

VIA FACSIMILE

June 10, 2020

David M. Hardy, Section Chief
Record/Information Dissemination Section
Federal Bureau of Investigation
170 Marcel Drive
Winchester, VA 22602-4843
Fax: (540) 868-4997
Attn: FOIA Request

Dear Mr. Hardy:

This letter constitutes a request under the Freedom of Information Act (“FOIA”), 5. U.S.C. § 552(a)(3), and is submitted on behalf of the Electronic Privacy Information Center (“EPIC”) to the Department of Justice’s (“DOJ”) Federal Bureau of Investigation (“FBI”).

EPIC seeks records related to the FBI’s engagement in electronic surveillance in connection with the civil unrest throughout the United States in the wake of George Floyd’s death. EPIC also seeks records related to the FBI’s policies regarding the sharing of electronic interceptions with state and local law enforcement.

Documents Requested

1. Emails and communications between the FBI and Minnesota state and local law enforcement regarding electronic surveillance of civil protests dating from May 25, 2020, including but not limited to the following individuals and search terms:
 - a. George Floyd;
 - b. Civil unrest;
 - c. Protests;
 - d. Police brutality;
 - e. Black lives matter or BLM;
 - f. Antifa;
 - g. Tim Walz;
 - h. Minnesota;
 - i. Minneapolis;
 - j. Minneapolis Police Department or MPD;
 - k. Police Officers Federation of Minneapolis or POFM;
 - l. Third parties with an email address ending in “@minneapolismn.gov,” “@mpdfederation.com,” “@hennepin.us,” “@state.mn.us,” and “@dc.gov”;

- m. Metropolitan Police Department or MPDC;
 - n. Signals intelligence, or SIGINT; communications intelligence, or COMINT; and electronic intelligence, or ELINT;
 - o. Electronic Surveillance or ELSUR;
 - p. Cell site stimulator, IMSI catcher, or Stingray
2. All emails, communications, memoranda, and reports regarding surveillance undertaken in relation to the FBI's investigation into Antifa dating from May 25, 2020;¹
 3. All "sensitive" and "emergency" Title III applications and affidavits dated from May 25, 2020;²

Background

On May 25, 2020, Mr. George Floyd died after former Minneapolis Police Department officer Derek Chauvin held his knee on the back of Mr. Floyd's neck for eight minutes and 46 seconds while two other officers pinned down Mr. Floyd's back.³ The Hennepin County medical examiner and independent doctors hired by Mr. Floyd's family determined that the manner of death was homicide.⁴ Since Mr. Floyd's death, over 300 civil protests have been held in cities across all 50 states,⁵ beginning in Minneapolis.⁶

After pockets of violence, destruction, and looting began in connection with some of the protests, President Trump and Attorney General Barr, in a call with governors on June 1st, "urged a firm local response."⁷ As of June 2nd, twenty-three states and the District of Columbia had activated the National Guard in response to the protests.⁸ In Washington, D.C., the *Associated Press* reports, the DOJ has "deployed agents from every one of its agencies" and has even granted the Drug Enforcement Administration ("DEA") temporary authority to "conduct covert surveillance" and collect intelligence on people participating in protests over the killing of George Floyd."⁹

¹ Ken Klippenstein, *The FBI Finds 'No Intel Indicating Antifa Involvement in Sunday's Violence*, Nation (June 2, 2020), <https://www.thenation.com/article/activism/antifa-trump-fbi/>.

² Fed. Bureau of Investigations, Dep't of Justice, Domestic Investigations and Operations Guide 18-185 to -191 (2016).

³ Frances Robles & Audra D.S. Burch, *How Did George Floyd Die? Here's What We Know*, N.Y. Times (June 2, 2020), <https://www.nytimes.com/article/george-floyd-autopsy-michael-baden.html>.

⁴ *Id.*

⁵ Janie Haseman, Karina Zaiets & Mitchell Thorson, *Tracking Protests Across the USA in the Wake of George Floyd's Death*, USA Today (June 3, 2020), <https://www.usatoday.com/in-depth/graphics/2020/06/03/map-protests-wake-george-floyds-death/5310149002/>.

⁶ Derrick Bryson Taylor, *George Floyd Protests: A Timeline*, N.Y. Times (June 2, 2020), <https://www.nytimes.com/article/george-floyd-protests-timeline.html>.

⁷ Andrew Restuccia & Catherine Lucey, *Trump Responds to Violent Protests by Pushing Governors to Get Tough*, Wall St. J. (June 2, 2020), <https://www.wsj.com/articles/trump-pushes-governors-to-get-tough-on-violent-protesters-11591026977>.

⁸ Ryan Browne, Alicia Lee & Renee Rigdon, *There Are as Many National Guard Members Activated in the US as There Are Active Duty Troops in Iraq, Syria and Afghanistan*, CNN (June 2, 2020), <https://edition.cnn.com/2020/06/01/us/national-guard-protests-states-map-trnd/index.html>.

