

MEMORANDUM FOR HEADS OF DEPARTMENT OF JUSTICE COMPONENTS AND
HEADS OF FEDERAL DEPARTMENTS AND AGENCIES WITH LAW
ENFORCEMENT RESPONSIBILITIES

FROM: THE ATTORNEY GENERAL

SUBJECT: Guidelines Regarding Disclosure to the Director of Central Intelligence and
Homeland Security Officials of Foreign Intelligence Acquired in the Course of a
Criminal Investigation

Background

The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. 107-56, 115 Stat. 272, 389, enacted into law certain requirements for the sharing of information by Federal law enforcement agencies with the intelligence community. Specifically, section 905(a) of the USA PATRIOT Act provides that “the Attorney General, or the head of any other department or agency of the Federal Government with law enforcement responsibilities, shall expeditiously disclose to the Director of Central Intelligence, pursuant to guidelines developed by the Attorney General in consultation with the Director, foreign intelligence acquired by an element of the Department of Justice or an element of such department or agency, as the case may be, in the course of a criminal investigation.”

Since the enactment of the USA PATRIOT Act, Federal law enforcement agencies have taken steps to improve existing channels of communication with the intelligence community and certain offices relating to homeland security (collectively, “Receiving Agencies”) in order to share foreign intelligence acquired in the course of criminal investigations. The purpose of these guidelines is to formalize a framework pursuant to section 905(a) of the USA PATRIOT Act that will facilitate and increase to the fullest extent possible the continued expeditious sharing of such information. The procedures established by these guidelines for the sharing of information between components of the Department of Justice or other departments and agencies having law enforcement responsibilities with Recipients (as defined below) are not, however, intended to replace or supersede existing operational or information sharing mechanisms between Federal law enforcement agencies and Receiving Agencies. As appropriate, those relationships should continue to be used to the fullest extent possible.

Heads of Department of Justice components and heads of other departments and agencies of the Federal government having law enforcement responsibility shall distribute these guidelines within their respective departments, components and agencies, as appropriate, to ensure prompt and effective implementation of section 905(a) and these guidelines.

Guidelines for Section 905(a) Information Sharing

1. Scope of Application. These guidelines apply to all elements of the Department of Justice having criminal investigative or prosecutorial responsibilities and to all other departments and agencies of the Federal government having law enforcement responsibilities (hereinafter, collectively, “Federal Law Enforcement Agencies”). These guidelines do not apply to agencies that provide support to criminal investigations, but that do not themselves

conduct criminal investigations (e.g., the Department of Treasury's Office of Foreign Assets Control and Financial Crimes Enforcement Network).

2. Law Enforcement Information Subject to Mandatory Disclosure. Subject to any exceptions established by the Attorney General in consultation with the Director of Central Intelligence (the "Director") and the Assistant to the President for Homeland Security, section 905(a) and these guidelines require expeditious disclosure to the Director, the Assistant to the President for Homeland Security or other members of the U.S. intelligence community or homeland security agencies as are designated under paragraph 4, *infra*, of foreign intelligence acquired in the course of a criminal investigation conducted by Federal Law Enforcement Agencies.
 - a. As used herein, the term "foreign intelligence" is defined in section 3 of the National Security Act of 1947 (50 U.S.C. § 401a) as: "information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities."
 - b. The term "section 905(a) information" means foreign intelligence acquired in the course of a criminal investigation.
 - c. Section 203(d) of the USA PATRIOT Act, provides that: "Notwithstanding any other law, it shall be lawful for foreign intelligence or counterintelligence (as defined in section 3 of the National Security Act of 1947 (50 U.S.C. § 401a)) or foreign intelligence information obtained as part of a criminal investigation to be disclosed to any Federal law enforcement, intelligence, protective, immigration, national defense, or national security official in order to assist the official receiving that information in the performance of his official duties." Thus, no other Federal or state law operates to prevent the sharing of such information so long as disclosure of such information will assist the Director and the Assistant to the President for Homeland Security in the performance of their official duties, and Federal Law Enforcement Agencies shall, notwithstanding any other law, expeditiously disclose to the Recipients (as defined below) section 905(a) information.
3. Training. Pursuant to section 908 of the USA PATRIOT Act, the Department of Justice, in consultation with the Director, the Assistant to the President for Homeland Security, and other Federal Law Enforcement Agencies, will develop a training curriculum and program to ensure that law enforcement officials receive sufficient training to identify foreign intelligence subject to the disclosure requirements under these guidelines.
4. Entities to Whom Disclosure Shall Be Made. The Director, in consultation with the Assistant to the President for Homeland Security, shall promptly advise the Attorney General of his designations of appropriate offices, entities and/or officials of Receiving Agencies to receive the disclosure of section 905(a) information not covered by an established operational or information sharing mechanism. Said designees, together with the Director and the Assistant to the President for Homeland Security and all offices, entities, or individuals covered by such an established mechanism, are collectively referred to herein as the "Recipients." The Director, in consultation with the Assistant to the President for Homeland Security, shall ensure that sufficient Recipients are identified to facilitate expeditious sharing and handling of section 905(a) information.

