

Summary of changes to the Attorney General guidelines

July 30, 2013

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On July 12, 2013, the Attorney General released a report on changes to the guidelines on subpoenaing members of the news media. See 28 C.F.R. § 50.10. The changes were broadly stated policy statements and will eventually be made more specific and incorporated into federal regulations.

The table below summarizes the changes by topic.

Issue	Current regulations	Coalition proposal	A.G. recommendations
Coverage			
Third-party records	Apply to direct subpoenas for records or testimony and to telephone toll records.	Should apply to all demands “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.”	Will “make clear that those policies apply to ‘communications records’ or ‘business records’ of members of the news media that are stored or maintained by third parties.”
Tools/demand instruments	Apply primarily to subpoenas, but include <i>arrest</i> warrants in a later section. Search warrants are not addressed.	Change “subpoenas” to “media-related demands,” which was defined as “all subpoenas, search warrants, national security letters or other similar legal instruments used to demand information, records or testimony.”	Will include “search warrants and court orders issued pursuant to 18 U.S.C. § 2703(d) directed at members of the news media.” (Section 2703(d) is part of the Electronic Communications Privacy Act and the Stored Communications Act and allows for a court order to obtain the contents of electronic communications older than 180 days.) National security letters and FISA warrants are not mentioned.

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<p>The Privacy Protection Act “suspect exception” (42 U.S.C. § 2000aa)</p>	<p>Not addressed. (Under a different Department policy, a Deputy Assistant Attorney General can authorize an application for a search warrant under the “suspect exception” to the Privacy Protection Act.)</p>	<p>Called on Justice to “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,” and to acknowledge 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.’”</p>	<p>Stated: “As an initial matter, it bears emphasis that it has been and remains the Department's policy that members of the news media will not be subject to prosecution based solely on news gathering activities.”</p> <p>Under the recommendations, the Department would apply the “suspect exception” of the PPA “only when the member of the news media is the focus of a criminal investigation for conduct not connected to ordinary newsgathering activities. Under this revised policy, the Department would not seek search warrants under the PPA's suspect exception if the sole purpose is the investigation of a person other than the member of the news media.”</p> <p>The recommendations would address the Fox News situation and would presumably not have allowed the search warrant for the Gmail account. However, it does not address the requirement of the intent to injure the U.S. or help a foreign power, which we believe is required under both the PPA and the Espionage Act.</p>
<p>PATRIOT Act searches for “any tangible things”</p>	<p>Not addressed.</p>	<p>Shall not “seek an order requiring the production of ‘any tangible things’ pursuant to Section 215 of the USA PATRIOT Act.”</p>	<p>Not included in recommendations.</p>
<p>Scope of records obtained</p>	<p>A third-party demand “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.”</p>	<p>Change “relevant” to “essential.”</p>	<p>Did not modify this test but added that Department attorneys will “employ search methods – such as computer search protocols and keyword searches – to limit the scope of intrusion into potentially protected materials.”</p>

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Alternative sources	“All reasonable attempts should be made to obtain information from alternative sources.”	Add “all” before “alternative sources.”	Not addressed.
Third-party demands in civil cases	Guidelines now do not cover third-party subpoenas in civil cases; such demands are only addressed in the context of criminal cases, meaning that Department policy forbids them in civil cases.	Add “and in a civil case no media-related demand should be directed to a non-media party” to (f)(2).	Not addressed; presumably Department policy still forbids third-party demands.
Notice and negotiations			
Presumption for third-party subpoenas	Current presumption against notice – only given if it <i>won't</i> threaten investigation	Notice in all cases. (Original proposal). If they cannot, pending further negotiations, “the current presumption in the guidelines relating to third-party instruments should be flipped in favor of notice.” (July 11 letter)	“The first and most significant policy change would be to reverse and expand the presumption concerning notice to, and negotiations with, affected members of the news media The presumption will ensure notice in all but the most exceptional cases.”
Standard for exception	Negotiations with the media should occur where “the responsible Assistant Attorney General determines that such negotiations would not pose a substantial threat to the integrity of the investigation.”	Should reverse the presumption in favor of notice, heighten the substantive standard for bypassing notice, or state that notice must be given in all public investigations. (July 11 letter)	The “presumption of advance notice will be overcome only if the Attorney General affirmatively determines ... that for compelling reasons, advance notice and negotiations <i>would</i> pose a clear and substantial threat to the integrity of the investigation, risk grave harm to national security, or present an imminent risk of death or serious bodily harm.” Any delay caused by notice or negotiation, including potential judicial review, is not a compelling reason to deny notice.
Approval of notice exception	Determination made by the Assistant Attorney General and reviewed by the Attorney General.	No position, because we were advocating for notice in all cases.	Affirmative determination to overcome notice must be made by the Attorney General, after consultation with the News Media Review Committee.

