

Proposed Revisions to 28 C.F.R. § 50.10

On behalf of a media coalition organized by
The Reporters Committee for Freedom of the Press

Submitted June 21, 2013

Overview of proposed changes

The following section-by-section analysis identifies and explains proposed revisions to existing Department of Justice guidelines regarding the issuance of subpoenas involving journalists. See 28 C.F.R. § 50.10. Some structural changes are proposed to simplify and clarify the existing policies. These suggestions have entailed renumbering items to reflect the following new groupings:

- **Section (1): Subpoenas, search warrants and related demands.** Current sections (b) through (g) are reorganized here as subsections (b) through (i). Current sections (f) and (g), which treat direct and third-party subpoenas separately, have been combined.
- **Section (2): Other law enforcement activity involving the press.** Current sections (h) through (l) are grouped here. Proposed sections (2)(b) to (2)(f) contain new provisions to address issues raised by legislation since the guidelines were adopted, including the USA PATRIOT Act, the Foreign Intelligence Surveillance Act, and the Privacy Protection Act.
- **Section (3): Scope.** Current sections (m) and (n) are included within proposed sections (3)(a) and (3)(b). Proposed section (3)(c) contains a new requirement for an annual report, and (3)(d) has a requirement for an annual meeting between members of the news media and the Attorney General.

A table showing where current sections have been moved is included at the end of this document, and commentary under each section provides additional background. No sections of the current policy have been completely removed.

For ease of use, additions to the existing regulations are underlined; deletions are marked with ~~strikethrough~~.

§ 50.10 Policy ~~with regard to the issuance of subpoenas to members of the news media, subpoenas for telephone toll records of members of the news media, and the interrogation, indictment, or arrest of, members of the news media~~ for seeking evidence from the news media or related to newsgathering.

Because freedom of the press can be no broader than the freedom of reporters to investigate and report the news, the prosecutorial power of the government should not be used in such a way that it impairs a reporter's responsibility to cover as broadly as possible controversial public issues. This policy statement is thus intended to provide protection for the news media from forms of compulsory process, whether civil or criminal, ~~which~~ and other law enforcement tools that might impair the news gathering function. In balancing the concern that the Department of Justice has for the work of the news media and the Department's obligation to the fair administration of justice, the following ~~guidelines~~ principles shall be adhered to by all members of the Department in all cases:

- In determining whether to ~~request issuance of a subpoena to a member of the news media, or for telephone toll records of any member of the news media,~~ seek evidence from the news media or related to the process of newsgathering, the approach in every case must be to strike the proper balance between the public's interest in the free dissemination of ideas and information and the public's interest in effective law enforcement and the fair administration of justice.
- Given the importance of avoiding unnecessary governmental interference in the constitutionally protected newsgathering process, obtaining the records of members of the news media should be considered an extraordinary measure and not a standard investigatory practice.
- These guidelines should be broadly construed to apply to any form of testimony or documentary evidence related to journalists and the newsgathering process, including materials held by third parties; to cover any and all instruments, investigative tools, and forms of compulsory process; and to ensure inclusion of the new and emerging methods and technologies for publishing information to the public.
- Members of the Department should recognize the importance of giving the news media notice and allowing an opportunity to be heard before pursuing any newsgathering-related testimony or material.
- Members of the Department must recognize that journalists should not be subject to arrest or interrogation for journalistic conduct; that journalists should not be accused of committing a crime simply by gathering or publishing news about classified materials; that the threat of obstruction of justice should not be used when requesting documents or providing notice of imminent service of legal process; and that notifying or negotiating with a journalist should not be presumed to lead to the destruction of evidence.
- Members of the Department should treat all material obtained from a journalist or related to newsgathering with care, recognizing that some material may relate to protected

newsgathering and publishing activities of journalists unrelated to the Department's investigation.

Commentary

The title was shortened to be broad, rather than to be specific about everything covered in the guidelines.

The addition of "other law enforcement tools" is meant to cover additional law enforcement activities that may threaten the newsgathering process and a reporter's ability to speak in confidence with a source. *See* (2)(f) below.

The Principles are meant to be broad, and are more fully developed in later sections.

