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Summary of changes to the Attorney General Guidelines in January 2015

The Department of Justice released modified guidelines regarding subpoenas to members of the news media in February 2014. There were several aspects of those guidelines that media organizations felt were unclear, incomplete, or even harmful to the interests they were meant to protect. The News Media Dialog Group, proposed by the Attorney General in his July 2013 report to the president, met and conferred with department officials several times in 2014, and the department then released modified guidelines in January 2015.

The key changes to those guidelines concern:

“Ordinary” newsgathering activities. The use of the phrase “ordinary newsgathering activities” appeared nine times in the 2014 regulations, even though that phrase was not in the original regulations and had never come up during the discussion process. Media organizations felt that the addition of the word “ordinary” created a large exception where prosecutors and future attorneys general could decide that a wide range of activities that they would find unacceptable – such as talking to sources about national security information – would be deemed “extra-ordinary” and thus not subject to the protections of the guidelines. Department officials said they only meant it to exclude situations where journalists were clearly breaking the law.

In the new 2015 regulations, the word “ordinary” was removed in each instance. Removal of this term should eliminate some ambiguity and provide clearer direction to prosecutors in how the guidelines are interpreted.

Similarly, in section (f), concerning the questioning, arrest, and charging of journalists, three uses of the language “the coverage or investigation of news, or while engaged in the performance of duties undertaken as a member of the news media” were replaced with the phrase “newsgathering activity” for internal consistency.

Business records. Most references to records held by third parties that were protected under the 2014 guidelines referred to communications records and business records, both of which are defined in the regulations. But a few references, particularly with regard to records held by “communications service providers” (section (b)(2)(ii)) and those subject to search warrants (section (d), including subparts (1), (2), (3) and (6)) referred only to “communications records.” Those sections were amended in the new 2015 regulations to include “business records.” In addition, the definition of “business records” (section (b)(3)(iii)(A)) was changed to specifically include

“work product and other documentary materials.” This is consistent with the intent of the 2014 changes, and the 2015 edits make it more explicit.

“Focus” of investigations. The 2014 regulations (*Statement of Principles*, section (a)(1)) stated that they did not cover journalists “who are the focus of criminal investigations for conduct not based on, or within the scope of” their newsgathering activities. The media coalition felt that “focus” was ambiguous, and was inconsistent with the terms of art used elsewhere in DOJ rules and regulations if it was meant to apply only to those actually under investigation. The 2015 regulations replaced “focus” with “subjects or targets.”

Similarly, section (d)(4), regarding when the Privacy Protection Act “suspect exception” (meaning the PPA’s protection for journalists against search warrants can only be overcome if they are suspected of a crime) is invoked, was changed from when the journalist is “a focus” of a criminal investigation to “a subject or target” of the investigation.

The 2015 guidelines also added new sections — (c)(4)(i) on direct subpoenas, and (c)(5)(i) on third-party subpoenas — addressing when the journalist is a subject or target of an investigation related to newsgathering activities. The new language says that when requesting a subpoena in such situations, the prosecutor must present facts supporting why the member is a subject or target to the Attorney General, and in reviewing the subpoena, the Attorney General “should” consider the *principles* of the policy (section (a)), but “need not” consider the *specific restrictions* created by the policy (sections (c)(4) and (c)(5)).

National defense information. The 2014 guidelines added sections stating that the Attorney General “may” authorize subpoenas when the Director of National Intelligence certifies the investigation concerns the unauthorized disclosure of properly classified information. But this language was ambiguous as to whether, when such a certification is made, the rest of this policy would be ignored by the Attorney General.

The 2015 guidelines now make clear that this is an additional step in leaks investigations and prosecutions. Sections (c)(4)(vi) (regarding direct subpoenas) and (c)(5)(v) (regarding third-party subpoenas) make clear that in approving a subpoena in a leaks investigation, the Attorney General “should take into account” both the DNI certification and the specific restrictions in the guidelines (sections (c)(4) and (c)(5)).

Harassment. A new section (c)(5)(vi) was added regarding third-party subpoenas to mirror language regarding direct subpoenas ((c)(4)(vii)). “Requests should be treated with care to avoid interference with newsgathering activities and to avoid claims of harassment.”

Extra step before compelled disclosure. A new section (c)(6) was added to clarify that even after any subpoena or other instrument is issued and negotiations with the media entity fail, prosecutors must consult with the Criminal Division before asking a

judge to compel compliance with any direct or third-party subpoena or court order. The initiative for this new section came from DOJ and the media coalition endorsed it.

Safeguarding seized materials. The Attorney General's July 2013 report to the president included promises that information obtained through a subpoena or other instrument would be safeguarded to protect against additional or unnecessary disclosure, but that language was not included in the 2014 guidelines. The department indicated that it had intended to create such a requirement in the U.S. Attorneys' Manual instead. A new section (h) was added to the 2015 guidelines saying such information must be "closely held so as to prevent disclosure of the information to unauthorized persons or for improper purposes," and also refers prosecutors to the Attorneys' Manual for further guidance.

Notice to the news media. The 2014 regulations required that the news media be given notice of subpoenas to third parties before they were served, thus giving the media the opportunity to move to quash them.

In the 2015 regulations, similar language was added to section (a)(3) of the "Statement of Principles." In addition, an exception to the notice requirement was added for instances where the member of the news media is a "subject or target" of the investigation. This section, (e)(1), gives the Attorney General discretion to nonetheless direct that notice be provided, and requires prosecutors to update the Attorney General every 90 days about the status of the investigation and the continuing need for withholding notice.

Detaining journalists. In section (f), regarding requests for approval to question, arrest, or seek indictment of members of the news media, a new section (f)(5) was added stating that the Attorney General must follow the Statement of Principles of this policy.

Cumulative information. Section (c)(5)(ii)(A) was amended to state: "The subpoena or court order should not be used to obtain peripheral, nonessential, *cumulative*, or speculative information."

"Filter teams." On search protocols for executing warrants, the 2015 guidelines removed a parenthetical in section (d)(7) that defined the department "filter teams" that would review searches of records as "reviewing teams separate from the prosecution and investigative teams." However, that phrase remains in section (c)(5)(viii), regarding third-party subpoenas. Presumably this means that when reviewing the material obtained through search warrants, the "filter teams" can come from the ranks of officials already involved in the case.

Foreign agents. Section (b)(1)(ii) changed person "who is or is reasonably likely to be" a foreign agent or terrorist to "where there are reasonable grounds to believe that the individual or entity is" such.