

Department of Justice Announces Review of Media Subpoena Policies

DOJ may revise policies on using investigatory tools to procure information about the media, with significant legal and business implications.

Key Points:

- The review marks DOJ's second significant evaluation of media subpoena policies since 2013.
- Policy changes may include reducing protections for media organization business records, narrowing the definition of newsgathering activities, and expanding national security exemption.
- The review reflects a broader pattern of changes to recent DOJ policy initiatives.

Introduction

On August 4, 2017, in response to concerns about recent disclosures of classified information, US Attorney General Jeff Sessions announced that the Department of Justice (DOJ, or the Department) would undertake a review of the internal guidelines for prosecutors governing the use of law enforcement tools in cases involving the media and news organizations (the Media Subpoena Guidelines, or the Guidelines). The Guidelines serve as DOJ's primary mechanism for voluntarily constraining the powers of its prosecutors in using law enforcement tools that might otherwise risk impinging on the freedom of the press. The Attorney General's statement was principally driven by the perceived need to provide prosecutors additional tools to identify and charge potential leakers of classified information. While, to date, no details have been released about the kinds of changes that are under consideration, any revision to the Guidelines that would ease limits on prosecutors investigating leak cases could have significant implications for media organizations.

Background on Current DOJ Guidelines

The Department has long recognized that "freedom of the press can be no broader than the freedom of members of the news media to investigate and report the news."¹ To this end, in 1974, DOJ established the Guidelines to protect the news media from certain "law enforcement tools" that might frustrate that freedom.² Through those Guidelines, as a matter of policy, DOJ has restricted its ability to issue subpoenas seeking information from or about a member of the news media, when doing so might "impair newsgathering activities."³

Despite those policies, DOJ received significant criticism under the Obama administration for aggressively using subpoenas to obtain journalists' records. Two incidents in May 2013 brought that criticism to a head.

First, the Associated Press learned that DOJ had successfully subpoenaed two months of phone records for its journalists.⁴ The subpoena related to DOJ's investigation of leaked information regarding a Yemeni terrorist plot.⁵ Second, around the same time, it was widely reported that DOJ had seized the contents of an email account belonging to Fox News reporter James Rosen.⁶ That seizure was part of a separate DOJ investigation of leaked information about North Korean missile tests.⁷ Particularly concerning to some was DOJ's labelling of Rosen as "an aider and abettor and/or co-conspirator" in the leak.⁸ The media and members of Congress criticized both subpoenas as overreaching DOJ Guidelines and warned that DOJ's actions risked putting a chill on freedom of the press.⁹

DOJ Revises Guidelines in 2015

In response to this criticism, President Obama directed then-Attorney General Eric Holder to review DOJ'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."¹⁰ DOJ consulted with members of the news media and other interested parties.¹¹ The Department announced an initial set of changes in July 2013,¹² implemented those changes in February 2014,¹³ and further amended the Media Subpoena Guidelines in 2015.¹⁴ The result was a revised set of Guidelines with enhanced protections for the news media against DOJ subpoenas, including:

- **Stronger Negotiation Requirement When Subpoenaing a Third Party for News Media Records.** DOJ revised its policies relating to when it will issue subpoenas to third parties (e.g., communications service providers) for records of a member of the news media. The prior Guidelines required negotiations with the affected news media member only when DOJ determined "such negotiations *would not* pose a substantial threat to the integrity of the investigation."¹⁵ DOJ changed the Guidelines to require negotiations in almost every instance of a third-party subpoena. The revised rule requires advance notice "unless the Attorney General determines that, for compelling reasons, such notice *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."¹⁶
- **Expanded Oversight for Search Warrants and Court Orders.** Under the prior Guidelines, the limits on DOJ applied primarily to the issuing of subpoenas for records related to the news media. DOJ expanded the restrictions in § 50.10 (e.g., notice and negotiation, exploring alternative sources for the information, and ensuring the subpoenaed information is essential and narrowly tailored) to also apply to other investigative tools, such as search warrant requests for stored electronic communications and subscriber records under 18 U.S.C. § 2703(d).¹⁷
- **Limited Suspect Exception.** An exception to the Privacy Protection Act (PPA) permits DOJ to seek search warrants for materials possessed by a member of the news media if DOJ has probable cause to believe the "information relat[es] to the national defense, classified information, or restricted data."¹⁸ DOJ amended the Guidelines to restrict its ability to seek warrants under that exception. Under the new Guidelines, DOJ lawyers may not apply for a search warrant for information belonging to the news media under the PPA if "the sole purpose is to further the investigation of a person other than the member of the news media."¹⁹ This means that "merely reporting leaked information would not implicate the exception."²⁰

