

[NSL p. 1309. Insert at the end of Note 6.]

Department of Justice Report on Review of News Media Policies

July 12, 2013

In May 2013, at the President's direction, the Attorney General initiated a comprehensive evaluation of the Department of Justice's policies and practices governing the use of law enforcement tools, including subpoenas, court orders, and search warrants, to obtain information or records from or concerning members of the news media in criminal and civil investigations. . . . Based on this review, the Attorney General is making significant revisions to the Department's policies regarding investigations that involve members of the news media.

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 newsgathering activities. Furthermore, in light of the importance of the constitutionally protected newsgathering process, the Department views the use of tools to seek evidence from or involving the news media as an extraordinary measure. The Department's policy is to utilize such tools only as a last resort, after all reasonable alternative investigative steps have been taken, and when the information sought is essential to a successful investigation or prosecution.

The changes in policy outlined in this report are intended to further ensure the Department strikes the appropriate balance between two vital interests: protecting the American people by pursuing those who violate their oaths through unlawful disclosures of information and safeguarding the essential role of a free press in fostering government accountability and an open society. As set forth in more detail below, the Department's policy revisions strengthen protections for members of the news media by, among other things, requiring more robust oversight by senior Department officials and by clarifying and expanding the presumption of negotiations with, and notice to, members of the news media when Department attorneys request authorization to seek newsgathering records. . . .

Revisions to Department of Justice News Media Policies

I. Reversing the Existing Presumption Regarding Advance Notice

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 whenever Department attorneys seek access to their records related to newsgathering activities. The presumption will ensure notice in all but the most exceptional cases.

. . . Under the new policy, the presumption of advance notice will be overcome only if the Attorney General affirmatively determines, taking into account recommendations from the newly established News Media Review Committee described below, that for compelling reasons, advance notice and negotiations *would* 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. The possibility that notice and negotiations with the media, and potential judicial review, may delay the investigation will not, on its own, be considered a compelling reason under this updated policy.

Advance notice will afford members of the news media the opportunity to engage with the Department regarding the proposed use of investigative tools to obtain communications or business records, and also provide the news media with the opportunity to challenge the government's use of such tools in federal court. . . .

It is expected that only the rare case would present the Attorney General with the requisite compelling reasons to justify a delayed notification. Under this updated policy, if a determination is made by the Attorney General to delay notification for an initial 45-day period, 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. No further delays may be sought beyond the 90-day period. . . .

II. Enhanced Approvals and Heightened Standards for Use of Search Warrants and Section 2703(d) Orders

The Privacy Protection Act of 1980 (PPA), 42 U.S.C. §2000aa, generally prohibits the search or seizure of work product and documentary materials held by individuals who have a purpose to disseminate information to the public. The PPA, however, contains a number of exceptions to its general prohibition, including the “suspect exception” which applies when there is “probable cause to believe that the person possessing such materials has committed or is committing a criminal offense to which the materials relate,” including “the receipt, possession, or communication of information relating to the national defense, classified information, or restricted data” under enumerated code provisions. . . .

. . . 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.

Second, the Department would revise current policy to elevate the current approval requirements and require the approval of the Attorney General for all search warrants and court orders issued pursuant to 18 U.S.C. §2703(d) [regarding access to contents of stored electronic communications] directed at members of the news media. In addition, as part of the new approval process the Attorney General would consider the factors . . . [that include] demonstrating that the information sought is essential to a successful investigation, that other reasonable alternative investigative steps to obtain the information have been exhausted, and that the request has been narrowly tailored to obtain only the information necessary for the investigation

III. Establishment of News Media Review Committee

The Department will create a standing News Media Review Committee, akin to its Capital Case Review Committee and State Secrets Review Committee, to advise the Attorney General and Deputy Attorney General when Department attorneys request authorization to seek media-related records in investigations into the unauthorized disclosure of information; when Department attorneys request authorization to seek media-related records in any law enforcement investigation without providing prior notice to the relevant member of the media; and when Department attorneys request authorization to seek testimony from a member of the media that would disclose the identity of a confidential source. . . . This committee will ensure that senior Department officials with relevant expertise and experience, and who are neither directly involved nor play a supervisory role in the investigations involved, are engaged in the consideration of the use of investigative tools that involve members of the news media. . . .

V. Intelligence Community Certification

In investigations of unauthorized disclosures of national defense information or of classified information, under the Department's revised policy the Director of National Intelligence after consultation with the relevant Department or agency head, would certify to the Attorney General 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 before the Attorney General authorizes the Department to seek media-related records in such investigations. . . . [C]urrent practice [provides] 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. . . .