



U. S. Department of Justice

Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

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MEMORANDUM FOR HEADS OF DEPARTMENT LAW ENFORCEMENT COMPONENTS
DEPARTMENT LITIGATING COMPONENTS
DIRECTOR, EXECUTIVE OFFICE FOR U.S. ATTORNEYS
ALL UNITED STATES ATTORNEYS

FROM: THE DEPUTY ATTORNEY GENERAL *Lina M. Maceo*

SUBJECT: Supplemental Policy Regarding Applications for Protective Orders
Pursuant to 18 U.S.C. § 2705(b)

This Memorandum provides clarification and direction for Department attorneys regarding protective orders pursuant to 18 U.S.C. § 2705(b) of the Stored Communications Act (SCA).¹ It supplements and clarifies the *Policy Regarding Applications for Protective Orders Pursuant to 18 U.S.C. § 2705(b)*, issued by Deputy Attorney General Rod J. Rosenstein on October 19, 2017 (hereinafter the *2017 Policy*). New policy or procedures that appear within this Memorandum apply prospectively to all applications seeking Section 2705(b) orders filed on or after 30 days from the date this Memorandum is issued (including an application seeking to extend the period of an existing protective order). Updates to Justice Manual Section 9-13.700 consistent with this Memorandum will be forthcoming.

The SCA authorizes the government to access records maintained by providers of electronic communication service and remote computing services. In the modern era, these provisions provide a critical means for evidence collection and are a common tool in all types of federal criminal investigations. At the same time, the “SCA contains no default sealing or nondisclosure provisions” that would prohibit the subscriber from receiving notice from the provider about the government action. *In re Leopold to Unseal Certain Elec. Surveillance Applications & Ords.*, 964 F.3d 1121, 1129 (D.C. Cir. 2020) (internal quotation marks omitted).

¹ This Memorandum is intended only to assist in the management of the Department of Justice and the execution of its responsibilities. It is not intended to and does not create any right, benefit, trust, or responsibility, whether substantive or procedural, enforceable at law or equity by a party against the United States, its departments, agencies, instrumentalities, entities, officers, employees, or any person, nor does it create any right of review in an administrative, judicial, or any other proceeding. This Memorandum does not impact or alter existing procedures governing protective orders pursuant to any other authority, including 18 U.S.C. § 2709(c) or the Termination Procedures for National Security Letter Nondisclosure Requirement, Federal Bureau of Investigation (Nov. 24, 2015).

Instead, Section 2705(b) permits the government to seek a court order that temporarily precludes a service provider from notifying another person of the existence of a warrant, subpoena, or court order issued pursuant to the SCA. To obtain such an order, however, the government must establish that there is reason to believe that notification of the existence of the warrant, subpoena, or court order “will”² result in (1) endangering the life or physical safety of an individual; (2) flight from prosecution; (3) destruction of or tampering with evidence; (4) intimidation of a potential witness; or (5) otherwise seriously jeopardizing an investigation or unduly delaying a trial.

As noted in the *2017 Policy*, a protective order should be sought only after a prosecutor engages in a case- and fact-specific analysis. For example, protective orders may not be warranted when prosecutors take actions unlikely to alert targets of the investigation. Likewise, as investigations progress or become public, prosecutors should carefully consider whether such orders remain warranted, and, if so, for how long. Prosecutors should not assume that a prior need for a protective order means a subsequent order is necessary. While in many cases, particularly at an early stage of an investigation, one or more of these provisions may apply, case or other developments may reduce the likelihood of adverse results.

A prosecutor must provide a court with sufficient facts to permit the court to conduct the same case- and fact-specific analysis. In particular, as the *2017 Policy* stated, prosecutors applying for a § 2705(b) order must tailor the application to include the available facts that permit “an individualized and meaningful assessment regarding the need for protection from disclosure.” Applications should identify which of the pertinent factors apply and explain why.

