ***Anti-circumvention.*** Members of the Department shall not direct any third party to take any action that would violate a provision of this section if taken by a member of the Department.

(s) ***Failure to comply.*** Failure to obtain the prior authorization required by this section may constitute grounds for an administrative reprimand or other appropriate disciplinary action.

(t) ***General provision.*** This section 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.

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