



U.S. Department of Justice
Office of Information Policy
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August 31, 2018

Ms. Carrie DeCell
Knight First Amendment Institute
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New York, NY 10027
carrie.decell@knightcolumbia.org

Mr. Trevor Timm
Freedom of the Press Foundation
601 Van Ness Avenue
Suite E731
San Francisco, CA 94102
trevor@freedom.press

Re: DOJ-2018-000135 (AG)
DOJ-2018-000288 (DAG)
DOJ-2018-000289 (ASG)
17-cv-9343 (S.D.N.Y.)
TAZ:JMS

Dear Ms. DeCell and Mr. Timm:

This is in response to your Freedom of Information Act (FOIA) request dated October 10, 2017, and received in this Office on October 11, 2017, for records concerning restrictions imposed by statute, regulation, or the First Amendment on government surveillance targeting members of the news media or otherwise implicating the freedoms of speech, association, or the press. This response is made on behalf of the Offices of the Attorney General (OAG), Deputy Attorney General (ODAG), and Associate Attorney General (OASG).

By letter dated July 31, 2018, we provided you with a partial response, and advised that we were processing additional records which were either recently referred, or required additional consultations. Our review of the remaining material containing records responsive to your request is now complete.

I have determined that fourteen pages containing records responsive to your request are appropriate for release with excisions, some on behalf of the Office of Legal Counsel, the National Security Division, and the Federal Bureau of Investigation, pursuant to Exemptions 1, 3, 5, and 7(E) of the FOIA, 5 U.S.C. § 552(b)(1), (b)(3), (b)(5), and (b)(7)(E). Exemption 1 pertains to information that is properly classified in the interest of national security pursuant to Executive Order 13526. Exemption 3 pertains to information exempted from release by statute, in this instance 50 U.S.C. § 403-1(i)(1) (currently at 50 U.S.C. § 3024(i)(1)) (National Security Act of 1947). Exemption 5 pertains to certain inter- and intra- agency communications protected by the deliberative process and attorney-client privileges.

Exemption 7(E) pertains to records or information compiled for law enforcement purposes, the release of which would disclose certain techniques or procedures for law enforcement investigations or prosecutions.

Finally, please be advised that because we located material that originated with the Office of Professional Responsibility (OPR), we have referred that material to OPR for review.

For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. *See* 5 U.S.C. § 552(c) (2012 & Supp. V 2017). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist.

If you have any questions regarding this response, please contact Jean-David Barnea of the U.S. Attorney's Office for the Southern District of New York at (212) 637-2679.

Sincerely,

A handwritten signature in black ink, appearing to read "Timothy A. Ziese", written over a horizontal line.

Timothy A. Ziese
Senior Reviewing Attorney

Enclosures



Office of the Attorney General
Washington, D. C. 20530

February 21, 2014

MEMORANDUM TO ALL DEPARTMENT EMPLOYEES

FROM: THE ATTORNEY GENERAL *EJA*

SUBJECT: UPDATED POLICY REGARDING OBTAINING INFORMATION FROM, OR RECORDS OF, MEMBERS OF THE NEWS MEDIA; AND REGARDING QUESTIONING, ARRESTING, OR CHARGING MEMBER OF THE NEWS MEDIA

In May 2013, at the President's direction, I initiated a comprehensive review and evaluation of the Department's policies and practices regarding the use of certain law enforcement tools, including subpoenas, or, in civil matters, other similar compulsory process such as a civil investigative demand, court orders issued pursuant to 18 U.S.C. §§ 2703(d) and 3123, and search warrants, to obtain information from, or records of, members of the news media. To facilitate this process, I convened a series of meetings to solicit input from a wide range of stakeholders, including members of the news media, First Amendment academics and advocates, and Members of Congress. I also assembled a Working Group composed of representatives from various Department components, including the Office of the Attorney General, the Office of the Deputy Attorney General, the Office of Legal Counsel, the Office of Legal Policy, the National Security Division, the Criminal Division, the Federal Bureau of Investigation, and the Executive Office for United States Attorneys. The Working Group was tasked with proposing specific revisions to the Department's policies and practices regarding obtaining information from, or records of, members of the news media. In so doing, the Working Group consulted with other agencies and offices within the Executive Branch.

On July 12, 2013, the Department released a Report on Review of News Media Policies, which highlighted significant changes to the Department's policies and practices. The Report also previewed additional technical revisions to the Department's policies and practices, and noted that formal guidance regarding these changes would be issued.

