

U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT

ICE Directive 10093.1: Use of Compulsory Investigative Tools to Obtain Information or Records Related to the Journalistic Activities of Members of the News Media

Issue Date: June 13, 2022.

Superseded: None.

1. **Purpose/Background.** This Directive establishes U.S. Immigration and Customs Enforcement (ICE) policy regarding the application of compulsory investigative tools with respect to members of the news media. This policy is intended to ensure that ICE's law enforcement activities do not improperly or unnecessarily impinge on the newsgathering activities of members of the news media. It is not intended to provide members of the news media who are subjects or targets of criminal investigations for conduct not based on their journalistic activities with any special protections, nor is it intended to hinder the ability of ICE officers and agents to engage with known members of news media to seek the voluntary production of information or records.
2. **Policy.** The use of compulsory investigative tools to obtain information or records related to the journalistic activities of members of the news media is an extraordinary act and not a standard investigative practice. In deciding whether to seek information from or the journalistic records of a member of the news media pursuant to this Directive, ICE must appropriately balance the following interests: protecting national security and public safety, promoting the fair administration of justice, fostering government accountability, and safeguarding the vital role of a free press in an open society.
 - 2.1. **ICE Deputy Director Preapproval.** Absent limited exceptions, the ICE Deputy Director must approve in advance the use of a compulsory investigative tool that seeks to obtain or is reasonably likely to result in the disclosure or encountering of information or records related to the journalistic activities of members of the news media.¹ The ICE Deputy Director will only approve the use of a compulsory investigative tool to obtain information or records related to the journalistic activities of members of the news media where the prerequisites set out in Section 5.1 are satisfied and where the tool is drawn as narrowly as is reasonably possible to minimize the risk that any nonessential information or records, or information about confidential sources, will be disclosed.² It is within the

¹ While this requirement may be applicable to the use of a compulsory investigative tool issued to a person other than the member of the news media (a third party) where it seeks to obtain or is reasonably likely to result in the disclosure or encountering of information or records related to the journalistic activities of the member of the news media, it will not apply where ICE is seeking to utilize a compulsory investigative tool to obtain information or records *from or of an ICE employee or contractor* who may have disclosed government information unlawfully or in violation of agency policy.

² ICE officers and agents should be aware that where the Department of Justice (DOJ) will be involved in helping ICE secure the use of certain compulsory investigative tools (e.g., by obtaining search warrants or court orders from

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ICE Deputy Director's discretion, after careful consideration, to deny any such request in his discretion where legal, policy, operational, or prudential considerations weigh against the use of a compulsory investigative tool in such a case.

- 2.2. Confidential Sources.** Absent a clear and articulable risk of death or serious bodily harm to an individual, or of significant harm to national security, and only where no reasonable alternative exists, ICE will not utilize a compulsory investigative tool to seek information about the confidential sources of members of the news media.
- 2.3. Applicable Investigative Tools.** This policy applies to the use of any compulsory investigative tool, including administrative and judicial subpoenas,³ or court orders.⁴ It also applies to applications for warrants under Federal Rule of Criminal Procedure 41 to search premises or property where such a search is reasonably expected to encounter information or records regarding the journalistic activities of a member of the news media.
- 2.4. Exceptions.** Preapproval from the ICE Deputy Director to utilize a compulsory investigative tool to obtain information or records related to the journalistic activities of a member of the news media is not required in the following circumstances:
- 1) Where ICE reasonably believes that the entity or individual that is a member of the news media is an agent of a foreign power;⁵
 - 2) Where ICE reasonably believes that the entity or individual that is a member of the news media is a member of a foreign terrorist organization, is attempting to or providing material support to a terrorist organization, or is committing or attempting to commit a terrorist act;
 - 3) Where the member of the news media agrees to provide the requested information or records with a subpoena or other form of compulsory process; or
 - 4) When the use of the compulsory investigative tool is necessary to prevent or mitigate the imminent death or serious bodily harm of any person, an act of human trafficking, an act of kidnapping, a violent or sexual offense against a child, an act of terrorism, or

the federal courts), authorization may be also required by specific DOJ officials under DOJ policy. *See generally* Memorandum from Merrick Garland, Att'y Gen., to the Dep'y Att'y Gen. et al., Use of Compulsory Process to Obtain Information From, or Records of, Members of the News Media (July 19, 2021); 28 C.F.R. § 50.10 (2022) (setting out DOJ's policy regarding obtaining information from, or records of, members of the news media, as well as regarding questioning, arresting, or charging members of the news media).

