



February 15, 2012

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Re: REQUEST UNDER FREEDOM OF INFORMATION ACT

To Whom It May Concern:

Pursuant to the Freedom of Information Act, the American Civil Liberties Union Foundation (“ACLU”) requests records regarding the annual statistical reports on the use of pen registers and trap and trace devices that the Attorney General is required to submit to Congress. 18 U.S.C. § 3126. The ACLU seeks the reports and associated records for reporting years 2010 and 2011. This request encompasses not only any reports actually submitted to Congress, but also all statistical data and other records gathered for the preparation of such reports. It also encompasses all records regarding whether these requests were submitted to Congress and the reasons for any failure to submit reports. Please search the Bureau of Alcohol, Tobacco, Firearms, and Explosives; Criminal Division; Drug Enforcement Administration; Federal Bureau of Investigation; United States Marshals Service, and Office of Legislative Affairs.

Background

Pen registers and trap and trace devices are used by law enforcement agencies to obtain non-content data about communications, such as the “to” and “from” line of emails, the telephone numbers a person dials and those from which he receives calls, and the IP addresses of websites a person visits. See Chris Soghoian, *The Law Enforcement Reporting Gap* (April 10, 2011), Social Science Research Network, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1806628&download=yes.

Pursuant to the Pen Register Act of 1986, the Attorney General is required to submit annual statistical data on the use of pen registers and trap and trace devices. 18 U.S.C. § 3126. Among other data, the Attorney General must report on the number of pen register orders and trap and trace devices applied for by law enforcement agencies in the Department of Justice, the length of the interceptions authorized, and the offenses specified in the order or application. *Id.*

While the Department of Justice has made this data publicly available up to 2009, it has not published such data for 2010 and 2011. Unfortunately, the Department of Justice does not have a strong track record of complying with its legal obligation to compile and submit these statistics. It failed to submit any reports between 2004 and 2008, a problem it rectified in 2009 when it supplied five years of data simultaneously. David Kravets, *Congress Left in Dark on DOJ Wiretaps*, *Wired.com* (Feb. 13, 2012, 6:30 AM), <http://www.wired.com/threatlevel/2012/02/congress-in-the-dark>. Moreover, there is good reason to believe that the Department of Justice also failed to submit any reports between 1999 and 2003. Paul Schwartz, *Reviving Telecommunications Surveillance Law*, 75 *U. Chi. L. Rev.* 287, 296-297 (2008), available at <http://www.paulschwartz.net/pdf/12%20Schwartz%20Final%202.19.pdf>. There is no public information indicating whether the Department of Justice has complied with its reporting duties for years 2010 or 2011.

Americans have a strong interest in understanding how frequently and under what circumstances their communications are the targets of pen registers and trap and trace devices. The people we communicate with through the telephone and Internet and the web pages we choose to visit can reveal a great deal about us, including the identities of our close friends and associates and what topics interest us when we engage in private sessions of reading and research. It is important to Americans' privacy and their ability to feel secure when availing themselves of new communications technologies that they understand the degree to which these technologies are subject to government surveillance.

Limitation of Processing Fees

The ACLU requests a limitation of processing fees pursuant to 5 U.S.C. § 552(a)(4)(A)(ii)(II) ("fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by . . . a representative of the news media . . .") and 28 C.F.R. §§ 16.11(c)(1)(i), 16.11(d)(1) (search and review fees shall not be charged to "representatives of the news media"). As a representative of the news media, the ACLU fits within this statutory and regulatory mandate. Fees associated with the processing of this request should, therefore, be limited accordingly.

The ACLU meets the definition of a representative of the news media because it is an "entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience." *Nat'l Sec. Archive v. U.S. Dep't of Def.*, 880 F.2d 1381, 1387 (D.C. Cir. 1989).

The ACLU is a national organization dedicated to the defense of civil rights and civil liberties. Dissemination of information to the public is a critical and substantial component of the ACLU's mission and work. Specifically, the ACLU broadly disseminates newsletters, news briefings, right-to-know documents, and other educational and informational materials to the public. Such material is widely available to everyone, including individuals, tax-exempt organizations, not-for-profit groups, law students, and educational faculty, for no cost or for a nominal fee through its public education department and web site. The web site addresses civil rights and civil liberties issues in depth, provides features on civil rights and civil liberties issues in the news, and contains many thousands of documents relating to the issues on which the ACLU is focused. The website specifically includes features on information obtained through the FOIA. For example, the ACLU's "Accountability for Torture FOIA" webpage, <http://www.aclu.org/torturefoia>, contains commentary about the ACLU's FOIA request for documents related to the treatment of detainees, press releases regarding the request, analyses of FOIA documents disclosed, and an advanced search engine permitting webpage visitors to search the documents obtained. See *Judicial Watch, Inc. v. U.S. Dep't of Justice*, 133 F. Supp. 2d 52, 53-54 (D.D.C. 2000) (finding Judicial Watch to be a news-media requester because it posted documents obtained through the FOIA on its website).

