



THE PERMANENT MISSION
OF THE
UNITED STATES OF AMERICA
TO THE
UNITED NATIONS AND OTHER INTERNATIONAL ORGANIZATIONS
IN GENEVA

July 29, 2015

Mr. David Kaye
Special Rapporteur on the Promotion of the
Right to Freedom of Opinion and Expression
Office of the United Nations High Commissioner for Human Rights
Palais des Nations
CH-1211 Geneva 10, Switzerland

Dear Mr. Kaye:

Thank you for the questionnaire dated May 18, 2015 regarding the protection of sources and whistleblowers. We appreciate the opportunity to respond after the stated due date. Answers to your questions are attached.

Thank you for reaching out to us regarding how the United States promotes this important topic. We look forward to reviewing your forthcoming report and we appreciate your important work on the promotion of the right to the freedom of opinion and expression.

Sincerely,

A handwritten signature in black ink that reads "Pamela K. Hamamoto".

Pamela K. Hamamoto
Ambassador

Enclosure

1. Please indicate if there are norms or regulations which protect those in the media from the compelled disclosure of confidential sources of information. When these exist, what limitations on such protections may be accepted under law?

The United States government has implemented a policy to protect members of the news media from certain forms of the compulsory law enforcement process that might impair the newsgathering function, and balances several vital interests, including protecting national security, ensuring public safety, promoting effective law enforcement, the fair administration of justice, and safeguarding the essential role of the free press in fostering government accountability and an open society. These policies regard obtaining information from, or records of, members of the news media; and questioning, arresting, or charging members of the news media codified in chapter 28, section 50.10 of the Code of Federal Regulations, which falls within the purview of the Department of Justice.

In the spring of 2013, at the request of President Obama, the Department of Justice initiated a comprehensive review and evaluation of its policies and practices regarding the use of certain law enforcement tools to obtain information from, or records of, members of the news media. The review and evaluation process included soliciting input from a wide range of stakeholders, including representatives of various Department components, members of the news media, academics, First Amendment advocates, and members of Congress. In connection with this review and evaluation process, the Department also established the News Media Dialogue Group, which comprises representatives of the news media and members of the Department, and which convenes at regular intervals to discuss these policies.

In February 2014 and, again, in January 2015, the Department announced revisions to its policy, which are reflected in chapter 28, section 50.10 of the Code of Federal Regulations, regarding investigations involving the news media. The current policy expressly provides that efforts using certain law enforcement tools to obtain information from, or records of, non-consenting members of the news media are viewed as “extraordinary measures, not standard investigatory practices.” Among other things, the policy identifies considerations relevant to evaluating requests for authorization to use certain law enforcement tools, such as subpoenas and search warrants, to obtain information from, or records of, members of the news media; creates a strong presumption in favor of negotiating with members of the news media regarding such requests; provides for high-level review and oversight of such requests; and ensures that information or records obtained pursuant to the policy are appropriately safeguarded.

The Obama Administration continues to support efforts within Congress to pass a media shield law, which would codify many of the principles underlying the revised Department of Justice guidelines.

2. Please indicate what protections are afforded to whistleblowers in national law. Please note that this report should focus on whistleblowing in the context of the public sector and adopts the definition of whistleblower as any person who reports or discloses information of a threat or harm to the public interest in the context of their work-based relationship.

The United States has a strong legal and cultural framework to protect and value freedom of expression. Content-based restrictions generally have to be for a compelling governmental interest and investigators are required to consider the least restrictive means to achieve such an

interest. Such a framework complies with our obligations under Article 19 of the International Covenant on Civil and Political Rights.

Where freedom of expression is restricted, it is the government's burden to show that its interest is sufficiently compelling to justify enforcement of the statute. Potential injury or harm to the United States must be more than merely speculative and incidental, lest the criminal statutes become a means to punish individuals who reveal information that poses more of a danger of embarrassing public officials or exposing government abuses than of endangering national security. The United States has an array of laws, regulations, and policies that provide confidential avenues for the protected disclosure of whistleblowing information. Whistleblowers are protected against reprisal for making protected disclosures and may be entitled to remedies, including equitable relief and monetary damages for violations of whistleblower protections and unlawful reprisal.

In 2012, the President signed the Whistleblower Protection Enhancement Act, which clarified the scope of protected disclosures; expanded judicial review; expanded the penalties imposed for violating whistleblower protections; created whistleblower ombudsmen in federal agencies; and strengthened the authority of the United States Office of Special Counsel (OSC), which receives, investigates and may prosecute whistleblowing claims on behalf of most federal employees.

Protected whistleblower disclosures investigated by OSC fall into five categories: violations of a law, rule or regulation; gross mismanagement; a gross waste of funds; an abuse of authority; and a substantial and specific danger to public health and safety. The National Defense Authorization Act of Fiscal Year 2013 also included unprecedented new whistleblower protections for federal contractors.

Due to unique secrecy requirements of information they receive in their jobs, whistleblower laws apply differently to employees in the Intelligence Community or other federal employees with access to classified information. However, in October 2012 the President issued a directive (please see Presidential Policy Directive 19) that extended new whistleblower protections to such individuals. Such individuals also retain the ability to report any perceived government fraud, waste, or abuse to appropriate inspectors general, other executive branch oversight entities, and certain members of Congress while preserving any national security interests at issue.

Moreover, statutes that criminalize the unauthorized disclosure of classified or national defense information of the U.S. government do not arbitrarily or unlawfully interfere with freedom of expression, which is protected by the First Amendment to the U.S Constitution. Generally speaking, and depending on which statute may have been violated, the government must prove that the information was obtained or disclosed willfully, with the intent, or with reason to believe, that the information is to be used, or could be used, to injure or harm the United States, or to advantage a foreign nation.

In addition, beyond the whistleblower protections provided to federal employees, U.S. law provides widespread whistleblower protections to employees of both private and non-profit businesses. Dismissals of employees for disclosing information reasonably believed to indicate a violation of law are uniformly viewed as wrongful discharges. As one example, the False Claims Act provides protection to employees who report improper conduct to the Government in support of a claim under that act.

Furthermore, current U.S. legislation promotes the effective implementation and enforcement by the United Nations, including its UN funds and programs and UN specialized agencies, of policies and procedures that reflect best practices for the protection of whistleblowers from retaliation. Section 7048(a) of the Department of State, Foreign Operations, and Related Programs Appropriations Act, 2015 (Div. J, P.L. 113-235) provides that the Department of State may not obligate 15 percent of certain funds made available under that Act for contributions to the United Nations or United Nations agencies until the United States Secretary of State reports that such organizations are meeting certain criteria with regard to public disclosure of audit reports and whistleblower protections.