5. Methods for Disclosure of Section 905(a) Information. Subject only to any exceptions that may be established pursuant to paragraph 9(a), *infra*, all section 905(a) information shall be shared as expeditiously as possible with one or more of the Recipients. The procedures established in this paragraph may be supplemented by more detailed definitions and protocols disseminated to appropriate law enforcement, intelligence, and homeland security officials in classified or confidential form.

a. Terrorism or Weapons of Mass Destruction (WMD) Information. Federal law enforcement officials shall disclose immediately to one or more Recipients information which they reasonably believe relates to a potential terrorism or WMD threat to the United States homeland, its critical infrastructure, key resources (whether physical or electronic), or to United States persons or interests worldwide. Other terrorism or WMD information, as defined by section 5(a)(i) and (ii), shall be disclosed to one or more Recipients as expeditiously as possible. In all cases, the official shall disclose such information with the understood priorities of disrupting terrorist plans, preventing terrorist attacks, and preserving the lives of United States persons. Disclosure may be made through one or more of the following: existing field-level operational or information sharing mechanisms, including a Joint Terrorism Task Force (JTTF); existing headquarters operational or information sharing mechanisms; or when the officer reasonably believes that time does not permit the use of any such established mechanisms, any other field level or other mechanism intended to facilitate immediate action, response or other efforts to address such threats.

As soon as possible after any disclosure under the preceding paragraph, the disclosing official shall notify the relevant JTTF of the disclosure. The JTTF shall, as appropriate, keep the relevant Anti-Terrorism Task Force (ATTF) apprised of the nature of the information disclosed. The relevant ATTF shall, in turn, apprise the Department of Justice Criminal Division's Terrorism and Violent Crime Section (TVCS). Where information is disclosed by the headquarters of the relevant Federal Law Enforcement Agency, the headquarters shall, as soon as practicable and to the extent reasonable, notify TVCS of all disclosures. Federal agencies may require additional notification procedures where appropriate.

For purposes of these guidelines, "terrorism information" and "weapons of mass destruction information" are defined as follows:

- i. Terrorism Information: All information relating to the existence, organization, capabilities, plans, intentions, vulnerabilities, means of finance or material support, or activities of foreign or international terrorist groups or individuals or threats posed by such groups or individuals to the United States, United States persons, or United States interests, or to those of other nations, or to communications between such groups or individuals, or information relating to groups or individuals reasonably believed to be assisting or associated with them.
- ii. Weapons of Mass Destruction (WMD) Information: All information relating to conventional explosive weapons and non-conventional weapons capable of causing mass casualties and damage, including chemical, biological, radiological and nuclear agents and weapons and the means of delivery of such weapons.