Following the release of the Report, the Working Group continued its review and evaluation of the Department's policies and practices, and finalized proposed revisions to the applicable Code of Federal Regulations provision, 28 C.F.R. § 50.10. I have endorsed those revisions. The revised regulations, which are attached, will be effective as of the date they are published in the Federal Register.

Overall, the revisions to 28 C.F.R. § 50.10 are intended to ensure that, in determining whether to seek information from, or records of, members of the news media, the Department strikes the proper balance among several vital interests: protecting national security, ensuring public safety, promoting effective law enforcement and the fair administration of justice, and safeguarding the essential role of the free press in fostering government accountability and an open society. The revisions to the Department's policies and practices better achieve this balance by ensuring more robust oversight by senior Department officials; centralizing the internal review and evaluation process; setting out specific standards for the use and handling of information obtained from, or records of, members of the news media; and extending the policies to cover the use of subpoenas, or, in civil matters, other similar compulsory process such as a civil investigative demand (collectively "subpoenas"), court orders issued pursuant to 18 U.S.C. §§ 2703(d) and 3123, and search warrants.

In addition to the revisions to 28 C.F.R. § 50.10, the Department has adopted additional changes to its practices regarding obtaining information from, or records, of members of the news media which will be reflected in revisions to sections 9-13.400 and 9-12.240 of the United States Attorney's Manual. I have highlighted several of those changes below:

News Media Review Committee

A News Media Review Committee will provide recommendations to the Deputy Attorney General and me in certain cases involving a member of the news media, to assist in balancing investigative imperatives with the protection of the public's interest in the freedom of the press. The Committee shall be consulted when Department attorneys request authorization to seek the use of subpoenas, search warrants, § 3123 orders, or § 2703(d) orders to obtain communication or business records of members of the news media, in investigations into the unauthorized disclosure of information; when Department attorneys request authorization to seek the use of subpoenas, search warrants, § 3123 orders, or § 2703(d) orders to obtain communication or business records, without providing prior notice to the relevant member of the media; when Department attorneys request authorization to seek testimony from a member of the news media that would disclose the identity of a confidential source; or when the Attorney General or Deputy Attorney General requests a Committee recommendation.

There are limited exceptions to use of the News Media Review Committee. Members of the Department may issue a subpoena to a member of the news media; or use a subpoena, § 2703(d) order, or warrant to obtain communication or business records of a member of the news media if a Deputy Assistant Attorney General for the Criminal Division determines that the exigent use of such law enforcement tool or technique is necessary to prevent or mitigate an act of terrorism; other acts that are reasonably likely to cause significant and articulable harm to national security; death; kidnapping; substantial bodily harm; conduct that constitutes a criminal offense that is a specified offense against a minor, as defined by 42 U.S.C. § 16911(7); or incapacitation or destruction of critical infrastructure, as defined by 42 U.S.C. § 5195c(e). In addition,

while it is expected that the Attorney General will make use of the Committee for cases that fall within the scope defined in the previous paragraph, the Attorney General may choose to bypass the Committee review process upon a finding that the time required to conduct the review will cause significant harm to the investigation.

The News Media Review Committee shall be composed of senior Department officials, including the Director of the Office of Public Affairs, the Chief Privacy and Civil Liberties Officer, and experienced prosecutors. After reviewing the materials and consulting with attorneys familiar with the investigation as necessary, the News Media Review Committee will communicate to the Attorney General and Deputy Attorney General its recommendation in concise, written form.

Safeguarding/Limited Use of Information

Members of the Department shall ensure that any information or records obtained from members of the news media or from third parties pursuant to 28 C.F.R. § 50.10 shall be closely held so as to prevent disclosure of the information to unauthorized persons or for improper purposes. Specifically, except as provided below,

- Access to information or records obtained from members of the news media or from third parties pursuant to 28 C.F.R. § 50.10 shall be limited to personnel who are working on the investigation or related judicial or administrative proceedings and who have a direct need to know.
- Information or records obtained from members of the news media or from third parties pursuant to 28 C.F.R. § 50.10 shall be used solely in connection with the investigation in which it was obtained, or related judicial or administrative proceedings; or for other purposes with the written consent of the affected member of the news media.
- Information or records obtained from members of the news media or from third parties pursuant to 28 C.F.R. § 50.10 may not be shared with any other organization or individual inside or outside of the federal government, except as part of the investigation or as required in the course of judicial proceedings.
- At the conclusion of all proceedings related to or arising from the investigation, other than information or records disclosed in the course of judicial proceedings, or as required by law, the Department shall retain only one copy of any records obtained from members of the news media or from third parties pursuant to 28 C.F.R. § 50.10, which copy shall be maintained in a secure and segregated repository.

