

DOJ WILL CONTINUE TO USE NSLS TO GET JOURNALIST CONTACTS

For years, I have been harping on the language in FBI's Domestic Investigations and Operations Guide that permits DOJ to get journalists' contact information using NSLs because – given that they are not warrants – they need no Attorney General review.

A heavily-redacted section (PDF 166) suggests that in investigations with a national security nexus (so international terrorism or espionage, as many leak cases have been treated) DOJ need not comply with **existing restrictions** requiring Attorney General approval before getting the phone records of a journalist. The reason? Because NSLs aren't subpoenas, and that restriction only applies to subpoenas.

Department of Justice policy with regard to the issuances of subpoenas for telephone toll records of members of the news media is found at 28 C.F.R. § 50.10. The regulation concerns only grand jury subpoenas, not National Security Letters (NSLs) or administrative subpoenas. (The regulation requires Attorney General approval prior to the issuance of a grand jury subpoena for telephone toll records of a member of the news media, and when such a subpoena is issued, notice must be given to the news media either before or soon after such records are obtained.) The following approval requirements and specific procedures apply for the issuance of an NSL for

telephone toll records of members of the news media or news organizations. [my emphasis]

So DOJ can use NSLs—with no court oversight—to get journalists' call (and email) records rather than actually getting a subpoena.

The section includes four different approval requirement scenarios for issuing such NSLs, almost all of which are redacted. Though one only partly redacted passage makes it clear there are some circumstances where the approval process is the same as for anyone else DOJ wants to get an NSL on:

If the NSL is seeking telephone toll records of an individual who is a member of the news media or news organization [2 lines redacted] there are no additional approval requirements other than those set out in DIOG Section 18.6.6.1.3 [half line redacted]

And the section on NSL use (see PDF 100) makes it clear that a long list of people can approve such NSLs:

- *Deputy Director*
- *Executive Assistant Director*
- *Associate EAD for the National Security Branch*
- *Assistant Directors and all DADs for CT/CD/Cyber*
- *General Counsel*
- *Deputy General Counsel*

- for the National Security Law Branch*
- *Assistant Directors in Charge in NY, Washington Field Office, and LA*
- *All Special Agents in Charge*

In other words, while DOJ does seem to offer members of the news media—which is itself a somewhat limited group—some protection from subpoena, it also seems to include loopholes for precisely the kinds of cases, like leaks, where source protection is so important.

See also this post, where I tried to write it really plainly.

Then, last year, after it got caught obtaining the call records of some Pulitzer Prize winners, DOJ pretended to roll out new protections for journalists.

Charlie Savage reports that DOJ has just rolled out the final version of those great new protections.

Here's the last paragraph of his report on the "new guidelines."

The rules cover grand jury subpoenas used in criminal investigations. They exempt wiretap and search warrants obtained under the Foreign Intelligence Surveillance Act and "national security letters," a kind of administrative subpoena used to obtain records about communications in terrorism and counterespionage investigations.

Which makes these "new guidelines" worth approximately shit in any leak – that is, counterintelligence – investigation.