Attorney General Sessions Announces Review of Media Subpoena Policies

Soon after taking office, the Trump administration confronted a series of news reports that appeared to disclose classified information.²¹ Senior national security officials have responded to those reports by repeatedly expressing concern about the damage caused by the unauthorized disclosure of classified material. For example, Director of National Intelligence Daniel Coats recently testified that the unauthorized disclosures “undermine[] the confidence in our allies” and that “lives are at stake and leaks jeopardize those lives.”²²

On August 4, 2017, Attorney General Sessions held a press conference to announce a DOJ review of its Media Subpoena Guidelines. Sessions began by condemning the “staggering” number of leaks and announcing that DOJ has tripled the number of leak investigations.²³ Sessions also announced that, based on suggestions from career investigators and prosecutors, DOJ was initiating a review of its Guidelines: “[O]ne of the things we are doing is reviewing policies affecting media subpoenas. We respect the important role that the press plays and will give them respect, but it is not unlimited. They cannot place lives at risk with impunity. We must balance their role with protecting national security and the lives who serve in our intelligence community, the armed forces, and all law abiding Americans.”²⁴

Media advocates have been quick to express concern about the planned review. For example, Bruce Brown, Executive Director of the Reporters Committee for Freedom of the Press, said that the Attorney General’s intent to revisit the Guidelines was “deeply troubling” and observed that the current Guidelines “carefully balance the need to enforce the law and protect national security with the value of a free press that can hold government accountable to the people.”²⁵ The American Civil Liberties Union warned that any revisions to the Guidelines that restrict the freedom of journalists to gather and report the news would be a “[a] crackdown on ... democracy as a whole.”²⁶ The concern expressed by media organizations and their allies is not unwarranted; as discussed below, DOJ could revise the Guidelines in a number of ways that significantly impact the protections that members of the media currently rely on in connection with their newsgathering activities.

Potential Changes to the Media Subpoena Guidelines

DOJ has yet to offer any details on the specific changes to the Media Subpoena Guidelines that are under consideration. Nonetheless, a review of the recent changes made to the Guidelines provides a number of guideposts as to areas where DOJ might seek to emphasize enforcement of criminal statutes, given the concerns expressed by Attorney General Sessions.

Relax Limits on Subpoenas for Media Business Records

When investigating the source of a leak, DOJ may seek to review a journalist’s communication records.²⁷ The Guidelines apply in those circumstances, protecting the news media’s business and work records (e.g., telephone, internet, and email data) held by third-party service providers.²⁸ If DOJ were to roll back that requirement, the US government could more easily investigate what sources the affected journalist used to obtain classified information. DOJ could also remove or weaken the requirement that it must exhaust “all reasonable attempts to obtain the information from alternative, non-media sources” before issuing a subpoena.²⁹ While this would not affect *whether* DOJ is able to obtain the information it seeks, the measure would permit DOJ to direct a greater volume of subpoenas (and with less procedural hurdles) at the news media. If DOJ were to make either of these changes, communication service providers could expect to see more subpoenas for reporters’ records — possibly before the news media member is aware of DOJ’s action.

Narrow Definition of “Newsgathering”

The current Guidelines protect the media against DOJ subpoenas so long as the information sought relates to “newsgathering activities.”³⁰ Because the Guidelines do not directly define what that encompasses, DOJ has some discretion to determine whether a particular subpoena must comply with the Guidelines. For instance, DOJ could decide — without needing to revise the Guidelines — that procuring or publishing classified information does not fit its definition of “newsgathering.” This seems unlikely, though, given the media’s traditional role in publicizing matters of public interest — classified or not.

