

October 4, 2023

The Honorable Merrick B. Garland
Attorney General
United States Department of Justice
950 Pennsylvania Ave., NW
Washington, DC 20530

Dear Attorney General Garland:

The undersigned broadcasters, press freedom organizations, and civil liberties organizations write to express concern, and call for greater transparency from the Department of Justice, regarding the raid of journalist Tim Burke's home, and seizure of equipment and work product, as part of an investigation into alleged computer crimes in the course of his newsgathering.¹

There is significant public interest in Burke's case.² That interest is compounded by the nationwide outrage following the August police raid of the Marion County Record based on allegations of computer crimes by its reporters.³ Given these and other investigations, journalists around the country are left uncertain about whether they could be prosecuted for acts of routine journalism on the mistaken grounds that they violated state or federal computer crime laws.⁴ The government's opposition to requests to unseal the probable cause affidavit submitted in connection with the warrant application,⁵ even if justified, leaves journalists unable to discern whether newsgathering activities they previously considered routine might trigger an investigation.

To avoid chilling lawful reporting, it is particularly important for the DOJ to be transparent about its investigation of Burke and the circumstances under which it considers online newsgathering to run afoul of the Computer Fraud and Abuse Act or other federal laws.

¹ See *Times Publ'g Co. v. United States*, 8:23-mc-0014-WFJ-SPF; 8:23-mj-1541-SPF (M.D. Fla. 2023).

² See, e.g., Rachel Olding & Lachlan Cartwright, [FBI Raid on Journalist's Home Reportedly Related to Embarrassing Tucker Carlson Vids](#), Daily Beast, May 26, 2023; Jack McCordick, [FBI Raid of Tampa Journalist Connected to Tucker Carlson Leaked Clips](#), Vanity Fair, May 27, 2023, Justin Garcia, [Tim Burke and lawyers deny hacking Fox News, demand return of devices](#), Tampa Bay Times, July 21, 2023.

³ Steven Lee Myers & Benjamin Mullin, [Raid of Small Kansas Newspaper Raises Free Press Concerns](#), N.Y. Times, Aug. 13, 2023; Kim Zetter, [Did a Journalist Violate Hacking Law to Leak Fox News Clips? The Government Thinks He Did.](#), Zero Day, Aug. 17, 2023.

⁴ Bruce D. Brown & Gabe Rottman, [Claiming a 'computer crime' shouldn't give police a free pass to raid newspapers](#), L.A. Times, Aug. 31, 2023; see also Jon Brodtkin, [Missouri governor rebuffed: Journalist won't be prosecuted for viewing HTML](#), Ars Technica, Feb. 14, 2022; Aaron Mackey, [Victory! California City Drops Lawsuit Accusing Journalists of Violating Computer Crime Law](#), Elec. Frontier Found., May 14, 2021.

⁵ 8:23-mc-0014-WFJ-SPF, Dkt. 17 (May 25, 2023); *id.*, Dkt. 33 (Aug. 9, 2023).

Accordingly, we write to ask that the DOJ publicly respond to the questions listed at the conclusion of this letter and provide clarity regarding what it considers to be protected journalism and newsgathering.

Background

Because the warrant affidavit remains sealed, our knowledge of the facts is based on public court filings and news reports.

Our understanding is that Burke obtained a recording containing unaired portions of Tucker Carlson’s interview with music and fashion superstar Ye (f/k/a Kanye West) by visiting a publicly available website, accessible by anyone with the URL, and downloading the recording. Fox News, Carlson’s then-employer, had apparently uploaded the video to the public site without encrypting it or taking any other measures to limit public accessibility.