³ This includes customs summonses, 19 U.S.C. § 1509; immigration subpoenas, 8 U.S.C. § 1225(d); controlled substance enforcement subpoenas, 21 U.S.C. § 967; and export enforcement subpoenas, 22 U.S.C. § 2778. It would also include financial summonses, 31 U.S.C. § 5318, though the authority to issue such summonses has not been redelegated by the ICE Director.

⁴ This includes but is not necessarily limited to court orders to be issued to third parties pursuant to 18 U.S.C. §§ 2703 or 3123 for the communications or business records of members of the news media.

⁵ *See, e.g.*, 50 U.S.C. § 1801 (2022).

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any act that is reasonably likely to cause significant and articulable harm to national security, and obtaining preapproval from the ICE Deputy Director is not reasonably possible in light of the exigency.

Where preapproval is not sought from the ICE Deputy Director based on one of the foregoing exceptions, notice of the use of the compulsory investigative tool must be made to the ICE Deputy Director as soon as practicable but no later than within twenty-four hours.

- 2.5. **Arresting a Member of the News Media.** Unless exigent circumstances exist, ICE Directorates and Program Offices must provide advance notice to the ICE Deputy Director, through their HRO, of the preplanned arrest (civil or criminal) of a member of the news media. Where practicable and when media coverage of the arrest is reasonably anticipated, advance notice of the arrest should also be provided to the Office of Public Affairs (OPA) and the Office of Congressional Relations (OCR).
3. **Definitions.** The following definitions apply for purposes of this Directive only.
 - 3.1. **Records.** Records include the communications and business records of a member of the news media.
 - 3.2. **Business Records.** Business records include work product and other documentary materials, and records of the activities, including the financial transactions, of a member of the news media related to the coverage, investigation, or reporting of news. Business records do not include records unrelated to newsgathering activities, such as those related to the purely commercial, financial, administrative, or technical, operations of a news media entity. Business records do not include records that are created or maintained either by the government or by a contractor on behalf of the government. Where third-party records are at issue, business records are limited to those generated or maintained by a third party with which the member of the news media has a contractual relationship, and which could provide information about the newsgathering techniques or sources of a member of the news media.
 - 3.3. **Communications Records.** Communications records include the contents of electronic communications as well as source and destination information associated with communications, such as email transaction logs and local and long-distance telephone connection records, stored or transmitted by a third-party communication service provider with which the member of the news media has a contractual relationship. Communications records do not include information described in 18 U.S.C. § 2703(c)(2)(A), (B), (D), (E), and (F).
 - 3.4. **Journalistic Activity.** Activity involved in the gathering and dissemination of news to the public, to include researching, collecting, assessing, creating, editing, and presenting news. Journalistic activity can generally be distinguished from other forms of communication by its purpose—which is ultimately to provide people with new, verified

information about current events and issues—and adherence to professional standards or practices.⁶

3.5. Member of the News Media. Any person or entity engaged in the gathering and dissemination of news to the public through journalistic activity.

Whether an individual is a member of the news media is a fact-specific inquiry. No one factor or characteristic is dispositive; rather, all relevant facts and circumstances must be considered to decide, based on the totality of the circumstances, that the individual or entity is engaged in the gathering and dissemination of news to the public through journalistic activity. Factors that may indicate that the individual is a member of the news media include, but are not limited to, the following:

- 1) Whether the individual or entity brings to light new information (as opposed to merely reposting or republishing content created by others and/or providing commentary or analysis of issues that have already been reported);
- 2) Whether the individual or entity regularly engages in investigation and newsgathering and publicly presents information derived from such activities (as opposed to from memory, experience, or expertise);
- 3) Whether the individual or entity carries out its journalistic activities with freedom from outside control or influence (as opposed to engaging in commissioned or directed information gathering and publishing);⁷
- 4) Whether the individual or entity primarily reports facts (as opposed to opinion);
- 5) Whether the individual or entity has independent sources for its reporting;⁸
- 6) Whether the individual or entity is widely identified or recognized as a journalist or reporter (as opposed to as an expert, pundit, commentator, or editorialist);
- 7) Whether the individual possesses a legitimate press credential;
- 8) Whether the individual is employed by or regularly contracts with (i.e., a freelance reporter) a media organization to report on news; and
- 9) The frequency with which the individual disseminates news.

⁶ Such professional standards and practices are generally based on principles of truthfulness, accuracy, objectivity, impartiality, and public accountability. *See generally* Journalism Essentials, American Press Institute, <https://www.americanpressinstitute.org/journalism-essentials/> (last visited Apr. 1, 2022).