A more likely option for DOJ would be to revise the Guidelines to qualify its definition of newsgathering. There is some precedent for this. DOJ’s 2014 revisions changed references to “newsgathering activities” to “*ordinary* newsgathering activities.”³¹ By requiring media subpoenas to seek information related to *ordinary* newsgathering, DOJ was able to narrow the scope of journalism that fell within the Guidelines’ protection. DOJ ultimately reversed course in 2015 and omitted “ordinary” from the Guidelines, evidently in response to concern from the news media.³² DOJ could simply reverse this decision and reinstate “ordinary newsgathering” as the applicable term. Or, DOJ could go further by issuing guidance that adds a more restrictive condition on “newsgathering” (e.g., stating that the Guidelines protect only “*responsible* newsgathering activities,” where “responsible” is further defined to exclude the publishing of information that jeopardizes national security). Such a change could have a dramatic impact by potentially excepting broad categories of journalism from any of the Guidelines’ protections.³³

Expand National Security Exemptions

The Guidelines acknowledge that DOJ has greater leeway in seeking information from or about the news media when it determines national security interests are at stake.³⁴ DOJ has signaled that it might use this language, or add language, to more aggressively pursue media subpoenas.³⁵

For instance, while DOJ commits itself to first negotiate with a news media member it plans to subpoena, that requirement does not apply when “the Attorney General determines that, for compelling reasons, such negotiations or notice would ... risk grave harm to national security.”³⁶ DOJ could loosen the language in this exception (e.g., by omitting “compelling” and “grave”) and thereby issue more subpoenas without providing notice to the affected news media members. Doing so would strip the news media of “the opportunity to engage with the Department regarding the proposed [subpoena]” or, in the case of a third-party subpoena, the opportunity to first ask a federal court to quash it.³⁷ If so, service providers, in many instances, may not be able to rely on their clients’ ability to quash those subpoenas.

DOJ may also narrow or remove a key provision in the Guidelines intended to check DOJ’s ability to issue subpoenas in leak investigations. In those cases, the Attorney General may authorize the subpoena only if the Director of National Intelligence “certifies ... the significance of the harm raised by the unauthorized disclosure and ... reaffirms the intelligence community’s continued support for the investigation.”³⁸ Without this provision, DOJ could theoretically use its subpoena power to investigate the news media’s reporting of *any* classified information — regardless of whether the reporting affects national security.

Potentially Shift DOJ Policies in Other Ways

DOJ could consider other significant changes to the Media Subpoena Guidelines. For instance:

- Under the existing Guidelines, DOJ limits its authority to obtain search warrants for information held by a member of the news media, permitting warrants only when a journalist is the subject or target of an investigation not within the scope of “newsgathering activities.”³⁹ DOJ has discretion to remove the “newsgathering activities” qualifier. If it did so, DOJ could seek search warrants for journalists’ records

merely on the basis that the journalist received and/or possessed classified information from a source within the government.⁴⁰

- DOJ might also consider changing its policies on the prosecution of the news media. DOJ's "policy [is] that members of the news media will not be subject to prosecution based solely on newsgathering activities."⁴¹ While nothing suggests that DOJ is affirmatively planning to change its policy, the Department has taken care to keep this option open. Prior to his August 4, 2017 press conference, Attorney General Sessions stated several times — including at his confirmation hearing — that he was not sure or could not comment on whether he would prosecute journalists.⁴²

Could Other Policy Reviews Follow?

Apart from any immediate impact on investigations and prosecutions involving the media, the Attorney General's willingness to review a set of recently revised policy guidelines is consistent with a series of announcements in which DOJ has modified or rolled back recent policy changes — including, for instance, new policies on drug offense charges and limitations on the use of civil forfeiture.⁴³ In light of the administration's willingness to revisit and revise so many significant policies in such a short time, the question of whether other policies could be changed merits consideration.

One notable candidate for revision is DOJ's September 2015 changes to the policies governing the prosecution of corporations, commonly referred to as the Yates Memo.⁴⁴ The Yates Memo announced an increased focus on targeting corporate executives and directors for criminal prosecution and civil punishment.⁴⁵ Among other potential changes that DOJ could consider would be de-emphasizing the importance of holding individuals accountable in prosecutions of corporations by simply withdrawing the Yates Memo or by implementing additional changes to the Guidelines. Such changes could include providing models for resolution (including immunity for corporate officers and directors, which the Yates Memo all but forbids), or providing different metrics for cooperation that would balance individual accountability with other considerations, such as timeliness or the extent of cooperation.