If the Attorney General or Deputy Attorney General finds that specific, identifiable records or information constitute evidence of a separate past or imminent crime involving death; kidnapping; substantial bodily harm; conduct that constitutes a criminal offense that is a specified offense against a minor, as defined by 42 U.S.C. §

16911(7); or incapacitation or destruction of critical infrastructure, as defined by 42 U.S.C. § 5195c(e), the Attorney General or Deputy Attorney General may authorize broader use of the information.

Public Reporting Requirements

By January 31 of each year, all Department Divisions and United States Attorneys' Offices shall report to the Director of the Office of Public Affairs and to the Director of the Criminal Division's Office of Enforcement Operations whether a subpoena, court order issued pursuant to 18 U.S.C. § 2703(d) or § 3123, or warrant, authorized by the Attorney General, or by a Deputy Assistant Attorney General for the Criminal Division, during the preceding calendar year was issued, served, or executed, and whether the affected member of the news media or recipient of the subpoena, court order, or warrant complied with or challenged the same, and the outcome of any such challenge. Based on this information, the Department will make public, on an annual basis, statistical data regarding the use of these law enforcement tools.

Questions

Any questions regarding the use of subpoenas, court orders issued pursuant to 18 U.S.C. § 2703(d) or § 3123, or search warrants to obtain information from, or records of, members of the news media should be directed to the Policy and Statutory Enforcement Unit of the Criminal Division's Office of Enforcement Operations at pseu@usdoj.gov or (202) 305-4023.

Attachment



U. S. Department of Justice


Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

February 28, 2014

MEMORANDUM FOR HEADS OF DEPARTMENT COMPONENTS

FROM: JAMES M. COLE 
DEPUTY ATTORNEY GENERAL

SUBJECT: Implementation of Policies and Procedures for the
News Media Review Committee

This memorandum sets forth the practices and protocols to implement the policies and procedures regarding the News Media Review Committee.

1. News Media Review Committee

A News Media Review Committee will provide recommendations to the Attorney General and the Deputy Attorney General in certain cases involving a member of the news media, to assist in balancing investigative imperatives with the protection of the public's interest in the freedom of the press.

The Committee shall be consulted when Department attorneys request authorization to seek the use of subpoenas, or, in civil matters, other similar compulsory process such as a civil investigative demand (collectively "subpoenas"), search warrants, § 3123 orders, or § 2703(d) orders to obtain communication or business records of members of the news media, in investigations into the unauthorized disclosure of information; when Department attorneys request authorization to seek the use of subpoenas, search warrants, § 3123 orders, or § 2703(d) orders to obtain communication or business records, without providing prior notice to the relevant member of the media; when Department attorneys request authorization to seek testimony from a member of the news media that would disclose the identity of a confidential source; or when the Attorney General or Deputy Attorney General requests a Committee recommendation.

2. Membership

The News Media Review Committee shall consist of the Department's Chief Privacy and Civil Liberties Officer, the Director of the Office of Public Affairs, an Associate Deputy Attorney General; and two senior career Assistant U.S. Attorneys (AUSAs) with relevant expertise and experience but no involvement (supervisory or otherwise) in the case under consideration. The two AUSAs will be selected from a standing panel on a case-by-case basis. The Deputy Attorney General will approve the AUSAs selected for the standing panel.

The Criminal Division will be responsible for providing staffing and logistical support to the News Media Review Committee. The Criminal Division Deputy Assistant Attorney General (DAAG) who oversees the Office of Enforcement Operations (OEO), or, in that person's absence, the DAAG who oversees the Computer Crimes and Intellectual Property Section (CCIPS), shall advise the Committee and provide perspective on how the Department has handled similar cases in the past. The Criminal Division DAAG will not be a member of the News Media Review Committee.

