

GOOGLE AT TEMPLE: DID DOJ FOLLOW ITS NEW GUIDELINES ON INSTITUTIONAL GAGS?

On October 19, 2017, DOJ issued new guidelines on default gag orders under the Stored Communications Act. It required that prosecutors “conduct an individualized and meaningful assessment requiring the need for protection from disclosure prior to seeking” a gag “and only seek an order when circumstances require.” Sometime after that, in association with its investigation of leaks about Carter Page, DOJ sought Ali Watkins’ call records, including her email subscriber records from when she was an undergraduate at Temple.

Under Justice Department regulations, investigators must clear additional hurdles before they can seek business records that could reveal a reporter’s confidential sources, such as phone and email records. In particular, the rules require the government to have “made all reasonable attempts to obtain the information from alternative, non-media sources” before investigators may target a reporter’s information.

In addition, the rules generally require the Justice Department to notify reporters first to allow them to negotiate over the scope of their demand for information and potentially challenge it in court. The rules permit the attorney general to make an exception to that practice if he “determines that, for compelling reasons, such negotiations would pose a clear and substantial threat to the integrity of the investigation, risk grave harm to national security, or present an imminent risk of death or

serious bodily harm.”

Top Justice Department officials must sign off on any attempt to gain access to a journalist’s communications records.

It is not clear whether investigators exhausted all of their avenues of information before confiscating Ms. Watkins’s information. She was not notified before they gained access to her information from the telecommunications companies. Among the records seized were those associated with her university email address from her undergraduate years.

This request would almost certainly *not* have been presented to Temple University. It would have been presented to Google, which provides email service for Temple. At least, that’s what appears to have happened in the case of Professor Xiaoxiang Xi in DOJ’s investigation of him for carrying out normal academic discussions about semiconductors with colleagues in China.

Thus far (as reflected here with the NYT coverage), the focus on whether DOJ followed its own regulations pertains to whether they followed guidelines on obtaining the records of a journalist. But the circumstances surrounding their request for Temple records should focus as much attention on whether the government followed its brand new regulations on imposing gags even when obtaining records from an institutional cloud customer like Temple.

The new guidelines were adopted largely in response to a challenge from Microsoft on default, indefinite gags. While few noted it at the time, what Microsoft most worried about was its inability to give its institutional customers notice their records had been subpoenaed. That meant that certain kind of cloud customers effectively gave up a legal right to challenge legal process by outsourcing

that service to Microsoft. Microsoft dropped its suit to legally force this issue when DOJ adopted the new guidelines last year. Best as I understand, those guidelines should have governed whether Google could tell Temple that DOJ was seeking the records of a former student.

So it's not just that DOJ didn't give Watkins an opportunity to challenge this subpoena, but also whether they gagged Google from telling Temple, and providing Temple the opportunity to challenge the subpoena on academic freedom grounds.

Given how they treated Xi, it's unlikely Temple would have done much to protect their former student. But some universities – and other institutions with special First Amendment concerns that use Microsoft or Google for their email service – might. They can only do so, however, if DOJ doesn't obtain frivolous gags to prevent them from doing so.