Conclusion

Although DOJ's latest review of the Media Subpoena Guidelines has only recently begun, journalists and media companies — as well as the third parties that hold these entities' communications records — could soon see an increasing volume and scope of subpoenas for media information. These changes would be consistent with the administration's broader pattern of willingness to modify and roll back DOJ policies in a number of areas, which bears careful monitoring going forward.

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Endnotes

- ¹ DOJ first codified the Guidelines in 1974. See 28 C.F.R. § 50.10 (1974).
- ² See generally 28 C.F.R. § 50.10 (2015).
- ³ *Id.* § 50.10(a)(1).
- ⁴ Ewen MacAskill, *Eric Holder Defends AP Seizure Citing Major Security Threat to Public*, THE GUARDIAN (May 15, 2013), <https://www.theguardian.com/world/2013/may/14/ap-phone-records-subpoena-holder>.
- ⁵ *Id.*
- ⁶ N.Y. Times Editorial Board, *Another Chilling Leak Investigation*, N.Y. TIMES (May 21, 2013), http://www.nytimes.com/2013/05/22/opinion/another-chilling-leak-investigation.html?_r=0.
- ⁷ *Id.*
- ⁸ Ann E. Marimow, *Justice Department's Scrutiny of Fox News Reporter James Rosen in Leak Case Draws Fire*, WASH. POST (May 20, 2013), https://www.washingtonpost.com/local/justice-departments-scrutiny-of-fox-news-reporter-james-rosen-in-leak-case-draws-fire/2013/05/20/c6289eba-c162-11e2-8bd8-2788030e6b44_story.html?utm_term=.c81fd87674dd.
- ⁹ See, e.g., Dana Milbank, Editorial, *In AP, Rosen Investigations, Government Makes Criminals of Reporters*, WASH. POST (May 21, 2013), https://www.washingtonpost.com/opinions/dana-milbank-in-ap-rosen-investigations-government-makes-criminals-of-reporters/2013/05/21/377af392-c24e-11e2-914f-a7aba60512a7_story.html?utm_term=.a05e88be6080; Josh Gerstein & Madeline Conway, POLITICO, *Sessions: DOJ Reviewing Policies on Media Subpoenas* (Aug. 4, 2017), <http://www.politico.com/story/2017/08/04/doj-reviewing-policies-on-media-subpoenas-sessions-says-241329>; Editorial Board, *Shielding Journalists, By Law*, L.A. TIMES (May 30, 2013), <http://articles.latimes.com/2013/may/30/opinion/la-ed-leaks-obama-holder-rosen-ap-shield-law-20130530>.
- ¹⁰ DOJ Report on Review of News Media Policies (July 12, 2013), available at <https://www.justice.gov/sites/default/files/ag/legacy/2013/07/15/news-media.pdf>.
- ¹¹ *Id.*
- ¹² *Id.*
- ¹³ Memorandum from the Attorney General to All Department Employees (Feb. 21, 2014).
- ¹⁴ Memorandum from the Attorney General to All Department Employees (Jan. 14, 2015), available at <https://www.justice.gov/file/317831/download>.
- ¹⁵ 28 C.F.R. § 50.10(d) (2014) (emphasis added).
- ¹⁶ 28 C.F.R. § 50.10(a)(4) (2015) (emphasis added).
- ¹⁷ *Id.* § 50.10(a); DOJ Report, *supra* note 10.
- ¹⁸ 42 U.S.C. §§ 2000aa(a)(1) and (b)(1).
- ¹⁹ 28 C.F.R. § 50.10(d)(5) (2015).
- ²⁰ Jonathan Bloom, *Department Of Justice Issues Revised News Media Subpoena Policies*, THE METRO. CORP. COUNSEL (Oct. 2013), <http://www.metrocorpcounsel.com/pdf/2013/October/36.pdf>.
- ²¹ Ken Dilanian, *Sessions Says Trump Administration Has Tripled Number of Leak Probes*, NBC NEWS (Aug. 4, 2017), <http://www.nbcnews.com/politics/justice-department/sessions-says-trump-administration-has-tripled-number-leak-probes-n789581> (describing several leaks).
- ²² Hearing on Worldwide Threats Before the Senate Armed Servs. Comm., 115th Cong. 11 (2017) (statement of Daniel Coats, Dir. of Nat'l Intelligence).
- ²³ Dilanian, *supra* note 21; DOJ Press Release 17-874 (Aug. 4, 2017), available at <https://www.justice.gov/opa/pr/attorney-general-jeff-sessions-delivers-remarks-briefing-leaks-classified-materials>.
- ²⁴ *Id.*
- ²⁵ Gerstein & Conway, *supra* note 9.
- ²⁶ Julia Edwards Ainsley, *Trump Administration Goes on Attack Against Leakers, Journalists*, REUTERS (Aug. 4, 2017), <https://www.reuters.com/article/us-usa-trump-sessions-leaks-idUSKBN1AK1UR>.
- ²⁷ For instance, DOJ successfully subpoenaed the contents of journalist James Rosen's personal e-mail account. See Editorial Board, *supra* note 6.
- ²⁸ 28 C.F.R. §§ 50.10(c)(5); see also Press Release, Reporters Committee for Freedom of the Press (Jan. 14, 2015), <https://www.rcfp.org/doj-issues-new-guidelines-reporter-subpoenas-following-dialogue-reporters-committee-and-other-news-m>.
- ²⁹ 28 C.F.R. §§ 50.10(c)(4)(iii), 50.10(c)(5)(iii) (2015).
- ³⁰ *Id.* § 50.10(c)(3)(ii)(A).
- ³¹ Memorandum from the Attorney General to All Department Employees (Feb. 21, 2014).
- ³² Kimberly Chow, *Revising the Attorney General's Guidelines*, THE NEWS MEDIA & THE LAW (Winter 2015, Vol. 39 No. 1), available at <https://www.rcfp.org/browse-media-law-resources/news-media-law/news-media-and-law-winter-2015/revising-attorney-generals->; see also DOJ Press Release, *supra* note 23.