3. Procedures & Timing

The Committee shall receive the recommendation package prepared by the Assistant Attorney General of the Criminal Division before the package is reviewed by the Deputy Attorney General and Attorney General. After reviewing the materials and consulting with attorneys familiar with the investigation as necessary, the Committee shall communicate to the Attorney General and the Deputy Attorney General its recommendation in a concise, written form.

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 Attorney General. If any member of the Committee non-concurs in the underlying recommendation, the reasons for the non-concurrence shall be provided in writing.

The Committee shall conduct its review as expeditiously as possible, consistent with the requirements of the underlying investigation. The Committee shall make a recommendation in a timely manner to ensure that the Attorney General and the Deputy Attorney General have adequate time to give meaningful consideration to such recommendations.

4. Exceptions to Committee Review

Members of the Department may issue a subpoena to a member of the news media; or use a subpoena, § 2703(d) order, or warrant to obtain communication or business records of a member of the news media if a Deputy Assistant Attorney General for the Criminal Division determines that the exigent use of such law enforcement tool or technique is necessary to prevent or mitigate an act of terrorism; other acts that are reasonably likely to cause significant and articulable harm to national security; death; kidnapping; substantial bodily harm; conduct that constitutes a criminal offense that is a specified offense against a minor, as defined by 42 U.S.C. § 16911(7); or incapacitation or destruction of critical infrastructure, as defined by 42 U.S.C. § 5195c(e). In addition, while it is expected that the Attorney General will make use of the Committee for cases that fall within the scope defined in Section 1, the Attorney General may choose to bypass the Committee review process upon a finding that the time required to conduct the review will cause significant harm to the investigation.



U.S. Department of Justice

Office of Legal Counsel

Office of the Assistant Attorney General

Washington, D.C. 20530

February 20, 2014

MEMORANDUM FOR ERIC H. HOLDER, JR.
Attorney General

Re: Amendments to Policy Regarding Obtaining Information
From, or Records of, Members of the News Media, and
Regarding Questioning, Arresting, or Charging Members of
the News Media

ACTION MEMORANDUM

The attached proposed Attorney General order is a final rule that was submitted to this Office by the Acting Assistant Attorney General for the Criminal Division for review with respect to form and legality.

The final rule would amend the policy of the Department of Justice, set out in 28 C.F.R. § 50.10, regarding the use of subpoenas (or, in civil matters, other similar compulsory process such as a civil investigative demand), court orders issued pursuant to 18 U.S.C. §§ 2703(d) and 3123, and search warrants, to obtain information from, or records of, members of the news media. The rule also would amend the policy regarding questioning, arresting, or charging members of the news media. Finally, the rule would amend 28 C.F.R. part 59, pertaining to documentary materials held by third parties, to add a cross-reference to the new policy set out in section 50.10.

In May 2013, at the direction of the President, the Department initiated a comprehensive evaluation of its policies and practices regarding the use of subpoenas, court orders, and search warrants to obtain information from, or records of, members of the news media. The Attorney General also assembled a Working Group, composed of representatives from various Department components, to propose specific revisions to the Department's policies and practices regarding obtaining information from, or records of, members of the news media. Based on this review, on July 12, 2013, the Department issued a "Report on Review of News Media Policies," announcing changes to the Department's existing policies. This final rule would implement the new policies by revising those existing policies, which are set out in 28 C.F.R. § 50.10. It also would revise section 50.10 with respect to the questioning, arrest, or charging of members of the news media.

(b)(5) per OLC

(b)(5) per OLC

(b)(5) per OLC


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(b)(5) per OLC

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(b)(5) per OLC

The proposed Attorney General order is approved with respect to form and legality.



Caroline D. Krass
Acting Assistant Attorney General



U.S. Department of Justice

Office of Legal Counsel

Office of the Principal Deputy Assistant Attorney General

Washington, D.C. 20530

January 13, 2015

MEMORANDUM FOR ERIC H. HOLDER, JR.
Attorney General

Re: Attorney General Order Revising Department of
Justice Policy Regarding Obtaining Information from, or
Records of, or Questioning, Arresting, or Charging,
Members of the News Media

The attached proposed Attorney General Order was prepared by the Criminal Division and submitted to this Office for review with respect to form and legality.