⁹ Jason Leopold & Anthony Cormier, *The DEA Has Been Given Permission To Investigate People Protesting George Floyd's Death*, BuzzFeed News (June 2, 2020), <https://www.buzzfeednews.com/article/jasonleopold/george-floyd-police-brutality-protests-government>.

Attorney General Barr's promise to authorize "greater law enforcement resources and support" for the D.C. region, as well as President Trump's contemplation of taking over the Metropolitan Police Department, suggest a willingness to use federal law enforcement resources at the local level.¹⁰ DOJ agencies have been deployed elsewhere in the U.S. to support state and local law enforcement: last week Attorney General Barr ordered a riot team from the Federal Bureau of Prisons to deploy in Miami;¹¹ he also announced that the DOJ would be using its "network of 56 regional FBI Joint Terrorism Task Forces (JTTF)" in order to "coordinate federal resources with [] state and local partners."¹² JTTFs "have been assigned to gather video and photo evidence of possible lawbreakers, as well as take tips from local police departments."¹³ Additionally, the Bureau of Alcohol, Tobacco, Firearms and Explosives "is helping local police departments with arson investigations related to unrest," including in Apple Valley, Minnesota.¹⁴

An official told the *Washington Post* that the FBI has not "changed its rules for how it uses surveillance powers towards Americans" and is aware of the legal limitations to national security intelligence.¹⁵ But, there are numerous policy concerns with federal agencies engaging in electronic surveillance:¹⁶ undermining public trust; encroachment on state and local jurisdiction; the chilling effect on protesters' First Amendment rights; and potential disparate targeting of certain segments of society through racial profiling. Moreover, the privacy implications of such surveillance are especially far-reaching in light of President Trump's recent vow to designate Antifa a domestic terrorist group;¹⁷ given that Antifa is a decentralized movement with no designated leadership, the FBI's ongoing investigation into alleged Antifa connections to violence at protests could result in the incidental interception of communications from third parties and non-parties.¹⁸ Any electronic surveillance of protesters must therefore comply with 18 U.S.C. §§ 2510-2523 and the FBI Domestic Investigation and Operations Guide ("DIOG"), as well as Fourth Amendment warrant and notice requirements.

Request for Expedited Processing

EPIC is entitled to expedited processing of this request under the FOIA and the DOJ's FOIA regulations. 5 U.S.C. § 552(a)(6)(E)(v)(II); 28 C.F.R. § 16.5(e)(1). Under the DOJ's FOIA

¹⁰ Michael Balsamo & Matthew Barakat, *DC Officials Push Back on Aggressive Response to Protests*, Assoc. Press (June 2, 2020), <https://apnews.com/bb5fff42f2ff7e46b8eb0e1d098d22e0>.

¹¹ Devlin Barrett, *Barr Seeks to Subdue D.C. Protests By 'Flooding the Zone' With Federal Firepower*, Wash. Post (June 3, 2020), https://www.washingtonpost.com/national-security/william-barr-george-floyd-protests-fbi-atf-us-marshals/2020/06/02/6d093d0a-a515-11ea-b473-04905b1af82b_story.html.

¹² Press Release, Department of Justice, Attorney General William P. Barr's Statement on Riots and Domestic Terrorism (May 31, 2020), <https://www.justice.gov/opa/pr/attorney-general-william-p-barrs-statement-riots-and-domestic-terrorism>.

¹³ Barrett, *supra* note 11.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Letter from the House Comm. on Homeland Security to Hon. Chad Wolf, Acting Sec'y of Dep't of Homeland Sec. and Hon. Christopher A. Wray, Dir. of Fed. Bureau of Investigation (June 2, 2020), <https://homeland.house.gov/imo/media/doc/DHS%20FBI%20Protests.pdf>.

¹⁷ Maggie Haberman & Charlie Savage, *Trump, Lacking Clear Authority, Says U.S. Will Declare Antifa a Terrorist Group*, N.Y. Times (May 31, 2020), <https://www.nytimes.com/2020/05/31/us/politics/trump-antifa-terrorist-group.html>.

¹⁸ Klippenstein, *supra* note 1.

regulation, a FOIA request will be granted expedited processing when (1) there is “an urgency to inform the public about an actual or alleged Federal Government Activity,” and (2) the request is “made by a person who is primarily engaged in disseminating information.” 28 C.F.R. § 16.5(e)(1)(ii). EPIC’s request satisfies both of these requirements.

First, there is “urgency to inform the public concerning actual or alleged Federal Government activity. The “actual . . . Federal Government activity” is the FBI’s involvement in the national response to protests through its JTTFs. It has been reported that Attorney General Barr has “logged hours at FBI headquarters, overseeing the national response efforts, focused not just on the broad efforts but the minutia of the government response” to state and local protests.¹⁹ Speaking with the *Washington Post*, an official at the DOJ confirmed that the department is “scrutinizing social media posts” and “exploit[ing] phones, data communications to see if there is a coordinated command and control” of “violence amid the protests.”²⁰

There is “clear urgency” to release the requested information because more than 10,000 people have been arrested during First Amendment-protected protests since the death of Mr. Floyd,²¹ and protests are expected to continue across the country and to be met with federal, state, and local security tactics.²² Besides Attorney General Barr’s broad promise to provide federal support to law enforcement in areas experiencing civil unrest, and reports confirming involvement by the FBI and DEA, the particular details of federal electronic surveillance of police brutality protests and whether intelligence is being shared with state and local law enforcement have not been made public.