⁷ *See, e.g.*, Ethics Policy, The Washington Post, <https://www.washingtonpost.com/policies-and-standards/> (last visited Apr. 28, 2022) (discussing the newspaper's policy regarding avoiding actual or perceived conflicts of interest).

⁸ An independent source is a source that has no vested interest in the matter being reported.

- 3.6. Headquarters Responsible Officials (HROs).** Executive Associate Directors of Enforcement and Removal Operations, Homeland Security Investigations, and Management and Administration; the Principal Legal Advisor;⁹ the Associate Director of the Office of Professional Responsibility; and the Assistant Directors, Officers, or equivalent positions who report directly to the Director, Deputy Director, or Chief of Staff.
- 3.7. Field Responsible Official (FRO).** The highest-ranking official in any ICE field location. This includes Special Agents in Charge, Field Office Directors, ICE Attachés, Chief Counsels, and any other officials who have been designated in writing by the Director.

4. Responsibilities.

4.1. The ICE Deputy Director is responsible for:

- 1) Reviewing and approving or disapproving requests by ICE Directorates or Program Offices to utilize a compulsory investigative tool to obtain information or records related to the journalistic activities of members of the news media;
- 2) In deciding whether to approve or disapprove such a request, ensuring that any prerequisites set out in Section 5.1 of this Directive are met and that the interests set out in Section 2 of this Directive are fairly and objectively weighed before approving or disapproving the use of the compulsory investigative tool; and
- 3) Ensuring that the approved use of any compulsory investigative tool to obtain information or records related to the journalistic activities of members of the news media is appropriate in scope.

4.2. HROs are responsible for:

- 1) Ensuring overall compliance with this Directive within their respective Directorate or Program Office;
- 2) Consulting with the OPLA (and the Office of Regulatory Affairs and Policy (ORAP), where appropriate) prior to seeking preapproval from the ICE Deputy Director to utilize a compulsory investigative tool to obtain information or records related to the journalistic activities of members of the news media or before relying on one of the exceptions to preapproval listed in Section 2.4 of this Directive;

⁹ This Directive applies to the Office of the Principal Legal Advisor (OPLA) to the extent it is not inconsistent with directives, policies, or formal guidance issued by the General Counsel of the Department of Homeland Security (DHS). DHS Delegation No. 0400.2, Delegation to the General Counsel (Sept. 14, 2004).

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- 3) Elevating to the ICE Deputy Director, in writing, requests for authorization to utilize a compulsory investigative tool to obtain information or records related to the journalistic activities of members of the news media;
- 4) Where preapproval is not sought from the ICE Deputy Director based on one of the exceptions listed in Section 2.4 of this Directive, providing notice of the use of the compulsory investigative tool to the ICE Deputy Director as soon as is practicable, but in no event later than twenty-four hours from the time the compulsory investigative tool is served;
- 5) Where use of a compulsory investigative tool is approved by the ICE Deputy Director under this Directive, keeping the ICE Deputy Director reasonably informed regarding the use of the applicable investigative tool (e.g., its issuance, service, compliance by the member of the news media or third party);
- 6) Where a member of the news media fails to comply with an administrative subpoena or similar non-judicial compulsory investigative tool subject to this policy, informing the ICE Deputy Director prior to seeking judicial enforcement;
- 7) Providing notice to the ICE Deputy Director, OPA, and OCR of any preplanned arrest or use of any compulsory investigative tool against or relating to a member of the news media for any purpose; and
- 8) In consultation with OPLA and ORAP, ensuring that the training required by Section 5.5 of this Directive is developed and delivered to all officers and agents within their Directorate or Program Office.

4.3. FROs are responsible for:

- 1) Ensuring overall compliance with this Directive within their respective area of responsibility (AOR);
- 2) Through their HRO, elevating to the ICE Deputy Director, in writing, requests for authorization to utilize a compulsory investigative tool to obtain information or records related to the journalistic activities of members of the news media;
- 3) Where preapproval is not sought from the ICE Deputy Director based on one of the exceptions listed in Section 2.4 of this Directive, providing notice of the use of the compulsory investigative tool to their HRO as soon as is practicable, but in no event later than twenty-four hours from the time the compulsory investigative tool is served;
- 4) Where use of a compulsory investigative tool is approved by the ICE Deputy Director under this Directive, keeping their HRO reasonably informed regarding the use of the applicable compulsory investigative tool (e.g., its issuance, service, compliance by

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the member of the news media or third party);

- 5) Where a member of the news media fails to comply with an administrative subpoena or similar non-judicial compulsory investigative tool subject to this policy, informing their HRO prior to seeking judicial enforcement;
- 6) Providing notice to their HRO of any preplanned arrest or use of any compulsory investigative tool against or relating to a member of the news media for any purpose; and
- 7) Ensuring that the training required by Section 5.5 of this Directive is delivered to all officers or agents within their AOR.