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Notification delay	Delay of 45 days permitted; Assistant Attorney General may authorize delay of additional 45 days	No position, because we were advocating for notice in all cases.	Delay of 45 days permitted, as currently. For an extension, “only the Attorney General may authorize a delay of notification for up to an additional 45 days, and even then, only if the Attorney General again determines, after an additional review by the News Media Review Committee, that, for compelling reasons, notice would pose a clear and substantial threat to the integrity of the investigation, grave harm to national security, or imminent risk of death or serious bodily harm.”
Judicial oversight of lack of notice	Not addressed.	Media coalition requested a mechanism for judicial oversight when notice is not given but did not specify what type or how to achieve. (July 11 letter)	The report noted that this remedy would have to come from Congress in a shield law, which could “provide a new mechanism for advance judicial review of the use of investigative tools such as subpoenas when they involve the news media, within a framework that establishes procedures for review and appeal, including expedited judicial determinations and under seal or ex parte review for good cause.”
Limitations			
Deletion of electronic data	Not addressed.	Proposed: “No member of the Department may delete information found on electronic devices or digital media belonging to a member of the news media.”	Not addressed.
Interception of mail or packages	Not addressed.	Proposed: “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.”	Not addressed.
Surveillance	Not addressed.	Proposed: surveillance only permitted with the approval of the Attorney General. (2)(f)	Not addressed.

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Approval process			
Centralization of review process	Not addressed.	Not addressed.	For consistency, all requests must “be submitted to, and initially evaluated by, the Criminal Division’s Office of Enforcement Operations before they are ultimately forwarded to the Attorney General for decision.”
Endorsement by requesting office	Not addressed.	Not addressed.	Requests for approvals will have to be “expressly endorsed by the relevant United States Attorney or Assistant Attorney General before submission.”
Advisory committee review	Not addressed.	Not addressed.	<p>A new layer will be added to the approval process.</p> <p>A permanent News Media Review Committee will advise the Attorney General on demands in three areas: for investigations into the unauthorized disclosure of information; for investigations where they will not provide prior notice to the media party; and for testimony that would disclose the identity of a confidential source.</p> <p><i>Make-up:</i> The committee will include senior officials, including the Director of the Office of Public Affairs and the Department’s Chief Privacy and Civil Liberties Officer.</p> <p><i>Authority:</i> “Members of the committee will have the opportunity to provide both individual and collective assessments of the merits of requests and to raise relevant issues for consideration by the Deputy Attorney General and the Attorney General.</p>

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DNI certification	Not addressed.	Not addressed.	<p>In investigations of unauthorized disclosures, the Director of National Intelligence must certify to “the significance of the harm that could have been caused by the unauthorized disclosure and reaffirm the intelligence community's continued support for the investigation and prosecution.”</p> <p>The certification must be made no more than 30 days before a request for a subpoena and will “formalize current practice by providing the Attorney General with information about whether the information disclosed was properly classified, whether the disclosure could have caused harm to the national security or foreign policy of the United States, and whether the victim Department or agency continues to support the investigation and potential prosecution of persons responsible for the unauthorized disclosure.”</p>
Penalty for non-compliance	Administrative reprimand or other disciplinary action.	Proposed adding a possible “exclusionary rule,” although the Department could subsequently approve a properly resubmitted subpoena.	Not addressed.
Disclosures and accountability			
Annual report	Not addressed.	Proposed: Should annually disclose information 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) [where the media consented to the production of materials].”	The Department will annually release statistical data regarding media subpoenas. To gather this material, the guidelines will require Department attorneys to report details on all subpoenas to the Criminal Division's Office of Enforcement Operations: “whether an approved subpoena, court order, or search warrant was issued, served, or executed, and whether the affected member of the news media or recipient of the subpoena, court order, or search warrant complied with or challenged the subpoena, court order, or search warrant, and the outcome of any such challenge. “ This recommendation exceeds the media coalition’s request by including the ultimate disposition of challenges.

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Annual meeting	Not addressed.	Proposed: "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."	<p>An Attorney General's News Media Dialogue Group will examine the impact of the policy and help the Department "maintain a dialogue with the news media." It will meet "six months after the proposed revisions to the Department's news media policies are effective and on an annual basis thereafter." It is not clear if this means six months after the July 12 announcement or from when more formal guidelines are announced.</p> <p><i>Make-up:</i> "The group will include members of the news media, attorneys from various Department components, and the Director of the Department's Office of Public Affairs." Apparently this group may <i>not</i> include the Attorney General, which we had requested.</p>
Training	Not addressed.	Not addressed.	The Department "will prepare training materials regarding these new policies for dissemination to the Department's law enforcement officials and attorneys."
Safeguarding of information	Information "shall be closely held so as to prevent disclosure of the information to unauthorized persons or for improper purposes."	Information "shall be closely held <i>on a need-to-know basis</i> , so as to prevent disclosure of the information to unauthorized persons, <i>use of the information beyond the specific investigation, search for additional information or sources in the journalist's materials, or other</i> improper purposes."	The Department will adopt formal safeguards on the use and handling of media-related records. Access will be limited to those prosecutors who have a need to know the information; the use of the information will be limited to the investigation and related proceedings; the information will not be shared with anyone; and the information "will be maintained in a secure, segregated repository that is not searchable" after the investigation or case is over. There is an allowance for broader use if the information is evidence of a crime involving death, kidnapping, substantial bodily harm, other offenses against minors, or destruction of critical infrastructure.