

## Questions of Media Censorship, Misinformation, and Denial of Access to Information Arise During Summer Of 2023

Several developments in the summer of 2023 sparked concerns about censorship of media and denial of access to information. In May, a proposed New York state Department of Corrections policy encountered backlash for censoring inmates; YouTube updated its misinformation policy in June to allow for more election denialism; and GQ pulled a story critical of David Zaslav after complaints from the media executive at the beginning of July. Meanwhile, a federal judge ruled in July that the government need not release most documents in a *New York Times* Freedom of Information Act (FOIA) request. Finally, a proposed international treaty threatens to censor journalists worldwide.

### **New York Corrections Rescinds Policy That Prevented Prisoners from Publishing Creative Works**

On May 11, 2023, a directive entitled “Creative Arts Projects,” issued by New York’s Department of Corrections and Community Supervision (DOCCS) went into effect, effectively blocking New York state prisoners from publishing creative works. The directive defined “creative arts” as including, but not limited to, “artwork, dramatic composition, music composition, graphic arts/cartooning, film scripts, poetry, short stories, or book manuscripts.”

The directive would apply to prisoners such as John J. Lennon, currently serving a 28-years-to-life sentence for murder, drug sales and gun possession at Sullivan Correctional Facility in Fallsburg, N.Y. He has built a career as a writer covering the prison system from the perspective of an incarcerated person. Lennon’s writing has been featured in *The New York Times Magazine* and, according to *New York Focus*, an independent nonprofit newsroom that occasionally publishes prisoners’ writing, he recently landed a book deal and contributing editor position with *Esquire*. Many newspapers and other journalism entities publish prisoners’ writings to provide the public insight into the U.S. penal system.

Under the rules established by the directive, a prisoner had to submit any creative work they wished to publish to the superintendent of the correctional facility for approval. Any publisher had to give DOCCS 60 days’ notice of the project prior to receiving creative works from an incarcerated individual.

According to the directive, the superintendent could prohibit publication of any works that depict or pertain to “a gang or unauthorized group activity,” “appear[] to be written in code,” “[p]romote sexual activity,” or advocate rebellion against the government. Creative works from incarcerated individuals were also prohibited from portraying “law enforcement officers or DOCCS in a manner which could jeopardize safety or security.” The directive additionally forbade creative works to depict or describe “the incarcerated individual’s crime or crime victims.”

The full text of the DOCCS directive is available online at: <https://s3.documentcloud.org/documents/23835283/doccs-directive-4406.pdf>.

On June 6, 2023, *New York Focus* ran an article about the directive. The directive was not posted online until after *New York Focus* reached out to DOCCS for comment. *New York Focus* further reported that DOCCS said the directive extended to any writing done for journalistic outlets, including blogs and newspapers.

Following *New York Focus*’s June 6 article, the directive was immediately criticized by both incarcerated individuals and prison watchdog groups. On June 7, one day after the *New York Focus* report, DOCCS rescinded the directive.

According to *HuffPost*, DOCCS rescinded its policy because it was “not being interpreted as the Department intended” and because “it was never [DOCCS’s] objective to limit free speech or creative endeavors.”

“If they have the aim of rehabilitation, it seems antithetical to limit creative arts,” Moira Marquis, senior manager of PEN America’s FreeWrite Project, told *The Nation*.

Antony Gemmell, director of detention litigation for the New York Civil Liberties Union, told *New York Focus*, “The Constitution does not give prison officials a choice whether to respect the fundamental rights of incarcerated New Yorkers. DOCCS should be embarrassed that this policy ever saw the light of day. We’re glad to hear that it’s being rescinded.”

Freddy Medina, who was released from prison after serving nearly 17 years for manslaughter and who wrote for *New York Focus* while he was incarcerated, told the publication that revocation of the directive means that DOCCS “knew they were doing something they weren’t supposed to.”

DOCCS told *HuffPost* that it “will engage [interested] stakeholders to revise the policy in order to encourage creative art projects, as originally intended.”

## **YouTube Updates Election Misinformation Policy to Allow for Election Denialism**

On June 2, 2023, YouTube announced a change to its election misinformation policy and will stop removing content that questions the validity of the 2020 election.

In the announcement, YouTube said it will allow content to remain on the site that “advances false claims that widespread fraud, errors, or glitches occurred in the 2020 and other past US Presidential elections.”