Second, EPIC is an organization “primarily engaged in disseminating information.” As the Court explained in *EPIC v. DOD*, “EPIC satisfies the definition of ‘representative of the news media’” entitling it to preferred fee status under FOIA. 241 F. Supp. 2d 5, 15 (D.D.C. 2003). EPIC is a non-profit organization committed to privacy, open government, and civil liberties that consistently discloses documents obtained through FOIA on its website, EPIC.org, and its online newsletter, the *EPIC Alert*.²³

In submitting this request for expedited processing, EPIC certifies that this explanation is true and correct to the best of its knowledge and belief. 5 U.S.C. § 552(a)(6)(E)(vi); 28 C.F.R. § 16.5(e)(3).

Request for “News Media” Fee Status and Fee Waiver

EPIC is a “representative of the news media” for fee classification purposes. *EPIC v. DOD*, 241 F. Supp. 2d 5 (D.D.C. 2003). Based on EPIC’s status as a “news media” requester, EPIC is entitled to receive the requested record with only duplications fees assessed. 5 U.S.C. § 552(a)(4)(A)(ii)(II); 28 C.F.R. § 16.10(c).

¹⁹ Barrett, *supra* note 11.

²⁰ *Id.*

²¹ Anita Snow, *AP Tally: Arrests at Widespread US Protests Hits 10,000*, Assoc. Press (June 4, 2020), <https://apnews.com/bb2404f9b13c8b53b94c73f818f6a0b7>.

²² Nomaan Merchant, Amy Forliti, & Tim Sullivan, *Protests Large But Peaceful After New Charges In Floyd Case*, Assoc. Press (June 4, 2020), <https://apnews.com/18c41cd260efeeef6c105571dc7f76a8>.

²³ EPIC, *About EPIC*, <https://epic.org/epic/about.html>.

Further, any duplication fees should also be waived because disclosure is (1) “in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government” and (2) “not primarily in the commercial interests of” EPIC, the requester. 5 U.S.C. § 552(a)(4)(A)(iii); 28 C.F.R. § 16.10(k)(1). EPIC’s request satisfies this standard based on the DOJ’s three factors for granting a fee waiver. 28 C.F.R. § 16.10(k)(2).

The DOJ considers the following three factors in their analysis: (1) the “subject matter of the request” concerns “identifiable operations or activities of the Federal Government with a connection that is direct and clear, not remote or attenuated;” (ii) disclosure “would be likely to contribute significantly to public understanding of those operations or activities;” and (iii) “disclosure [is] not be primarily in the commercial interest of the requester.” 28 C.F.R. 16.10(k)(2)(i)-(iii).

First, the deployment of federal resources, including intelligence support, in response to civil protests concerns a “direct and clear...identifiable operation of the Federal Government.” 28 C.F.R. 16.10(k)(2)(i).

Second, disclosure is “likely to contribute significantly to public understanding of those operations or activities.” 28 C.F.R. § 16.10(k)(2)(ii)(A)–(B). Disclosure would “be meaningfully informative about government operations or activities” because little specific information has been released about federal “covert surveillance” in relation to protests and protesters. The records requested will help inform the public on what information the FBI and other connected law enforcement entities are collecting, how they are collecting and sharing it, and for what purpose.

Furthermore, disclosure will “contribute to the understanding of a reasonably broad audience of persons interested in that subject” because it “shall be presumed that a representative of the news media,” like EPIC, satisfies this consideration. 28 C.F.R. § 16.10(k)(2)(ii)(B).

Third, disclosure of the requested information is “not primarily in the commercial interest” of EPIC. 28 C.F.R. § 16.10(k)(2)(iii)(A)–(B). Again, EPIC is a non-profit organization committed to privacy, open government, and civil liberties.²⁴ Moreover, the DOJ “components ordinarily will presume that when a news media requester has satisfied the requirements of paragraphs (k)(2)(i) and (ii) of this section, the request is not primarily in the commercial interest of the requester.” 28 C.F.R. § 16.10(k)(2)(iii)(B). As described above, EPIC is a news media requester and satisfies the public interest standard.

For these reasons, a fee waiver should be granted.

²⁴ EPIC, *About EPIC*, <https://epic.org/epic/about.html>.

Conclusion

Thank you for your consideration of this request. EPIC anticipates your determination on its request within ten calendar days. 5 U.S.C. § 552(a)(6)(E)(ii)(I). For questions regarding this request contact Enid Zhou at 202-483-1140 x104 or zhou@epic.org, cc: FOIA@epic.org.

Respectfully submitted,

/s/ Margaret Foster

Margaret Foster
EPIC Clerk

/s/ Enid Zhou

Enid Zhou
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