

REPORTERS COMMITTEE

FOR FREEDOM OF THE PRESS

1156 15th St. NW, Suite 1020
Washington, D.C. 20005
(202) 795-9300 • www.rcfp.org

Bruce D. Brown, Executive Director
bruce.brown@rcfp.org
(202) 795-9301

STEERING COMMITTEE CHAIR

STEPHEN J. ADLER

EXECUTIVE COMMITTEE MEMBERS

MARGARET LOW
WBUR

MASSIMO CALABRESI
Time Magazine

DAVID BOARDMAN
Temple University

MANNY GARCIA
Austin American-Statesman

LAURA HANDMAN
Davis Wright Tremaine

NORMAN PEARLSTINE

THOMAS C. RUBIN
OpenAI

STEERING COMMITTEE MEMBERS

WOLF BLITZER
CNN

THEODORE J. BOUTROUS, JR.
Gibson, Dunn & Crutcher LLP

LYNETTE CLEMETSON
University of Michigan

NIKHIL DEOGUN
Brunswick Group

EMILIO GARCIA-RUIZ
San Francisco Chronicle

JOSH GERSTEIN
POLITICO

ALEX GIBNEY
Jigsaw Productions

SUSAN GOLDBERG
GBH

GAIL GOVE
NBCUniversal

JAMES GRIMALDI
The Wall Street Journal

DIEGO IBARGÜEN
Hearst

JEREMY JOJOLA
9NEWS Colorado

KAREN KAISER
Associated Press

KIMBRIELL KELLY
The Los Angeles Times

DAVID LAUTER
The Los Angeles Times

COLLEEN MCCAIN NELSON
The McClatchy Company

JAMES NEFF
The Philadelphia Inquirer

BRUCE W. SANFORD
BakerHostetler, retired

CHARLIE SAVAGE
The New York Times

JENNIFER SONDAG
Bloomberg News

NABIHA SYED
The Markup

ADAM SYMSON
The E.W. Scripps Company

MATT THOMPSON
The New York Times

VICKIE WALTON-JAMES
NPR

SUSAN ZIRINSKY
CBS News

By email

August 13, 2023

Chief of Police Gideon Cody
Marion Police Department
112 N. Fifth St.
Marion, KS 66861

Re: Newsroom Search of Marion County Record.

Dear Chief Cody:

On August 11, 2023, law enforcement officers with the Marion Police Department executed a search warrant at the Marion County Record's newsroom and at its publisher's home, and seized the Record's electronic newsgathering equipment, work product, and documentary material.

The Reporters Committee for Freedom of the Press (the "Reporters Committee") and the undersigned 34 news media and press freedom organizations write to condemn that raid. Newsroom searches and seizures are among the most intrusive actions law enforcement can take with respect to the free press, and the most potentially suppressive of free speech by the press and the public.

Based on public reporting, the search warrant that has been published online, and your public statements to the press, there appears to be no justification for the breadth and intrusiveness of the search—particularly when other investigative steps may have been available—and we are concerned that it may have violated federal law strictly limiting federal, state, and local law enforcement's ability to conduct newsroom searches. We urge you to immediately return the seized material to the Record, to purge any records that may already have been accessed, and to initiate a full independent and transparent review of your department's actions.

As detailed in the search warrant, on Friday your department executed a warrant at the Record's offices and at the home of its owner and publisher that authorized the seizure and forensic search of electronic media, as well as the confiscation of journalistic work product and documentary material related to a named individual. *See Sherman Smith et al., Police Stage 'Chilling' Raid on Marion County Newspaper, Seizing Computers, Records, and Cellphones, Kansas Reflector (Aug. 11, 2023), <https://perma.cc/637N-ZMZC>.* The predicate crimes listed in the search warrant include identity theft regarding that named individual and K.S.A. 21-5839, "unlawful acts concerning computers." *Id.* (posting search warrant authorized by Marion County Magistrate Judge Laura Viar). According to media reporting, the raid followed the Record having received information from a source, attempting to verify that information through a state website available to the public, and thereafter, alerting your department out of

concern that, according to the owner and publisher of the paper, the paper was being “set up.” *Id.*

Your department’s seizure of this equipment has substantially interfered with the Record’s First Amendment-protected newsgathering in this instance, and the department’s actions risk chilling the free flow of information in the public interest more broadly, including by dissuading sources from speaking to the Record and other Kansas news media in the future.

Further, as you acknowledge in your public statement, the federal Privacy Protection Act of 1980 (the “PPA”) protects that flow of information to journalists by prohibiting law enforcement, including local agencies, from searching for or seizing journalistic work product¹ or documentary materials, except in narrow, exceptional circumstances. *See* Pub. L. No. 96-440, 94 Stat. 1879 (1980), codified at 42 U.S.C. §§ 2000aa, 2000aa-5 to 2000aa-7.

As you note, authorities may only search for or seize work product if the immediate seizure is necessary to prevent the death of, or serious bodily injury to, a human being, or where there is probable cause to believe that the possessor has committed or is committing certain crimes. This “suspect exception,” which you cite, is inapplicable when the relevant conduct consists of the receipt, possession, communication, or withholding of the material, with only limited exceptions for certain federal statutes that are not at issue here. 42 U.S.C. § 2000aa(a)(1)-(2).