Burke contends that he found the publicly available URL of the Carlson interview on a website that transmits live feeds of broadcasts. He further contends that he logged into the live feed website where he found the publicly available URL using a user ID and password for a “demo account” provided to him by a source.⁶ The source, he has said, found the credentials on a public website where the demo account holder posted them, without any restriction on their use.⁷

Burke viewed the outtakes and determined that they were newsworthy. Among other things, Ye made anti-Semitic remarks, which are a matter of public concern (indeed, similar comments Ye would later make became major national stories).⁸ The outtakes also showed that Carlson and Fox News may have intentionally omitted those portions of the interview to cast Ye in a more sympathetic light. Burke has a history of breaking news of national interest during his long career in journalism. He may be best known for his reporting for Deadspin in 2013 that revealed that Heisman Trophy winner Manti Te'o's girlfriend, and her supposed death, were a hoax, and he’s also broken other significant national news stories.⁹

FBI agents raided Burke’s home on or about May 8, 2023 in connection with an investigation of whether Burke violated the Computer Fraud and Abuse Act and wiretapping laws¹⁰ by accessing the embarrassing outtakes. Agents reportedly also seized equipment and files that had nothing to

⁶ Mathew Ingram, [Q&A: Tim Burke’s lawyer on the seizure of his devices and what it means for journalism](#), Columbia Journalism Rev., Aug. 9, 2023.

⁷ Kim Zetter, [Did a Journalist Violate Hacking Law to Leak Fox News Clips? The Government Thinks He Did.](#), Zero Day, Aug. 17, 2023.

⁸ Bobby Allyn, [Adidas dumps Kanye West over antisemitic remarks that caused an uproar](#), NPR, Oct. 25, 2022.

⁹ Timothy Burke & Jack Dickey, [Manti Te'o's Dead Girlfriend, The Most Heartbreaking And Inspirational Story Of The College Football Season, Is A Hoax](#), Deadspin, Jan. 16, 2013; Timothy Burke, [How America's Largest Local TV Owner Turned Its News Anchors Into Soldiers In Trump's War On The Media](#), Deadspin, Mar. 31, 2018.

¹⁰ 18 U.S.C. § 1030; 18 U.S.C. § 2511.

do with the Carlson interview, and that might have included confidential source communications relating to other stories Burke was working on. As a result of the raid, Burke may have been effectively restrained from reporting newsworthy materials that the government seized,¹¹ which raises additional constitutional concerns.¹²

The DOJ should not use computer crime laws to criminalize journalism

The CFAA prohibits accessing a protected computer “without authorization.” Access to publicly available information is not “without authorization,” even if the owner of the information — in this case, Fox News — did not want it to be accessed. It is therefore highly worrisome if the DOJ is investigating Burke based on his access to an unencrypted website through a publicly accessible URL that anyone can type into their browser and view.¹³

It would be extremely problematic — and unconstitutional — to criminalize access to publicly available information simply because powerful people would prefer it be kept private. It is antithetical to the Fourth Estate’s constitutionally-protected function to place a burden on journalists to intuit what publicly-available, newsworthy information public figures want kept secret, and to abide by their wishes.

To the extent that the DOJ’s investigation is based on Burke’s use of “demo” credentials to access to the platform on which he found the publicly accessible URL, it is also not clear how such access could be “without authorization.” Burke, to the best of our knowledge based on the aforementioned reporting, received the demo credentials from a source, who found them publicly posted on the internet with no restrictions on anyone’s use.¹⁴ If there is more to the story, then the government should explain those facts to avoid chilling similar newsgathering.

¹¹ Christopher Spata, [Tampa’s Tim Burke has certain skills and a Twitter following. The FBI has his computers](#), Tampa Bay Times, May 26, 2023.

¹² *Fort Wayne Books v. Indiana*, 489 U.S. 46, 63 (1989) (holding that interfering with the right to possess expressive materials intended for publications runs “[t]he risk of prior restraint”) (quoting *Maryland v. Macon*, 472 U. S. 463, 470 (1985)).

¹³ We focus on the investigation of Burke under the CFAA because of the use of that law or similar provisions under state law against journalists in the past. *See supra* n.4. However, we note that the basis for investigating Burke under the federal wiretapping statute is also questionable. That law states that it is not unlawful to intercept or access “an electronic communication *made through an electronic communication system that is configured so that such electronic communication is readily accessible to the general public.*” 18 U.S.C. § 2511(2)(g) (emphasis added). That would seem to be the case where Fox News failed to encrypt or otherwise protect footage it posted to a public URL.