The first Principle is taken from current section (a) and expanded to cover third-party demands. The third Principle establishes broad applicability of the guidelines in terms of the materials, investigatory tools, and individuals covered. The last three emphasize negotiation and notice, avoidance of arrests, and protection of what journalists would consider privileged information.

Except for the first Principle, the text here is completely new to the guidelines.

- (1) **Subpoenas, search warrants and related instruments (“media-related demands”).**
- (a) **This section applies to all subpoenas, search warrants, national security letters or other similar legal instruments used to demand information, records or testimony, that are issued to a member of the news media or a non-media third-party provider that holds records or things documenting newsgathering activities, including but not limited to records of telephone calls, credit cards, travel, packages, email, online activity and other forms of electronic communications (collectively “media-related demands”).**

Commentary

This wording is completely new, and seeks to establish the broad range of demands that are the subject of the rest of these provisions. The current section (a) language is now the first Principle and is not limited just to subpoenas.

By placing the detailed description of a “media-related demand” here, this simpler term can be used throughout Section 1, instead of repeatedly listing the types of instruments and whether they are served on the journalist or a third party. Also, placing this term in section (1)(a) helps us keep the numbering similar to the current guidelines once the current language of section (a) was moved to the Principles.

[Section (1) continued]

- (b) **Before considering issuing a media-related demand, all reasonable attempts should first be made to obtain the information from all alternative sources.**

~~All reasonable attempts should be made to obtain information from alternative sources before considering issuing a subpoena to a member of the news media, and similarly all reasonable alternative investigative steps should be taken before considering issuing a subpoena for telephone toll records of any member of the news media.~~

Commentary

This section is substantially similar to current section (b), but emphasizes the obligation to first seek information from “all” alternative sources. The two sentences in the current policy, separately addressing direct subpoenas to journalists and subpoenas for third-party telephone records, have been combined.

[Section (1) continued]

- (c) ~~Negotiations with the media shall be pursued~~ In all cases in which a subpoena media-related demand to a member of the news media is contemplated, negotiations with the media shall be pursued. These negotiations should attempt to accommodate the interests of the trial or grand jury with the interests of the media. Where the nature of the investigation permits, the government should make clear what its needs are in a particular case as well as its willingness to respond to particular problems of the media.

Commentary

This section is substantially similar to current section (c) but emphasizes that negotiations should occur *before* approval is sought.

[Section (1) continued]

- (d) **In all cases in which a media-related demand to a non-media third-party provider is contemplated, prior negotiations with the affected member of the news media shall also be pursued** ~~in all cases in which a subpoena for the telephone toll records of any member of the news media is contemplated where the responsible Assistant Attorney General determines that such negotiations would not pose a substantial threat to the integrity of the investigation in connection with which the records are sought. Such determination shall be reviewed by the Attorney General when considering a subpoena authorized under paragraph (e) of this section.~~

Commentary

This section differs from current section (d) because the exception from negotiations has been removed.

[Section (1) continued]

- (e) ~~No subpoena may be issued to any member of the news media or for the telephone toll records of any member of the news media~~ **media-related demand may be issued** without the express authorization of the Attorney General: Provided, that, if a member of the news media with whom negotiations are conducted under paragraph **(1)(c)** of this section expressly agrees to provide the material sought, and if that material has already been published or broadcast, the United States Attorney or the responsible Assistant Attorney General, after having been personally satisfied that the requirements of this section have been met, may authorize issuance of ~~the a~~ **a** subpoena and shall thereafter submit to the Office of Public Affairs a report detailing the circumstances surrounding the issuance of the subpoena.

Commentary

This section is substantially similar to current section (e).

[Section (1) continued]

- (f) In requesting the Attorney General's authorization for a subpoena to a member of the news media media-related demand, the following principles requirements will apply:**

Commentary

“Principles” was changed to “requirements” here because it is more appropriate for what follows, and a new statement of broad principles has been added to the opening section of the guidelines.

The following subsections have been modified to incorporate the requirements for subpoenas directed at members of the news media (current section (f)) and subpoenas directed at third parties who hold media records (current section (g)).

