

THE SECRETS THAT REMAIN ABOUT JOURNALIST NSLS

Someone has liberated to the Intercept a copy of the FBI's guidelines for using NSLs to obtain the call records of journalists. The entire appendix is For Official Use Only save one paragraph noting that foreigners serving as spooks or working for news outlets that are agents of a foreign power don't get any protection. Otherwise, this is only being protected under a claim of privilege, not classification. That's particularly troubling given that the US Attorney Guidelines on subpoenaing the press includes equivalent language about agents of a foreign power not getting the special treatment (though here it is more focused on terrorists).

The protections of the policy do not extend to any individual or entity where there are reasonable grounds to believe that the individual or entity is a foreign power or an agent of a foreign power; a member or an affiliate of a foreign terrorist organization; designated a specially designated global terrorist; a specially designated terrorist; a terrorist organization; committing or attempting to commit a crime of terrorism; committing or attempting to commit the crime of providing material support or resources to a terrorist organization; or aiding, abetting, or conspiring in illegal activity with such individuals or entities. 28 C.F.R.50.10(b)(1)(ii).

The liberated passage (like the USA guidelines) does not, however, define who counts as a member of the news media.

For those so lucky as to be considered a member

of the news media, when DOJ is obtaining their records to learn a confidential source, they need to get the Executive Assistant Director of National Security Branch (who must consult with the AAG for National Security) and General Counsel's approval to obtain an NSL. Note, the Public Affairs Director is not involved in this process, as he or she is supposed to be in the subpoena process (though even there, the policy states that DOJ's Policy and Statutory Enforcement Unit will make the call on who is or is not entitled to be a journalist). Which would say NSLs, on top of being secret and offering the journalist no opportunity to fight the subpoena, also receive only a national security review, not a press review.

Which brings me back to the other point about NSLs I keep harping on. The 2014 NSL IG report showed that the FBI was not reporting at least 6.8% of their NSLs, even to Congress, much less to the Inspector General. When asked about that, FBI said an accurate number was really not worth trying to do, even while it admitted that the uncounted NSLs were "sensitive" cases – a category that includes journalists (and politicians and faith leaders).

That means there's at least a decent possibility that some of the NSLs the FBI chooses not to report to either Congress or the Inspector General – in spite of the clear legal obligation to do so – are of journalists.

Given that they've been hiding this unclassified NSL policy under a dubious claim of privilege, that decent possibility seems all the more likely.