



# **A BRIEF EXPLANATION OF PROBABLE CAUSE FOR FOREIGN AUTHORITIES**

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**OFFICE OF INTERNATIONAL AFFAIRS  
CRIMINAL DIVISION  
U.S. DEPARTMENT OF JUSTICE**

This document is intended to provide foreign authorities with a basic understanding of the probable-cause legal standard under the law of the United States of America. It does not address the issue of probable cause comprehensively. Rather, it sets out basic concepts intended to provide a non-practitioner of U.S. law with sufficient familiarity with this legal standard to assist them in formulating requests for assistance that depend on satisfying the probable cause standard. Nothing contained in this document is intended to create any substantive or procedural rights, defenses, privileges, or benefits enforceable in any administrative, civil, or criminal matter by any private party.

## A BRIEF EXPLANATION OF PROBABLE CAUSE FOR FOREIGN AUTHORITIES

Probable cause is a requirement of the Fourth Amendment to the U.S. Constitution, which provides that “. . . no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” This requirement permits U.S. courts to issue warrants to conduct searches only when a prosecutor can establish, through the affidavit of a U.S. agent, that there is probable cause to believe that a crime has been committed and that it is more likely than not that evidence of that crime will be found in the place to be searched. Similarly, to arrest persons, the court must find that there is probable cause to believe that a crime has been committed and that it is more likely than not that the person to be arrested committed the offense.

To satisfy the probable cause standard, it is necessary to have (1) reasonably trustworthy information (2) which is sufficient to warrant a man of reasonable caution in the belief that an offense has been committed. This standard has been further elaborated under the jurisprudence of the U.S. Supreme Court. While this body of jurisprudence is complex, the following is a simplified explanation to aid in the preparation of requests for assistance or extradition to the United States that require satisfaction of the probable cause standard.

The first factor requires that the information be trustworthy. This requirement can be satisfied in a few ways, the most typical being that the information is presumed trustworthy if its source is an ordinary citizen or a law enforcement agent or other government official. If the source is a criminal, further support may be required to demonstrate that the information is reliable. This can be done by showing, *e.g.*, that (a) information received from this source has proven trustworthy in the past; (b) the source of the information also risks conviction by having provided the information; or (c) much of the information provided is independently corroborated so there are reasonable grounds to believe the remaining unverified portion of the information is true.

To meet the second factor, it is helpful to show that the source’s information is based on personal observation. A request for an arrest warrant maybe sufficient if it contains personal observations that make it appear probable that the person to be arrested committed the offense (*i.e.*, the source saw the person commit the offense, or did not see who committed the offense, but recognized his voice, or saw physical evidence linking the person to the crime, etc.). A request for a search warrant should demonstrate personal observations showing that an offense was committed and that the premises to be searched are likely at the present time to contain specific evidence. The information presented should be recent, or a U.S. court may deny the request, concluding that so much time has passed since the evidence was believed to be located at the place to be searched that the evidence may have been moved.

If the information is not based on the source’s personal observation, it should be sufficiently corroborated by independent investigation so that a U.S. court can conclude that it is probable that the information is correct.

Whether acting in a domestic case or on behalf of a foreign authority pursuant to a mutual legal assistance or extradition request, U.S. prosecutors generally must establish probable cause to secure a warrant from a court to (1) search a location and seize evidence or proceeds of a crime; (2) arrest an individual upon belief that the person committed an offense; or (3) cause the production of the content of communications from communications and other electronic service providers. The following

examples present scenarios that may satisfy probable cause for a court to issue a search warrant for a place or a digital account or an arrest warrant for a person.

### *Examples*

**Example 1:** A local bank was robbed late at night. X, a person known to the police as a criminal, informs the police that it was Y who robbed the local bank. X does not claim that he was a witness to the crime. X also does not state how he came to know that Y robbed the bank. The police do not provide any other information linking Y to the crime.

If this information were provided in a request to search the home of Y, the judiciary would most likely find that no probable cause exists and would refuse to issue a warrant to search Y's home or to arrest Y. First, X, a known criminal, is not shown to be a credible and reliable source of information. In this situation, X may be fabricating the story altogether to achieve some ulterior motive (perhaps it was actually X who committed the crime and he wanted to mislead the police in their investigation, or perhaps he wants to gain favor with the police to avoid being charged with other crimes). In addition, X did not state that he witnessed Y rob the bank, nor does he divulge the source of his information about Y. The police did not provide any further corroborating information regarding Y that might compensate for the lack of X's demonstrated reliability and credibility. Finally, no information has been provided to demonstrate that it is likely that evidence of the offense is in Y's house (this might be a reasonable inference if the search is conducted soon after the robbery; see italicized language in Example 4).

**Example 2:** A local bank is robbed late at night. The police arrive at the scene and interview G, who informs them that he is the evening security guard at the bank and that he was on duty the night of the robbery. G states that he saw H break through a window of the bank, steal money from the vault, leave the bank, and flee in the direction of H's home. G gives the police a general description of the physical appearance of the robber, depicting him as being 1.25 meters tall, wearing black clothing, and having pale skin. G is sure it is H, because G had seen H the previous night looking around outside of the bank, followed H and saw him enter an apartment building, and through the window saw that H lived in an apartment on the first floor. G has had an impeccable record over his long career as a security guard. When presented with a series of photographs taken of various individuals, including H, G identified H's photo as that of the robber.