4.4. Officers and Agents are responsible for:

- 1) Complying with all aspects of this Directive; and
- 2) Completing the annual training required by Section 5.5 of this Directive;

4.5. ORAP is responsible for:

- 1) Resolving all questions regarding the interpretation of this policy, including whether an individual or entity is a member of the news media, as well as whether activity qualifies as journalistic activity; and
- 2) Reviewing and approving any training created and delivered by Directorates and Program Offices regarding this Directive.

5. Procedures/Requirements.

5.1. Preapproval for the Issuance of Compulsory Investigative Tools to Obtain Information or Records Regarding Members of the News Media.

- 1) In General. Absent an exception listed in Section 2.4 of this Directive, the ICE Deputy Director must approve in advance the use of a compulsory investigative tool that seeks to obtain or is reasonably likely to result in the disclosure or encountering of information or records related to the journalistic activities of members of the news media.
- 2) Prerequisites to Seeking ICE Deputy Director Preapproval. The use of compulsory investigative tools to obtain information or records related to the journalistic activities of members of the news media is an extraordinary act and not a standard investigative practice. Accordingly, the ICE Deputy Director will only approve the use of a compulsory investigative tool pursuant to this Section where there is a reason to believe that a crime has been committed and the following prerequisites (where

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applicable) have been met:

- a) That the information or records related to the journalistic activities of the member of the news media are essential to the investigation;
- b) That ICE has first made all reasonable attempts to get the essential information from alternative, non-media sources;
- c) That such essential information or records cannot be obtained through any other means; and
- d) That ICE made reasonable attempts to obtain the information or records voluntarily from the relevant member of the news media, unless compelling reasons exist for not doing so.

3) ICE Deputy Director Preapproval.

- a) Directorates or Program Offices must request, in writing, the ICE Deputy Director's preapproval to use a compulsory investigative tool to obtain, or that is reasonably likely to result in the disclosure or encountering of, information or records related to the journalistic activities of members of the news media. Directorates or Program Offices should consult with OPLA (and ORAP, where appropriate) prior to seeking preapproval from the ICE Deputy Director pursuant to this Directive.

The written request must be submitted to the ICE Deputy Director by the relevant HRO, and it must contain sufficient facts and details for the ICE Deputy Director to make a determination as to whether the use of the compulsory investigative tool is appropriate in light of the requirements set out in this Directive. At a minimum, the written request must contain the following information:

- i) The nature of the investigation;
- ii) Whether the relevant member of the news media is a target or is tangential to the investigation;
- iii) Specific details about the information or records sought, including their nature, whether they are essential to the investigation, whether the information can be obtained from a non-media source, and any reasonable steps that have been made to attempt to obtain the information through other means;
- iv) The compulsory investigative tool intended to be utilized, and whether the

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approval of the Attorney General will be required;¹⁰

- v) Details about any reasonable attempt to obtain the information or records voluntarily from the relevant member of the news media, or the nature of any compelling reasons for not making such an attempt;
 - vi) Whether the compulsory investigative tool will be issued to the member of the news media or to a third party;
 - vii) Whether the use of the compulsory investigative tool is likely to result in the disclosure of information about confidential sources; and
 - viii) Details regarding how any search will be conducted or how the information or records will be described in any subpoena or court order so as to avoid the disclosure or encounter of nonessential information or records.
- b) The ICE Deputy Director will approve or disapprove all requests in writing. Any approval issued by the ICE Deputy Director must be specific as to the particular compulsory investigative tool(s) authorized and its scope.

The ICE Deputy Director will only approve the use of a compulsory investigative tool to obtain information or records related to the journalistic activities of members of the news media where it is drawn as narrowly as is reasonably possible to minimize the risk that any nonessential information or records, or information about confidential sources, will be disclosed.

- 4) Exceptions to ICE Deputy Director Preapproval and Required Notice. Where a Directorate or Program Offices does not obtain the preapproval of the ICE Deputy Director to utilize a compulsory investigative tool to obtain information or records related to the journalistic activities of a member of the news media based on an exception set out in Section 2.4 of this Directive, notice of the use of the compulsory investigative tool must be made to the ICE Deputy Director within twenty-four hours of the time of service.