For documentary material, which it appears was also seized by your department,² the PPA adds two additional exceptions that permit its seizure by law enforcement, neither of which appear to apply here: (1) when notice pursuant to a subpoena would result in destruction, alteration, or concealment of such materials; or (2) when such materials have not been produced pursuant to a court order directing compliance with a

¹ “Work product” is material prepared by the journalist or another in anticipation of reporting to the public. It is defined as material that is prepared, produced, authored, or created by any person in anticipation of that material being communicated to the public; is possessed for the purposes of communicating such materials to the public; and includes the mental impressions, conclusions, opinions, or theories of the person who created the material. 42 U.S.C. § 2000aa-7(b).

² “Documentary materials” means materials upon which information is recorded. 42 U.S.C. § 2000aa-7(a) (listing examples, such as photographs, video, and audio tapes). Neither documentary materials nor work product materials include contraband; the fruits of a crime; things otherwise criminally possessed; or property designed or intended for use as, or which has been used as, the means of committing a criminal offense. 42 U.S.C. § 2000a-7(a) and (b). That said, and crucially, it is well-settled First Amendment law that the possession of material that may have been acquired unlawfully in the first instance by a source, but where the news organization has not participated in the underlying offense, is constitutionally protected. *Bartnicki v. Vopper*, 532 U.S. 514 (2001).

subpoena, all appellate remedies have been exhausted, and there is reason to believe that delay in an investigation or trial occasioned by further proceedings relating to the subpoena would threaten the interests of justice. 42 U.S.C. § 2000aa(b)(1)-(4). With respect to the “interests of justice” exception, the person possessing such materials must be permitted to submit an affidavit explaining why the materials are not subject to seizure. 42 U.S.C. § 2000aa(c).

In short, search warrants based on the mere receipt, possession, communication, or withholding of work product material are virtually always proscribed with only limited exceptions, and the PPA’s “subpoena first” requirement for documentary material reflects the law’s design to steer law enforcement to the least intrusive investigative means with respect to newsrooms. Both help ensure that affected news organizations can negotiate the scope of a demand or challenge one that is overbroad. Applying these principles to the search your office conducted of the Record, its sweep—and the related threat to the Record’s lawful newsgathering and reporting—clearly runs counter to the intent of the statute, regardless of the asserted predication for the search.

It is also meaningful that the U.S. Department of Justice takes such investigative steps so seriously that the Attorney General must personally sign off before members of the department may execute a search warrant for “the premises of a news media entity.” See Policy Regarding Obtaining Information from or Records of Members of the News Media; and Regarding Questioning, Arresting, or Charging Members of the News Media, 28 C.F.R. § 50.10(d)(2)(ii) (2022). Notably, that Attorney General authorization requirement applies *even when* prosecutors are invoking the suspect exception under the PPA for search warrants. *Id.* And, when newsroom searches do occur, they not only generate broad public outcry but also can result in significant liability for the municipality and agency. See Thomas Fuller, *San Francisco Police Raid on Journalist Alarms Free Press Advocates*, N.Y. Times (May 13, 2019), <https://perma.cc/K5AK-K5CU>; Luke Henkaus, *San Francisco Expected to Reach \$396,000 Settlement with Journalist Bryan Carmody Over Police Raid*, Reporters Comm. for Freedom of the Press (Mar. 5, 2020), <https://perma.cc/AX75-5HVG>.

Importantly, the state of Kansas has recognized similar sensitivities with respect to the compelled disclosure of unpublished information and confidential source identities, see K.S.A. § 60-480 to 485 (statutory reporter’s privilege), and the U.S. Court of Appeals for the Tenth Circuit has cautioned, in recognizing a qualified reporter’s privilege in this jurisdiction, that “any infringement of the First Amendment must be held to a minimum that it is to be no more extensive than the necessities of the case,” *Silkwood v. Kerr-McGee*, 563 F.2d 433, 437 (10th Cir. 1977).

In short, the search warrant directed at the Marion County Record was significantly overbroad, improperly intrusive, and possibly in violation of federal law. Again, and crucially, we urge you to immediately return any seized equipment and records to the newspaper; purge any such records retained by your department; and initiate a full, independent, and transparent review into your department’s actions.

If you have any questions or wish to discuss, contact Reporters Committee Executive Director Bruce Brown or Gabe Rottman, the director of the Technology and Press Freedom Project at the Reporters Committee. They can be reached at bruce.brown@rcfp.org and grottman@rcfp.org.

Sincerely,

Reporters Committee
for Freedom of the Press

ALM Media, LLC
The Associated Press
The Atlantic Monthly Group LLC
Bloomberg L.P.
Boston Globe Media Partners, LLC
Cable News Network, Inc.
CBS News
The Center for Investigative Reporting (d/b/a Reveal)
Committee to Protect Journalists
Dow Jones & Company, Inc., publisher of *The Wall Street Journal*
The E.W. Scripps Company, on behalf of KSHB-TV and KMCI-TV
Gannett Co., Inc.
Hearst Corporation
The Intercept Media, Inc.
Kansas Press Association
Kansas Coalition for Open Government
The McClatchy Company, LLC
Los Angeles Times Communications LLC
National Newspaper Association
National Press Photographers Association
NBCUniversal News Group Inc.
New England Newspaper and Press Association, Inc.
The New York Times Company
The New Yorker
The News Leaders Association
News/Media Alliance
Online News Association
Pro Publica, Inc.
Radio Television Digital News Association
Reuters News & Media Inc.
Society of Professional Journalists
TEGNA Inc.
TIME USA, LLC
The Washington Post

cc: Reporters Committee for Freedom of the Press Steering Committee