The announcement signals a reversal of the policy put in place in December 2020 when YouTube began removing content that made false claims about the 2020 election.

In its June 2023 statement, YouTube said that it reevaluated its policy due to “today’s changed landscape.” The company said that allowing political debates, even those based on controversial or disproven assumptions, is an essential element of a functioning democracy.

YouTube said that although removing content could limit the spread of some misinformation, “it could also have the unintended effect of curtailing political speech without meaningfully reducing the risk of violence or other real-world harm.”

According to the statement, YouTube’s other election misinformation policies remain in place, including those that prohibit content aimed at misleading voters about the time or place of an election or other false claims that could materially discourage voting and the democratic process. YouTube said it will provide more details about its policy regarding the 2024 election season in the coming months.

The full text of YouTube’s June statement is available online at: <https://blog.youtube/inside-youtube/us-election-misinformation-update-2023/>.

## **GQ Pulls Story Critical of CEO of Warner Bros. Discovery David Zaslav After Complaints From the Media Executive**

On July 3, 2023, just hours after publishing, an article critical of David Zaslav, CEO of media and entertainment company Warner Bros. Discovery, was removed from GQ’s site after complaints from the media executive.

The original article, written by freelance film critic Jason Bailey, heavily criticized Zaslav, calling him “perhaps the most hated man in Hollywood.” Hours after the article was published on GQ’s website, the company received complaints from a Zaslav spokesman, according to *The Washington Post*.

Soon after receiving the complaint, GQ made significant edits to the article to modify the aggressive tone. The “most hated man in Hollywood” line was removed.

Bailey told *The Post* that he asked to have his byline removed from the story after GQ made the changes. According to Bailey, GQ refused to keep any story on its site that did not have a byline, and by that afternoon, the entire article was removed.

In a statement sent to multiple news organizations, GQ said the article was removed because it was not properly edited. “After a revision was published, the writer of the piece asked to have their byline removed, at which point GQ decided to unpublish the piece in question. GQ regrets the editorial error that led to a story being published before it was ready,” the statement said.

In a statement distributed to multiple news outlets, Warner Bros. Discovery complained that Bailey did not reach out to the company for comment prior to publishing. The company said that after the article was posted, it contacted GQ to ask that “numerous inaccuracies be corrected.” In the process of doing so, Warner Bros. Discovery said that GQ editors “ultimately decided to pull the piece.”

Bailey confirmed to *The Post* that he did not seek comment from Warner Bros. Discovery, but disputed the contention that the original article contained “numerous inaccuracies.” According to Bailey, GQ editors never told him that the article was inaccurate, and the edited version did not contain a correction.

The archived full text of the original GQ article is available online at: <https://archive.ph/ftmBd>.

The archived full text of the edited GQ article is available online at: <https://web.archive.org/web/20230703211252/https://www.gq.com/story/david-zaslav-warner-bros-discovery-ceo-tcm-max>.

### **Judge Rules That Government Can Withhold Most Documents in FOIA Request from *The New York Times***

On July 7, 2023, a federal judge ruled that *The New York Times* is not entitled to most of the government documents it requested in a 2022 federal Freedom of Information Act (FOIA) request. The documents sought by *The Times* concerned the Department of Justice’s (DOJ) and the FBI’s use of spyware from the Israeli technology company NSO Group.

*The Times* reported in January 2022 that the FBI and other government entities had purchased NSO Group’s flagship surveillance product “Pegasus.” The spyware is known to be used by foreign governments to hack into encrypted

communications on smartphones to surveil political dissidents, journalists, and others. That same month, *The Times* and one of its reporters, Mark Mazzetti, filed FOIA requests for communications between the FBI and NSO. Their filing included requests for internal FBI and DOJ documents related to the use of NSO surveillance products, dating back to January 2018. Later that month, the DOJ denied the request. *The Times* filed suit in February 2022.

Judge Jed S. Rakoff for the U.S. District Court for the Southern District of New York ruled that the federal government can withhold most documents regarding its use of the Israeli firm's spyware, but must turn over FBI staff emails discussing the spyware's potential risks.

Rakoff wrote that the government appropriately withheld most of the documents because the information requested was protected by FOIA exemptions. The relevant exemptions cited were for records containing classified information or national security-related information (Exemptions 1 and 3), and government agencies' deliberations (Exemption 5) that could reveal techniques used in law enforcement investigations (Exemption 7e).