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- ³³ Memorandum from the Attorney General (Jan. 14, 2015), *supra* note 14 (describing “the elimination of the phrase ‘ordinary newsgathering activities’” as “[t]he most significant change” in the revised Guidelines); *cf.* Dylan Byers, *What Justice Department Leak Review Could Mean for the Media*, CNN (Aug. 4, 2017), <http://money.cnn.com/2017/08/04/media/department-of-justice-reporter-subpoena-rules/> (stating the 2014 “guidelines were further strengthened in 2015 to protect reporters engaged in all ‘newsgathering activities,’ ostensibly meaning that the Justice Department could not subpoena reporters for doing their jobs”).
- ³⁴ 28 C.F.R. §§ 50.10(a)(2) (2015).
- ³⁵ See *supra* notes 22-24 and accompanying text.
- ³⁶ 28 C.F.R. §§ 50.10(a), 50.10(c)(4)(iv)(A), 50.10(c)(5)(iv)(A) (2015).
- ³⁷ DOJ Report, *supra* note 10.
- ³⁸ 28 C.F.R. §§ 50.10(c)(4)(vi), 50.10(c)(5)(v) (2015).
- ³⁹ *Id.* § 50.10(d)(4).
- ⁴⁰ 42 U.S.C. §§ 2000aa(a)(1) and (b)(1).
- ⁴¹ DOJ Report, *supra* note 10.
- ⁴² See, e.g., Tom Kludt, *Sessions Won't Say if Assange Charges Could Lead to Prosecution of Journalists*, CNN (Apr. 21, 2017), <http://money.cnn.com/2017/04/21/media/jeff-sessions-wikileaks/>.
- ⁴³ See Memorandum from the Attorney General to All Federal Prosecutors (May 10, 2014), available at <https://www.justice.gov/opa/press-release/file/965896/download>; DOJ Press Release 17-795 (Jul. 19, 2017), available at <https://www.justice.gov/opa/pr/attorney-general-sessions-issues-policy-and-guidelines-federal-adoptions-assets-seized-state>.
- ⁴⁴ Memorandum from the Deputy Attorney General to All United States Attorneys et al. (Sep. 9, 2015), available at <https://www.justice.gov/archives/dag/file/769036/download>.
- ⁴⁵ *Id.*