Here, a U.S. judge would likely find that probable cause does exist and would issue a search warrant for H's home. G was likely credible because he was an ordinary citizen whose statement could be considered trustworthy. G also had a sufficient basis of knowledge for stating that H committed the robbery because: (1) G was on duty at the time of the robbery and saw the robbery in progress, and (2) G identified H's photo as being that of the person he saw robbing the bank. It is reasonable to conclude that evidence of the robbery is in H's home because the robbery occurred the prior night and G saw H flee in the direction of his home. *See italicized language in Example 4 for a further discussion of the importance of seeking a search warrant as soon as possible after the commission of a crime. Also note that the judge would issue a warrant for only H's apartment, not for the entire apartment building.*

**Example 3:** A local bank is robbed late at night. J comes to the police station the next day to inform them that he saw K enter the bank and return to his car with the stolen money. J explains that he was the driver of the getaway car on the night of the robbery. J admits that (1) the night before, he and K planned the operation together and agreed to hide the evidence and proceeds of the crime in K's home; and (2) J's sole responsibility was to drive the getaway car. J also describes the getaway car. Although J realizes that he is incriminating himself by coming to the police, he had a guilty conscience about his participation in the crime. J identifies K as the robber when presented with a series of photographs, and he explains that K was wearing black pants, a black vest, and had a red snake tattoo the night of the robbery. The police have some information to link J and K to the crime, including the fact that several other witnesses saw two people fleeing the scene of the crime in the type of getaway car described by J.

Here, a U.S. judge would likely approve of a search warrant for K's home if sought soon after the robbery (*see also italicized language in Example 4*). While J is a criminal, his statement may be sufficiently reliable because, by making it, J has also incriminated himself as an accomplice to the crime. In addition, other information the police gathered corroborates J's statement, so it is likely that there is enough evidence to conclude that it is indeed K who committed the robbery and took the evidence and proceeds of the crime to his home.

**Example 4:** Police conduct a raid of the base of a drug trafficking organization and seize a computer that contains stored emails indicating that messages discussing drug trafficking were received from Hotmail email account cocaine@hotmail.com. Five messages were retrieved that had been sent from cocaine@hotmail.com between one week and one month prior to the raid. The content of these messages referred to other communications relating to drug trafficking. No other messages involving other email accounts were retrieved.

A U.S. judge would likely conclude that there is probable cause to believe that the account cocaine@hotmail.com contains evidence of drug trafficking. The physical evidence seized shows that the account was involved in communications relating to drug trafficking, and it is clear from the messages that there are further, recent communications involving drug trafficking that have been carried out. It is reasonable to infer that this account was involved in the other communications, because of the frequency of the messages, and the fact that no other email accounts appear to be in use. *It is important to note that if the messages were old (e.g., more than one year old), there may not be probable cause, because it would not be probable that the messages were still stored by Hotmail.*

**Example 5:** C telephones the police to tell them that she believes D committed a murder. C refuses to identify herself. However, she says that D killed a white male, about 20 years old, about 1.75 meters tall, with a medium build, who was wearing a soccer uniform. Before terminating the call, C states the address of D's house as being 19 Elm Street. The police check and determine that E, who matches the description of the victim given by C, was reported missing the prior day after failing to return home from soccer practice. Police also confirm that D lives at 19 Elm Street. Investigators also talk with other individuals who saw D and E have an argument prior to E's disappearance. The police request a search and seizure warrant of 19 Elm Street to find evidence of a murder.

Here, a judge most likely would find probable cause for the requested search and seizure warrant. Although the informant (a) is anonymous and her trustworthiness cannot be established; and (b) did not provide the basis for knowing that D committed the murder, her detailed statement, combined

with corroborating evidence, likely compensate for this lack of information. Thus, a judge, upon being presented with a request for the search of a specified place for specified fruits of a crime, likely would find probable cause.

### ***Summary***

To obtain a search warrant from the United States, the description of facts in the request should, to the greatest extent possible, meet the following standards.

1. The request must describe a specific location to be searched and the specific items to be seized.
2. The source(s) of the information upon which the request is based must be trustworthy. A source is usually considered trustworthy if he or she is an ordinary citizen or a law enforcement or other government official. If the source is a criminal, provide further support to demonstrate that the information is reliable. Do this by showing, *e.g.*, that (a) information received from this person has proven trustworthy in the past; (b) the source of the information also risks conviction by having provided the information; or (c) the information provided is so precise that it must be true.
3. The source(s) of information should describe personal observations that make it appear likely that a crime was committed, and that it is probable that evidence of a crime will be found in the location to be searched. Provide the basis of knowledge for the facts stated (*e.g.*, how the source saw, heard or otherwise perceived the relevant facts). These facts must demonstrate a probability that a crime was committed. It is usually not sufficient to recite the conclusions of the investigators; rather, please summarize the evidence supporting those conclusions.
4. Absent an explanation of the source(s)' basis of knowledge, provide a description of the other evidence uncovered by the investigators that corroborates the statements of the source(s).
5. The information cannot be too old, or a U.S. court may conclude that there is no longer a likelihood that the evidence is at the location to be searched.