Additional Section 2705(b) Orders After an Initial Order of One Year

The *2017 Policy* directs that prosecutors filing § 2705(b) applications may only seek to delay notice for one year or less, barring exceptional circumstances. Prosecutors may seek a second or additional protective order of equal or shorter duration if factors justifying non-disclosure continue to exist at the expiration of the original order, but requests should be supported with such additional, specific facts as may have been developed through the investigation.

To ensure that all facts and circumstances continue to be considered before applying for a protective order, applications for protective orders must be approved in writing by a supervisor whenever (a) it appears reasonably likely that the target(s) of the investigation already knows of the investigation’s existence or (b) the application is for a second or successive period of non-

² In contrast, a different subsection of 18 U.S.C. § 2705 dealing with the government’s more limited notice requirements permits a shorter, 90-day protective order where there is reason to believe that notification “may” have one of the enumerated adverse results. *See* 18 U.S.C. § 2705(a).

disclosure, such that the total period of the protective order exceeds 18 months.³ In order to maintain records of appropriate approvals, where approval is required, the litigating component making the application should maintain a record of such approval.

All sections and offices must establish a protocol by which they routinely review the need for § 2705(b) orders in an ongoing investigation or case. Such review can be accomplished through an office's regular case review.

The Department recognizes that judges may direct shorter or longer periods for orders, consistent with the language of § 2705(b), and this guidance does not affect those circumstances.

Closed Investigations and Termination of Section 2705(b) Orders

When closing an investigation or matter, a prosecutor must immediately assess whether there is a basis to maintain any outstanding protective orders issued pursuant to § 2705(b). If the prosecutor concludes that there is no such basis, the office must terminate the protective order and ensure the service provider is notified of any such termination (and, if necessary, notifying and/or seeking approval from the appropriate court before doing so). If the prosecutor believes there is a compelling reason to maintain a protective order, the prosecutor must seek approval from a supervisor to allow the protective order to remain in effect. Early termination of protective orders is not required for accounts that prosecutors believe were solely used as part of criminal infrastructure (e.g., accounts exclusively used to send malware to victims).

All sections and offices must establish a protocol by which an investigation's or case's outstanding § 2705(b) orders are reviewed as part of a case closing procedure.

Exceptional Circumstances and Section 2705(b) Protective Orders

Where there are "exceptional circumstances," the *2017 Policy* permits prosecutors to apply for initial or successive protective orders greater than one year in length. In almost all cases, these exceptional circumstances involve certain national security investigations with a significant foreign nexus, where the investigation differs in significant ways from a traditional criminal investigation.

To assist the Department in monitoring the use of this exception, prosecutors must notify the Department's Criminal Division (CRM) or National Security Division (NSD) when they seek

³ Supervisory approval for a successive protective order is not necessary if one or more target(s) of the investigation remains outside the United States and/or is a current fugitive.

a Section 2705(b) protective order of greater than one year due to “exceptional circumstances.”⁴ To ensure that the exception continues to be used only where warranted, for orders issued under “exceptional circumstances” for a period of greater than one year, supervisors in the section or office seeking such orders should conduct a review at least annually of such orders in order to confirm that any such unexpired orders remain necessary and notify CRM or NSD, as warranted, of the result of the review.⁵ The review should include an assessment of whether there remains a need for those protective orders.

Other Existing Department Requirements

All additional existing approval requirements related to the issuance of legal process—such as those governing sensitive investigative matters or legal process involving members of the news media—remains in effect.

Thank you for all you do to serve the public and your dedication to the rule of law.

⁴ For all investigations and cases that otherwise have a Justice Manual notification, consultation, and/or approval requirement to NSD (or one of its Sections), notification of an application for a 2705(b) order should be made to the relevant NSD Section. For all other 2705(b) order applications, notifications should be made to CRM.

⁵ If a prosecutor believes a matter that is not a national security investigation with a significant foreign nexus still constitutes exceptional circumstances for purposes of this memorandum, he or she should consult with CRM and NSD before seeking a protective order for greater than one year. Consultation can simultaneously be done for a set of related matters that have a common reason for falling within this exception.