5.2. Notice and Reasonable Updates.

- 1) Notice and an Opportunity to Comply. Where the ICE Deputy Director approves the use of a compulsory investigative tool to obtain information or records related to journalistic activities, the affected member of the news media shall be given advance notice before the compulsory investigative tool is utilized, unless doing so would pose a clear and substantial risk to the investigation, national security, or the life or safety of a person. Additionally, advance notice shall not be required where a court

¹⁰ See generally Memorandum from Merrick Garland, Att’y Gen., to the Dep’y Att’y Gen. et al., Use of Compulsory Process to Obtain Information From, or Records of, Members of the News Media (July 19, 2021); 28 C.F.R. § 50.10 (2022).

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order or written certification is obtained pursuant to 18 U.S.C. § 2705(a).

- 2) Keeping the ICE Deputy Director Reasonably Informed. Where use of a compulsory investigative tool is approved by the ICE Deputy Director under this Directive, HROs are responsible for keeping the ICE Deputy Director reasonably informed regarding the use of the applicable compulsory investigative tool. This includes but is not limited to providing information regarding any advance notice provided of the use of the compulsory investigative tool and any response, service/execution of the investigative tool, compliance (or noncompliance) of the member of the news media or third party.

Advance notice of intent to pursue judicial enforcement of an administrative subpoena through DOJ must also be provided to the ICE Deputy Director, and reasonable updates regarding DOJ's consideration and decision on the matter must also be provided to the ICE Deputy Director.¹¹

- 3) Notice to OPA and OCR. Where a compulsory investigative tool will be utilized against a member of the news media under this policy, where practicable and when media coverage or congressional attention is anticipated, advance notice of the use of the compulsory investigative tool must be provided to OPA and/or OCR.

- 5.3. **Safeguarding Information and Records.** Any information or records obtained from members of the news media or from third parties pursuant to this policy shall be closely held, in accordance with applicable law, so as to prevent disclosure of the information to unauthorized persons or for improper purposes.
- 5.4. **Interpretation.** Where there is a reasonable question regarding whether an individual is a member of news media or information or records related to journalistic activity are at issue for purposes of this policy, the Directorate or Program Office seeking to issue the compulsory investigative tool must consult with ORAP. ORAP will decide all matters related to the interpretation of this policy.
- 5.5. **Training.** In consultation with OPLA and ORAP, Directorates and Program Offices employing officers and agents must develop and provide annual training to their officers and agents regarding the requirements of this Directive.
6. **Recordkeeping.** HROs are responsible for ensuring that their Directorate or Program Office maintains records of any written requests for authorization to utilize a compulsory investigative tool that are that are made to the ICE Deputy Director under this policy, as well as any written decision provided by the ICE Deputy Director in response. All documents produced or provided in accordance with this Directive must be maintained in accordance with a National Archives and Records Administration approved retention

¹¹ See generally Memorandum from Merrick Garland, Att'y Gen., to the Dep'y Att'y Gen. et al., Use of Compulsory Process to Obtain Information From, or Records of, Members of the News Media (July 19, 2021); 28 C.F.R. § 50.10 (2022).

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schedule. If the records are not subject to a records schedule they must be maintained indefinitely by the agency. In the event the records are subject to a litigation hold, they may not be disposed of under a records schedule until further notification.

7. Authorities/References.

- 7.1. 8 U.S.C. § 1225(d) (2022), Authority relating to inspections.
- 7.2. 18 U.S.C. § 2703 (2022), Required disclosure of customer communications or records.
- 7.3. 18 U.S.C. § 2705 (2022), Delayed notice.
- 7.4. 18 U.S.C. § 3123 (2022), Issuance of an order for a pen register or a trap and trace device.
- 7.5. 19 U.S.C. § 1509 (2022), Examination of books and witnesses.
- 7.6. 21 U.S.C. § 967 (2022), Smuggling of controlled substances; investigations; oaths; subpoenas; witnesses; evidence; production of records; territorial limits; fees and mileage of witnesses.
- 7.7. 22 U.S.C. § 2778 (2022), Control of arms exports and imports.
- 7.8. 31 U.S.C. § 5318 (2022), Compliance, exemptions, and summons authority.
- 7.9. 50 U.S.C. § 1801 (2022), Definitions.
- 7.10. Fed. R. Crim. P. 41, Search and Seizure.

8. Attachments. None.

- 9. **No Private Right.** This document provides only internal ICE policy guidance, which may be modified, rescinded, or superseded at any time without notice. It is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party in any administrative, civil, or criminal matter. Likewise, no limitations are placed by this guidance on the otherwise lawful enforcement or litigative prerogatives of ICE.



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