The proposed Order would revise the Department's policy, found at 28 C.F.R. § 50.10, regarding obtaining information from, or records of, members of the news media, and regarding questioning, arresting, or charging members of the news media. These proposed revisions to the policy would require the Attorney General's authorization in certain circumstances prior to obtaining information from, or records of, a member of the news media, and prior to questioning, charging, or arresting a member of the news media. The proposed revisions also provide that notice need not be provided, except at the Attorney General's direction, where the Attorney General has authorized the use of a subpoena, court order, or warrant with respect to a member of the news media who is the subject or target of an investigation. The proposed revisions would also clarify the policy to ensure consistent interpretation and application.

The proposed Order is approved with respect to form and legality.

Karl R. Thompson
Principal Deputy Assistant Attorney General

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Office of the Attorney General
Washington, D. C. 20530

March 19, 2015

MEMORANDUM FOR THE NATIONAL SECURITY DIVISION

FROM: THE ATTORNEY GENERAL

CC: THE FEDERAL BUREAU OF INVESTIGATION

SUBJECT: Procedures for Processing Foreign Intelligence Surveillance Act ("FISA")
Applications Targeting Known Media Entities or Known Members of the Media

This memorandum directs the National Security Division ("NSD") to implement the following procedures that are designed to ensure that the Attorney General ("AG") or Deputy Attorney General ("DAG") reviews those FISA applications targeting known media entities or known members of the media, so that review of such FISA applications occurs at even higher levels than otherwise permitted by FISA and existing AG orders:

1. All FISA applications under Title I (electronic surveillance), Title III (physical search), Title IV (PR/TT), Title V (business records—which do not require formal AG approval under the statute), Section 703 (targeting certain U.S. persons located outside the U.S.), or Section 704 (targeting certain U.S. persons located outside the U.S.) that target known media entities or known members of the media must be presented to the AG or DAG for approval prior to submission to the Foreign Intelligence Surveillance Court ("FISC"); but, upon direction of the AG or DAG, any such applications may be referred to the Assistant Attorney General ("AAG") for NSD for disposition.
2. Once the AG or DAG has approved the submission of an application to the FISC as set forth in paragraph 1, or referred that application to the AAG for NSD for disposition, subsequent applications for the same target (such as renewal applications or motions) should be presented to the AAG for NSD unless circumstances related to the target's news media status have changed subsequent to AG or DAG approval or referral. If circumstances have changed, the application must be presented to the AG or DAG for approval; but, upon direction of the AG or DAG, any such applications may be referred to the AAG for NSD for disposition.
3. To the extent that an entity or individual who is already a FISA target subsequently is assessed to be a known media entity or known member of the media, the AG or DAG will be so notified promptly.

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4. The Federal Bureau of Investigation ("FBI") will identify to NSD as soon as known whether any target under FISA is a known media entity or known member of the media. [REDACTED]

[REDACTED]

[REDACTED] In assessing whether to refer matters to the AG or DAG, NSD and the FBI shall err on the side of referral.

These procedures are solely for internal Department of Justice guidance. They are not intended to, do not, and may not be relied upon to create any rights or benefits, substantive or procedural, enforceable at law or in equity in any matter, civil or criminal, by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person, nor do they place any limitation on otherwise lawful investigative and litigative prerogatives of the Department of Justice.



U. S. Department of Justice

Office of the Deputy Attorney General

The Deputy Attorney General


Washington, D.C. 20530

January 8, 2015

MEMORANDUM FOR THE NATIONAL SECURITY DIVISION

FROM: THE DEPUTY ATTORNEY GENERAL 





SUBJECT: (U) Guidance for Processing Foreign Intelligence Surveillance Act ("FISA")
Applications Targeting Known Media Entities or Known Members of the Media

(U) The Attorney General has determined that review of FISA applications targeting known media entities or known members of the media should occur at even higher levels than otherwise permitted by FISA and existing Attorney General orders. Consistent with this determination, such applications shall be reviewed by the Attorney General or Deputy Attorney General. In implementing this policy, the Attorney General and Deputy Attorney General shall retain discretion to refer such FISA applications to the Assistant Attorney General for the National Security Division for disposition.  b(5)

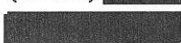






1. ~~(S//NF)~~  b(1), b(3), b(5)



2. ~~(S//NF)~~ 

~~SECRET//NOFORN~~

3. ~~(S//NF)~~ [REDACTED] b(1), b(3), b(5)
[REDACTED]
[REDACTED]

[REDACTED]

4. ~~(S//NF)~~ [REDACTED]
[REDACTED]
[REDACTED]
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[REDACTED]

(U) [REDACTED] b(5)
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