¹⁴ Even if the source had obtained the credentials unlawfully before providing them to Burke (which we’ve seen no indication is the case), Burke would not be responsible for any potential crime by the source. *Bartnicki v. Vopper*, 532 U.S. 514 (2001).

Prosecuting Burke under the CFAA for obtaining publicly available newsworthy materials implicates the First Amendment.¹⁵ “[E]ntrenched in Supreme Court case law is the principle that the First Amendment’s protections for free speech include a constitutionally protected right to gather news.”¹⁶ The First Amendment protects even “surreptitious, confrontational, unscrupulous, and ungentlemanly” newsgathering methods.¹⁷

Thus, even if academic arguments could be made that the CFAA’s language permits prosecuting Burke for use of the demo credentials, the DOJ should not test the outer limits of the CFAA in a case involving newsgathering. If it does, other journalists will refrain from pursuing important stories based on materials they find on public, but obscure, corners of the internet due to uncertainty regarding where prosecutors draw the line between computer savviness and computer crime.

For these reasons, transparency is desperately needed. The DOJ must publicly explain its CFAA investigation of Burke.

The DOJ should explain whether the search complied with the PPA and DOJ policies

The DOJ must also be transparent about the procedures that were (or were not) followed during and after the search of Burke’s home.

The Privacy Protection Act of 1980 (PPA) makes it unlawful to “search for or seize any work product materials possessed by a person reasonably believed to have a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication, in or affecting interstate or foreign commerce,” except when investigating crimes unrelated to the “receipt, possession, communication, or withholding of such materials or the information contained therein.”¹⁸ Burke, undoubtedly, intended to (and did) disseminate the content of the Tucker Carlson interview to the public. The PPA, therefore, applies to Burke, and the issuance of a warrant should have been contingent on a finding that its exceptions apply.

Further, the DOJ’s recently revised “Policy Regarding Obtaining Information from or Records of Members of the News Media; and Regarding Questioning, Arresting, or Charging Members of

¹⁵ See, e.g., *Florida Star v. B.J.F.*, 491 U.S. 524 (1989) (protecting journalist’s right to obtain and publish publicly available information, even where it is made public by accident).

¹⁶ *Nicholas v. Bratton*, 376 F. Supp. 3d 232, 279 (S.D.N.Y. 2019); see also, e.g., *People for the Ethical Treatment of Animals, Inc. v. N.C. Farm Bureau Fed’n, Inc.*, 60 F.4th 815, 829 (4th Cir. 2023) (“The right to gather information plays a distinctly acute role in journalism.”), petition for cert. filed, Nos. 22-1148 & 22-1150 (May 26, 2023); *Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011) (recognizing the “undoubted right to gather news from any source by means within the law” (internal quotation marks and citation omitted)); *CBS, Inc. v. Young*, 522 F.2d 234, 238 (6th Cir. 1975) (“The protected right to publish the news would be of little value in the absence of sources from which to obtain it.”).

¹⁷ *J.H. Desnick v. Am. Broad. Cos., Inc.*, 44 F.3d 1345, 1355 (7th Cir. 1995).

¹⁸ 42 U.S.C. § 2000aa *et seq.*

the News Media” (the “News Media Policy”) states that, subject to limited exceptions, the DOJ “will not use compulsory legal process [including search warrants] for the purpose of obtaining information from or records of members of the news media acting within the scope of newsgathering.” The News Media Policy states that “[a]ll authorizations pursuant to this section must comply” with the PPA’s provisions.