The ACLU publishes a newsletter at least twice a year that reports on and analyzes civil liberties-related current events. The newsletter is distributed to approximately 450,000 people. The ACLU also publishes a bi-weekly electronic newsletter, which is distributed to approximately 300,000 subscribers (both ACLU members and non-members) by e-mail. Both of these newsletters often include descriptions and analyses of information obtained from the government through the FOIA, as well as information about cases, governmental policies, pending legislation, abuses of constitutional rights, and polling data. Cf. *Elec. Privacy Info. Ctr. v. Dep't of Def.*, 241 F. Supp. 2d 5, 13-14 (D.D.C. 2003) (finding EPIC to be a representative of the news media under Department of Defense regulations because it published a "bi-weekly electronic newsletter that is distributed to over 15,000 readers" about "court cases and legal challenges, government policies, legislation, civil rights, surveys and polls, legislation, privacy abuses, international issues, and trends and technological advancements").

The ACLU also regularly publishes books,¹ "know your rights" publications,² fact sheets,³ and educational brochures and pamphlets

¹ Some of the recent books published by the ACLU include: Susan N. Herman, *Taking Liberties: The War on Terror and the Erosion of American Democracy* (Oxford Univ. Press 2011); Lenora M. Lapidus, Emily J. Martin & Namita Luthra, *The Rights of Women: The Authoritative ACLU Guide to Women's Rights* (NYU Press 4th ed. 2009); Jameel Jaffer & Amrit Singh, *Administration of Torture: A Documentary Record from Washington to Abu*

designed to educate the public about civil liberties issues and governmental policies that implicate civil rights and liberties. These materials are specifically designed to be educational and are widely disseminated to the public. *See Elec. Privacy Info. Ctr.*, 241 F. Supp. 2d at 11 (finding EPIC to be a news-media requester because of its publication and distribution of seven books on privacy, technology, and civil liberties).

Depending on the results of this request, the ACLU plans to “disseminate the information” it receives “among the public” through these kinds of publications in these kinds of channels. The ACLU is therefore a news media entity.

Disclosure is not in the ACLU’s commercial interest. The ACLU is a “non-profit, non-partisan, public interest organization.” *See Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) (“Congress amended FOIA to ensure that it be ‘liberally construed in favor of waivers for noncommercial requesters.’” (citation and internal quotations omitted)). Any information disclosed by the ACLU as a result of this FOIA request will be available to the public at no cost.

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Waiver of all Costs

The ACLU additionally requests a waiver of all costs pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) (“Documents shall be furnished without any charge . . . if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.”).

Disclosure of the requested information will help members of the public understand the frequency of the government’s use of pen registers and trap and trace devices and the circumstances under which it engaged in

Ghraib and Beyond (Columbia Univ. Press 2007) (a book based on documents obtained through FOIA).

² Some of the more recent “know your rights” publications include: ACLU, *Know Your Rights: Demonstrations and Protests* (2011), available at http://www.aclu.org/files/assets/kyr_protests.pdf; ACLU, *Gender-Based Violence & Harassment: Your School, Your Rights* (2011), available at http://www.aclu.org/files/assets/genderbasedviolence_factsheet_0.pdf; ACLU, *Know Your Rights: What to Do If You’re Stopped by Police, Immigration Agents or the FBI* (2010), available at http://www.aclu.org/files/assets/bustcard_eng_20100630.pdf.

³ *See, e.g.*, ACLU, *Military Abortion Ban in Cases of Rape and Incest (Factsheet)* (2011), available at <http://www.aclu.org/reproductive-freedom/military-abortion-ban-cases-rape-and-incest-factsheet>; ACLU, *The Facts About “The No Taxpayer Funding For Abortion Act”* (2011), available at http://www.aclu.org/files/assets/Chris_Smith_bill-_ACLU_Fact_Sheet-_UPDATED-4-30-11.pdf; ACLU, *Fact Sheet on H.R. 3, the No Taxpayer Funding for Abortion Act* (2011), available at <http://www.aclu.org/reproductive-freedom/fact-sheet-hr-3-no-taxpayer-funding-abortion-act>.

surveillance. The scale of government use of these technologies is currently shielded from public view. The requested information will “contribute significantly to public understanding.” 5 U.S.C. § 552(a)(4)(A)(iii).

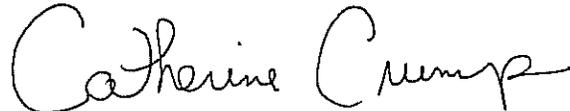
As a nonprofit 501(c)(3) organization and a “representative of the news media”, the ACLU is well-situated to disseminate information it gains from this request to the general public. Because the ACLU meets the test for a fee waiver, fees associated with responding to FOIA requests are regularly waived for the ACLU.⁴

Thank you for your prompt attention to this matter. Please furnish all applicable records to:

Catherine Crump
Staff Attorney
American Civil Liberties Union Foundation
125 Broad Street, 17th floor
New York, NY 10004

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION

Sincerely,



Catherine Crump
Staff Attorney
American Civil Liberties Union

⁴ Fees associated with responding to FOIA requests are regularly waived for the ACLU. In June 2011, the National Security Division of the Department of Justice granted a fee waiver to the ACLU with respect to a request for documents relating to the interpretation and implementation of a section of the PATRIOT Act. In October 2010, the Department of the Navy granted a fee waiver to the ACLU with respect to a request for documents regarding the deaths of detainees in U.S. custody. In January 2009, the CIA granted a fee waiver with respect to the same request. In March 2009, the State Department granted a fee waiver to the ACLU with regard to a FOIA request submitted in December 2008. The Department of Justice granted a fee waiver to the ACLU with regard to the same FOIA request. In November 2006, the Department of Health and Human Services granted a fee waiver to the ACLU with regard to a FOIA request submitted in November of 2006.