[Section (1)(f) continued]

- (1) In criminal cases, there should be reasonable grounds to believe, based on information obtained from non-media sources, that a crime has occurred, and that the information sought is essential to a successful investigation -- particularly with reference to directly establishing guilt or innocence. The ~~subpoena~~ media-related demand should not be used to obtain peripheral, duplicative, nonessential, or speculative information.**

Commentary

This section is substantially similar to section (f)(1).

[Section (1)(f) continued]

- (2) In civil cases there should be reasonable grounds, based on non-media sources, to believe that the information sought is essential to the successful completion of the litigation in a case of substantial importance. ~~The subpoena~~ media-related demand should not be used to obtain duplicative, peripheral, nonessential, or speculative information, and in a civil case no media-related demand should be directed to a non-media party.

Commentary

This section is substantially similar to current section (f)(2). Language was added to explicitly state that subpoenas to third parties holding media records are not allowed in civil cases. Doing so is consistent with current section (g)(1), which governs third-party subpoenas and addresses only criminal matters.

[Section (1)(f) continued]

- (3) **In all cases, the media-related demand should be as narrowly drawn as possible; it should be directed at essential information regarding a limited subject matter, should cover a reasonably limited time period and should avoid requiring production of a large volume of unpublished material.**

Commentary

This section is drawn from current section (f)(6) and current section (g)(1). Current section (f)(6) applies to subpoenas directly to members of the news media and states:

Subpoenas should, wherever possible, be directed at material information regarding a limited subject matter, should cover a reasonably limited period of time, and should avoid requiring production of a large volume of unpublished material.

Current section (g)(1) contains similar language, but applies to third-party subpoenas:

The subpoena should be as narrowly drawn as possible; it should be directed at relevant information regarding a limited subject matter and should cover a reasonably limited time period.

The proposed changes adopt the terminology of current section (g)(1), adding the “narrowly drawn” requirement, and specifying “essential” information rather than just “material” information to be consistent with the two preceding subsections.

[Section (1)(f) continued]

- (4) Before seeking the Attorney General's authorization, the government should have unsuccessfully attempted to obtain the information from all alternative sources, as required by paragraph (1)(b) of this section.**

Commentary

This section is substantially similar to current section (f)(3) while adding language to emphasize that pursuit of alternatives must occur before seeking approval and to emphasize that "all" sources must have been tried.

[Section (1)(f) continued]

- (5) The use of media-related demands should, except under exigent circumstances, be limited to the verification of published information and to such surrounding circumstances as relate to the accuracy of the published information. Even subpoena authorization requests for publicly disclosed information should be treated with care to avoid interference with the newsgathering process or claims of harassment.**

Commentary

This section has minor edits from current sections (f)(4) and (f)(5), which are combined here. The final sentence was revised to emphasize the Department's interest in avoiding interference with the newsgathering process.

[Section (1)(f) continued]

- (6) **In all cases, reasonable and timely advance notice, sufficient to allow for judicial review, shall be given to the affected member of the news media of the Attorney General's decision to authorize a media-related demand issued to a member of the news media before it is executed.**

Commentary

The “reasonable and timely notice” language comes from the last line of current section (f)(6). The rest of current section (f)(6) has been moved to (1)(f)(3), above.

[Section (1)(f) continued]

- (7) **In all cases, reasonable and timely advance notice, sufficient to allow for judicial review, shall be given to the affected member of the news media of the Attorney General's decision to authorize a media-related demand issued to a non-media third-party provider before it is executed.**

Commentary

This provision requires notice of a third-party demand for news media records before it is served. This section differs from current sections (g)(2) and (g)(3). Those sections have more limited notice provisions for telephone toll record subpoenas, which are the only third-party records covered by the current guidelines.

[Section (1) continued]

- (g) **Any information obtained ~~as a result of a subpoena issued for telephone toll records~~ through a media-related demand shall be closely held on a need-to-know basis, so as to prevent disclosure of the information to unauthorized persons, use of the information beyond the specific investigation, search for additional information or sources in the journalist's materials, or other ~~or for~~ improper purposes.**

Commentary

This section is substantially similar to current section (g)(4), but is more specific in detailing other improper purposes.