The News Media Policy further provides that when there is a “close or novel” question as to whether someone is a member of the news media or acting within the scope of newsgathering, any determination must be approved by the Assistant Attorney General for the Criminal Division.¹⁹

We appreciate the DOJ’s revisions to the News Media Policy,²⁰ and do not doubt that it is the department’s intention that federal prosecutors everywhere adhere to the Policy. We are concerned, however, about whether it was followed here. The government’s response in opposition to Burke’s motion to unseal the probable cause affidavit and for return of property states that “the government has fully complied with all aspects of its own PPA policy and its News Media Policy during the ongoing investigation.”²¹ However, it is unclear whether the government believes it has fully complied with its policies because it concluded that they do not apply to Burke at all or because they believe an exception in the policies permitted the search and seizure of Burke’s work product and documentary materials.

We are especially concerned that the government might not have considered Burke to be subject to the News Media Policy. The government’s response brief takes the position that Burke should not be considered a “member of the news media” who is “acting within the scope of newsgathering” under the News Media Policy, despite the fact that the court has rightly acknowledged Burke’s status as a member of the media.²² In support of its position, the response brief notes Burke had not recently published under his own byline, does not work for an established media outlet, and sometimes used job titles other than “journalist.”

Of course, one does not need to work full-time as a journalist in order to engage in protected journalism. The PPA protects anyone “with a purpose to disseminate” information to the public, regardless of whether their own byline is attached. And it’s quite common for journalists — including freelancers, producers, researchers, editors, news services and consultants — to provide research and documents for stories they do not themselves write, or even provide written copy without receiving a byline. That does not deprive them of constitutional protection. Courts have rightly warned against limiting the First Amendment’s press clause to established media

¹⁹ 28 C.F.R. § 50.10(e)(2)

²⁰ 28 C.F.R. § 50.10

²¹ 8:23-mc-0014-WFJ-SPF, Dkt. 33 at 13.

²² *Id.*, Dkt. 23 at 3.

outlets²³ — a warning that is especially important as technological advances give rise to new forms of journalism while traditional news outlets close their doors at alarming rates.²⁴

Thus, if the DOJ determined Burke is *not* a member of the news media, clarity is needed regarding why, so that other non-traditional journalists will know whether their newsgathering is protected.

In addition, we are deeply concerned by the government’s attempts to minimize the import of the News Media Policy in its response brief. The brief characterizes the policy as a mere internal guideline and emphasizes that violations of it do not invalidate searches or give rise to legal claims.²⁵ Even if that is literally true, it is troubling to see the government downplay a policy the DOJ has promoted as an important protection for press freedom and newsgathering.²⁶

We also urge the DOJ to be transparent about what process, if any, it will follow for segregating confidential newsgathering materials unrelated to its investigation from other materials seized for its investigation. Prosecutors contend that an FBI agent was assigned to filter confidential materials seized from Burke’s home.²⁷ Presumably this would include source communications (although it might refer to records relating to his wife’s political career).²⁸ But there has been no transparency on how that process has or will work, including how the agent was instructed to determine what was privileged (especially if agents were operating under the erroneous assumption that Burke is not a journalist).

Without information about the processes followed during the raid and subsequent searches, members of the public will surely question whether the federal government engaged in abuses similar to those that seem to have occurred in Marion, Kansas. That perception, whether valid or not, undermines public trust in the DOJ and its commitment to press freedom.

²³ See, e.g., *Pulliam v. County of Fort Bend*, No. H-22-4220 (N.D. Tex. June 30, 2023); *Von Bulow by Auersperg v. Von Bulow*, 811 F.2d 136 (2d Cir. 1987).

²⁴ Margaret Sullivan, [Every week, two more newspapers close — and ‘news deserts’ grow larger](#), Wash. Post, June 29, 2022.

²⁵ 8:23-mc-0014-WFJ-SPF, Dkt. 33 at 15.

²⁶ [Attorney General Garland Announces Revised Justice Department News Media Policy](#), Office of Public Affairs, U.S. Dep’t of Justice, Oct. 26, 2022.