The documents Rakoff said were appropriately withheld included FBI PowerPoint presentations about the use of NSO Group spyware as well as contracts between the FBI and NSO Group.

Rakoff did, however, agree with *The Times* that an email chain between two FBI divisions regarding the "potential counterintelligence or operational risks posed by NSO or other software" could not be withheld under FOIA. The judge ruled that these communications did not fall under FOIA's Exemption 5 because the emails did not appear "to play any deliberative role in the formulation of any actual policy."

"Over the past two years, in response to our filing this suit, the government has released many pages of documents concerning the FBI's controversial purchase of NSO spyware. We are pleased that the court agreed that some additional information should now be released," a spokesperson for *The Times* said in a statement sent via email to *Law360*.

The full text of the judge's order is available online at: <https://storage.courtlistener.com/recap/gov.uscourts.nysd.575522/gov.uscourts.nysd.575522.29.0.pdf>. Memorandum Order, *The New York Times Company v. United States Department of Justice*, No. 1:22-cv-01539 (S.D.N.Y. filed July 7, 2023).

## **Proposed UN Treaty Threatens to Censor Journalists Worldwide**

A United Nations (UN) committee failed to reach a consensus at a meeting in New York from Aug. 21, 2023 to Sept. 1, 2023, to finalize a treaty that could potentially provide authorities in repressive governments more tools to silence the press.

The resolution to develop the treaty was initially introduced at a UN meeting in October 2019. Entitled “Countering the use of information and communications technologies for criminal purposes,” the resolution was initially sponsored by Russia, which was later joined by Belarus, Cambodia, China, North Korea, Myanmar, Nicaragua, and Venezuela — countries with limited press freedom and aggressive online censorship policies, according to the International Press Institute (IPI).

The UN officially adopted the resolution in December 2019 and established the “Ad Hoc Committee to Elaborate a Comprehensive International Convention on Countering the Use of Information and Communications Technologies for Criminal Purposes.”

The August 2023 meeting in New York was the sixth negotiating session aimed at finalizing the treaty.

According to IPI, the latest draft of the convention lacks safeguards “necessary to ensure that this treaty does not end up weakening existing global expression, privacy, and security standards and protocols.”

Among the provisions in the current draft that concern free expression experts are the broad investigatory and surveillance powers given to member states. However, requirements for independent judicial authorization and oversight over this surveillance are, according to IPI, “notably absent.”

The draft also calls on other member states to enter into agreements to assist each other in investigations of cybercrimes. According to IPI, the current draft does not allow states to withhold such “mutual legal assistance” based on potential human rights concerns.

The landing page of the ad hoc committee is available online at: [https://www.unodc.org/unodc/en/cybercrime/ad\\_hoc\\_committee/home](https://www.unodc.org/unodc/en/cybercrime/ad_hoc_committee/home).

“The draft follows a trend of cybercrime laws that are used to attack freedom of expression, undermine privacy and exert control over our legitimate online activities,” Barbora Bukovská, senior director for law and policy at the free expression group Article 19, told Voice of America (VOA). “It might also have real consequences for journalists, dissidents, human rights defenders, and civil society,” Bukovská added.

According to VOA, the convention is set to be adopted in January 2024, pending negotiations and possible delays. Once adopted, it would go to the member states to be ratified nationally.

The United States, along with other democratic countries, previously opposed the resolution, but nevertheless has continued to take part in negotiations. Prior to the last committee negotiation session in April 2023, the U.S. Department of State issued a press release about the proposed convention. “The United States continues to seek consensus towards the adoption of a narrowly focused criminal justice instrument which advances international cooperation to fight cybercrime, while respecting human rights and supporting multi-stakeholder engagement,” the statement read.

The full text of the April 2023 press release is available online at: <https://www.state.gov/ad-hoc-committee-to-elaborate-a-un-cybercrime-convention-fifth-negotiating-session-at-the-united-nations-in-vienna/>.

Several groups, including digital rights group Electronic Frontier Foundation (EFF), participated in the negotiations in New York in August. According to VOA, EFF previously opposed the treaty, but is taking part in the negotiations to try to “mitigate potentially harmful provisions.”

According to Human Rights Watch, the sixth negotiating session on the treaty failed to reach a consensus on fundamental issues including the scope of the treaty, what constitutes a cybercrime, and what role, if any, human rights should play in the treaty’s implementation.

A new draft of the treaty is expected to be released at the end of November as the next step in negotiations, according to EFF.

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