2. Other law enforcement activity involving the news media.**(a) The following principles shall apply when questioning a member of the news media, or seeking to arrest or arresting a member of the news media.**

- (1) No member of the Department shall subject a member of the news media to questioning as to any offense which he or she is suspected of having committed in the course of, or arising out of, the coverage or investigation of a news story, or while engaged in the performance of ~~his official~~ duties undertaken as a member of the news media, without the express authority of the Attorney General: Provided, however, That where exigent circumstances preclude prior approval, the requirements of paragraph 2(a)(5) of this section shall be observed.
- (2) A member of the Department shall secure the express authority of the Attorney General before a warrant for an arrest is sought, and whenever possible before an arrest not requiring a warrant, of a member of the news media for any offense which he or she is suspected of having committed in the course of, or arising out of, the coverage or investigation of a news story, or while engaged in the performance of ~~his official~~ duties undertaken as a member of the news media.
- (3) No member of the Department shall present information to a grand jury seeking a bill of indictment, or file an information, against a member of the news media for any offense which he or she is suspected of having committed in the course of, or arising out of, the coverage or investigation of a news story, or while engaged in the performance of ~~his official~~ duties undertaken as a member of the news media, without the express authority of the Attorney General.
- (4) In requesting the Attorney General's authorization to question, to arrest or to seek an arrest warrant for, or to present information to a grand jury seeking a bill of indictment or to file an information against, a member of the news media for an offense which he or she is suspected of having committed during the course of, or arising out of, the coverage or investigation of a news story, or committed while engaged in the performance of ~~his official~~ duties undertaken as a member of the news media, a member of the Department shall state all facts necessary for determination of the issues by the Attorney General. A copy of the request shall be sent to the Director of Public Affairs.
- (5) When an arrest or questioning of a member of the news media is necessary before prior authorization of the Attorney General can be obtained, notification of the arrest or questioning, the circumstances demonstrating that an exception to the requirement of prior authorization existed, and a statement containing the information that would have been given in requesting prior authorization, shall be communicated immediately to the Attorney General and to the Director of Public Affairs.

Commentary

Proposed sections (2)(a)(1) through (2)(a)(5) parallel current sections (h) through (l) [the letter "L"], respectively, with minor changes as noted. The headings for (2) and (2)(a) are new.

[Section (2) continued]

(b) In requesting the Attorney General’s authorization for a media-related search warrant under section (1)(f), members of the Department must ensure that the requirements of the Privacy Protection Act (42 U.S.C. Sec. 2000aa) are satisfied in full, including the requirement in Espionage Act cases that "the suspect exception to the ban on searches would apply only if there was an allegation of an intent to injure the United States or give advantage to a foreign power." See S. Rep. No. 96-874, at 12 (1980), reprinted in 1980 U.S.C.C.A.N. 3950, 3958 ("For the purposes of this Act, the government shall recognize the higher standard, the requirement of intent, before utilizing the suspect exception for searches of materials sought under 18 U.S.C. 793.")

Commentary

The current guidelines do not address search warrants. Section (1) of this proposal requires Attorney General approval of media-related search warrants. This new section was meant to alert members of the Department that the first hurdle they must meet *under current law* is compliance with the Privacy Protection Act and to further inform them that Congress intended that in Espionage Act cases the “suspect exception” – allowing a search when the reporter is accused of committing the crime – requires a showing of intent to injure the United States.

[Section (2) continued]

(c) No member of the Department may delete information found on electronic devices or digital media belonging to a member of the news media.

Commentary

This section is new.

[Section (2) continued]

(d) No member of the Department shall intercept mail or packages of any type being sent to or from a member of the news media without a search warrant. Any such seizure must meet the requirements of the Privacy Protection Act and notice must be given immediately to the member of the news media whose mail is intercepted. Any materials turned over to members of the Department from other law enforcement or regulatory agencies (such as local police, U.S. Immigration and Customs Enforcement, the Transportation Security Administration, U.S. Secret Service, etc.) shall also be subject to these notice requirements.

Commentary

This new section addresses seizure of mail as part of a surveillance program.

[Section (2) continued]

- (e) No member of the Department shall seek an order requiring the production of “any tangible things” pursuant to Section 215 of the USA PATRIOT Act (Pub. L. No. 107-56, 115 Stat. 272, codified at 50 U.S.C. § 1861) from a member of the news media, or a newsroom, except with the direct approval of the Attorney General and as authorized under the Privacy Protection Act.**

Commentary

This new section was added to reconcile issues concerning document production orders obtained under the USA PATRIOT Act with these guidelines.