²⁷ The government also stated in a recent filing that seized folders and files would be subjected to an “internal filter review,” but did not provide details about the review process, including whether the filter review would consider the First Amendment or common law reporter’s privilege. 8:23-mc-0014-WFJ-SPF, Dkt. 37 (Sept. 29, 2023).

²⁸ Justin Garcia, [Tampa City Council member Lynn Hurtak’s home searched by FBI](#), Tampa Bay Times, May 8, 2023.

Conclusion

We implore the DOJ to release adequate information so that the public can understand the legal basis behind the seizure of Burke's newsgathering materials and the processes that were followed to avoid undue interference with press freedom.

Accordingly, we request that the DOJ publicly explain:

(1) the legal and factual basis for investigating Burke for violating the Computer Fraud and Abuse Act and wiretapping laws;

(2) the DOJ's basis for its belief that investigating and potentially charging Burke is an appropriate exercise of prosecutorial discretion consistent with its charging policy, especially in light of the First Amendment's press freedom clause;²⁹

(3) whether prosecutors followed the News Media Policy regarding the use of search warrants for obtaining information or records from members of the news media and, if not, its reasoning and processes when the policy was not followed;

(4) whether the magistrate judge who issued the warrant was informed of the PPA and its protections for newsgathering;

(5) whether prosecutors made a determination about whether Burke is member of the news media acting within the scope of newsgathering and whether that determination was approved by the Assistant Attorney General for the Criminal Division;

(6) whether the "filtering" process for privileged materials was intended to avoid the government accessing source communications and, if so, to explain how that objective was or will be achieved;

(7) the steps the DOJ has taken to ensure that journalistic work product unrelated to the investigation is returned promptly to minimize any restraint on Burke's reporting; and

(8) the DOJ's reasons for not using investigative tools short of a search warrant so that Burke could have the opportunity to object to seizure of newsgathering materials.

We also ask the DOJ to reiterate that it expects all members of the department to comply with the DOJ policy and to clarify how the DOJ will ensure compliance.

²⁹ U.S. Dep't of Justice, Justice Manual, Title 9: Criminal, [9-48.000 - Computer Fraud and Abuse Act](#).

We note that many of the foregoing questions would be best answered by unsealing the warrant affidavit, with redactions if necessary, for the reasons previously stated in the motion filed by Times Publishing Company.³⁰ Even if the affidavit is unsealed, however, there is a need for transparency on how the DOJ plans to deal with similar situations going forward.

We would welcome the opportunity to meet with the appropriate representative of the department to further discuss our concerns.

Very truly yours,

Freedom of the Press Foundation
Florida First Amendment Foundation
American Civil Liberties Union
Advocacy for Principled Action in
Government
ARTICLE 19
Association of Health Care Journalists
Authors Guild
Center for Democracy & Technology
Center for Public Integrity
Committee to Protect Journalists
Defending Rights & Dissent
The Digital Democracy Project
Electronic Frontier Foundation
The E.W. Scripps Company
Fight for the Future
First Amendment Coalition
Florida Association of Broadcasters
Florida Center for Government
Accountability
Florida Press Association
Free Press
Gray Media Group, Inc.
Institute for Nonprofit News
International Press Institute
Marion B. Brechner First Amendment
Project
The Media Institute

MuckRock
National Association of Science Writers
National Freedom of Information Coalition
National Press Club
National Press Club Journalism Institute
National Press Photographers Association
New England First Amendment Coalition
Nexstar Media Group, Inc.
Online News Association
PEN America
Project for Privacy & Surveillance
Accountability (PPSA)
Project On Government Oversight
Protect The 1st Foundation
Radio Television Digital News Association
Reporters Without Borders (RSF)
Restore The Fourth
RootsAction.org
Society of Environmental Journalists
Society of Professional Journalists
SPJ Florida
Surveillance Technology Oversight Project
TechFreedom
Tully Center for Free Speech
The Whistleblower & Source Protection
Program at ExposeFacts
Woodhull Freedom Foundation
X-Lab

³⁰ 8:23-mc-00014-WFJ-SPF, Dkt. 1.