- b. All Other Section 905(a) Information. In consultation with the Department of Justice and the Director, Federal Law Enforcement Agencies shall develop (or continue to follow existing) protocols (which may be classified or confidential) to provide for the expeditious sharing of section 905(a) information concerning all other subjects.
 - c. Consultation With Respect to Title III and Grand Jury Materials. Except as to section 905(a) information related to a potential terrorism or WMD threat, disclosure of 905(a) information will be accomplished in consultation with the prosecuting official assigned to the case if: (i) the information was developed through investigatory activities occurring after a particular investigation has been referred formally to the Department of Justice for prosecution; and (ii) the information was produced by an electronic, wire, or oral interception or solely as a result of a grand jury subpoena or testimony occurring before a grand jury receiving information concerning the particular investigation. This consultation may be the basis for identifying appropriate use restrictions or for seeking an exception to the section 905(a) disclosure requirements as set forth in paragraph 9, *infra*. Consultation shall be accomplished expeditiously, and any resulting disclosure shall occur no later than 48 hours after the prosecutor is initially notified. Section 905(a) information that a Federal law enforcement official reasonably believes is related to a potential terrorism or WMD threat, including information received from an electronic, wire, or oral interception or as a result of a grand jury subpoena or testimony occurring before a grand jury, shall be immediately disclosed by the Federal law enforcement official using the mechanisms described in paragraph 5(a), *supra*, and without need for advance consultation with the prosecuting official responsible for the case. Contemporaneously or as soon after making the disclosure as possible, the Federal law enforcement official shall notify the prosecuting official responsible for the case in order to facilitate notice to the court, if necessary or appropriate.
6. Requests for Additional Information and Amplification of Initial Disclosure.
 - a. Initial disclosure of section 905(a) information to Recipients shall be accomplished automatically and without specific prior request to the disclosing department, component, or agency.
 - b. Requests by any Recipient for additional information or for clarification or amplification related to the initial disclosure should be coordinated, as applicable, through the component that provided the initial information or the designated headquarters office of the relevant Federal law enforcement agency.
 7. Disclosure of Grand Jury and Electronic, Wire, and Oral Interception Information.
 - a. Sections 203(a) and (b) of the USA PATRIOT Act permit the disclosure of federal grand jury information and electronic, wire, and oral interception information to specified recipients for specified purposes (hereinafter “section 203 information”).
 - b. Where section 203 information is shared pursuant to Paragraph 5, notice of such disclosures shall be promptly provided to the Office of Enforcement Operations (OEO) of the Department of Justice, Criminal Division. OEO shall establish appropriate record keeping procedures to ensure compliance with notice

requirements related to the disclosure of grand jury information pursuant to section 203.

- c. The USA PATRIOT Act requires special procedures for the disclosure of section 203 information that identifies United States persons. The Federal law enforcement agency disclosing section 203 information pursuant to these guidelines shall observe the procedures established by the Attorney General for disclosing such information that identifies a United States person. A copy of the section 203 United States person information procedures is attached as Appendix B.
- d. By these guidelines the special procedures that were established pursuant to section 203(c) are made applicable to all section 905(a) disclosures of information that identify a United States person.

8. Information Use Restrictions.

- a. In the absence of any significant law enforcement interests, as identified below in paragraph 8(b), necessitating the imposition of use restrictions, Federal Law Enforcement Agencies shall disclose section 905(a) information to Recipients pursuant to these guidelines free of any originator controls or information use restrictions.
- b. The originator of the section 905(a) information may impose appropriate use restrictions necessary to protect sensitive law enforcement sources and ongoing criminal investigations and prosecutions. The scope and duration of such restrictions, including caveats restricting use of the disclosed information to a particular level or element of the intelligence community, will be tailored to address the particular situation or subject matter involved.
 - i. When imposed, use restrictions shall be no more restrictive than necessary to accomplish the desired effect.
 - ii. Once imposed, use restrictions shall be reviewed periodically by the originator to determine whether they can be narrowed or lifted at the request of Recipients.
- c. Section 203 information shall be disclosed subject to any use restrictions necessary to comply with notice and record keeping requirements and to protect sensitive law enforcement sources and ongoing criminal investigations and prosecutions.

9. Attorney General Exceptions to Mandatory Disclosure of Section 905 Information.

- a. Section 905(a) expressly authorizes the Attorney General, in consultation with the Director, to exempt by regulation from the mandatory disclosure obligation one or more classes of foreign intelligence or foreign intelligence related to one or more targets or matters.
- b. Pending the development of appropriate permanent exceptions, exemptions from the mandatory disclosure obligation will be determined by the Attorney General in consultation with the Director and the Assistant to the President for Homeland Security on a case-by-case basis.

- c. Requests for an Attorney General exception to mandatory disclosure of section 905(a) information must be submitted by the department, component or agency head in writing with a complete description of the facts and circumstances giving rise to the need for an exception and why lesser measures such as use restrictions are not adequate.
- 10. Administering Agent. The Assistant Attorney General of the Criminal Division, in consultation with affected Agencies, Offices and Divisions of the Department of Justice, will act as executive agent for the Attorney General in administering these guidelines and providing advice and assistance to Federal law enforcement regarding the implementation of sections 203 and 905.
- 11. No Private Rights Created. These procedures are not intended to and do not create any rights, privileges, or benefits, substantive or procedural, enforceable by any party against the United States, its departments, agencies, or other entities, its officers or employees, or any other person.
- 12. Effective Immediately. The guidelines in this memorandum shall be effective immediately.

APPENDICES:

- A. Extract Copy of Section 905
- B. Procedures for Marking, Handling and Disclosing Information that Identifies a United States Person