[Section (2) continued]

(f) Notwithstanding any authority provided in the USA PATRIOT Act and the Foreign Intelligence Surveillance Act (50 U.S.C. §§ 1801-1811, 1821-1829, 1841-1846, 1861-1862), no member of the Department shall knowingly conduct surveillance of a member of the news media as part of an investigation without obtaining the approval of the Attorney General.

Commentary

This new section subjects the surveillance powers of the Department of Justice to the same considerations as subpoenas. It does not completely foreclose this option, but simply adds one step to the process of approval.

As mentioned in the commentary under the opening section of the guidelines, the inclusion of “surveillance” tools and techniques is meant to cover additional law enforcement activities that may threaten the newsgathering process and a reporter’s ability to speak in confidence with a source. The primary consideration in approving such activity must be whether the surveillance is undertaken to obtain sources’ identities or information gained through the newsgathering process. Therefore, even standard tools such as “trash covers,” tracking devices on cars in public places, pole cameras, and physical (visual) surveillance are covered if such intent is present.

(3) Scope.

- (a) ~~In light of the intent of this Section~~ **These guidelines are intended to protect freedom of the press, news gathering functions, and news media sources, this policy statement does and do not apply to demands directed to members of the news media for purely commercial or financial information unrelated to their news gathering or news reporting functions.**

Commentary

This section is substantially similar to current section (m), while clarifying that some commercial records could contain sensitive news-related information.

[Section (3) continued]

- (b) **Failure to obtain the prior approval of the Attorney General whenever required by these guidelines may constitute grounds for an administrative reprimand or other appropriate disciplinary action. In the event that evidence is obtained through a media-related demand without seeking the requisite approval, any member of the Department who comes into possession or control of such evidence shall immediately seek approval consistent with the requirements of these guidelines. If approval is not obtained, the evidence should not be used by the government for any purpose, and specifically should not be used by the members of the Department as evidence in any court.**

Commentary

This section is based on current section (n), expanded to recognize that if a member of the Department obtains evidence in a manner inconsistent with these guidelines, the evidence should not be used in court. This standard is substantially less onerous than a true “exclusionary rule” since the subsequent attempt to comply with these provisions could produce useable evidence; however, it should also lead to negotiations with the member of the news media and possibly to a more narrowly drawn request for documents or testimony.

[Section (3) continued]

(c) The Department of Justice shall each year publicly disclose information about media-related demands, such as the number of requests submitted under these guidelines in the previous year, the number of those granted, the number of those that sought the identity of sources, and any reports made under (1)(e).

Commentary

This new section calls for an annual report to be prepared in conjunction with the annual meeting discussed in the next section.

[Section (3) continued]

- (d) The Attorney General shall meet with representatives of the news media on an annual basis to review the effectiveness of the guidelines in accommodating the rights of the news media to report the news while also meeting law enforcement needs.**

Commentary

This new section seeks to establish an annual meeting with the Attorney General.

CROSS REFERENCE: REVISED PLACEMENT OF EXISTING PROVISIONS

CURRENT SECTION:	MOVED TO:
(a)	"Principles"
(b)	(1)(b)
(c)	(1)(c)
(d)	(1)(d)
(e)	(1)(e)
(f)	(1)(f)
(f)(1)	(1)(f)(1)
(f)(2)	(1)(f)(2)
(f)(3)	(1)(f)(4)
(f)(4)	(1)(f)(5)
(f)(5)	(1)(f)(5)
(f)(6)	(1)(f)(3) and (1)(f)(6)
(g)	<i>See generally</i> (f)
(g)(1)	(1)(f)(2) and (1)(f)(3)
(g)(2)	(1)(f)(6) and (1)(f)(7)
(g)(3)	(1)(f)(7)
(g)(4)	(1)(g)
(h)	(2)(a)(1)
(i)	(2)(a)(2)
(j)	(2)(a)(3)
(k)	(2)(a)(4)
(l)	(2)(a)(5)
(m)	(3)(a)
(n)	(3)(b)