



ELECTRONIC PRIVACY INFORMATION CENTER

May 14, 2013

Representative Bob Goodlatte, Chairman
Representative John Conyers, Ranking Member,
Committee on the Judiciary
U.S. House of Representatives
2138 Rayburn House Office Building
Washington, DC 20515

Re: Justice Department Subpoena of AP Reporters' Telephone Records

Dear Chairman Goodlatte, Ranking Member Conyers, and Members of the Committee:

We are writing to you regarding the hearing that will be held before the House Judiciary Committee on Wednesday, May 14, 2013 concerning news reports that the Justice Department obtained two months of telephone records of reporters and editors for the Associated Press.¹ EPIC supports your inquiry into this very troubling development. We write to provide additional background on this matter. We ask that this letter be entered into the hearing record.

The Electronic Privacy Information Center ("EPIC") is a non-partisan public interest research organization established in 1994 to focus public attention on emerging privacy and civil liberties issues. EPIC has a long-standing interest in the Privacy Protection Act, a law passed by Congress in 1980 that recognizes the particular need to safeguard the records of journalists from unwarranted government searches.² EPIC today filed a detailed Freedom of Information Act request with the Department of Justice, Office of Legal Counsel, seeking documents explaining the DOJ's legal authority to search the electronic communications of reporters (Attached). EPIC is seeking to determine whether the agency's conduct complies with the 1980 law as well as the associated policy adopted by the agency in 1980.³ EPIC previously filed the first FOIA request concerning the government's "warrantless

¹ House Judiciary Committee, "Attorney General Eric Holder to Testify Before House Judiciary Committee," (May 14, 2013), <http://judiciary.house.gov/news/2013/05142013.html>

² See EPIC, "The Protection Act of 1980," <http://epic.org/privacy/ppa/>. 42 U.S.C. § 2000aa, P.L. 96-440, 94 Stat. 1879 (1980).

³ 28 C.F.R. § 50.10, 45 Fed. Reg. 76,436 (1980).

wiretapping” program in 2005 and obtained documents from high-level DOJ officials expressing doubt about the government’s justification for its wiretapping activity.⁴

A preliminary review of the facts made available to date raise substantial questions about the Department’s conduct.

(1) The Associated Press Has Been Subject to An Overbroad and Unjustifiable Seizure of Telephone Records that Implicate Confidential Sources

This week, members of the Associated Press (“AP”) received letters from United States Attorney Ronald C. Machen Jr. (“USA Machen”) notifying them that the DOJ had obtained telephone toll records for more than 20 separate telephone lines assigned to the AP and its journalists.⁵ These records were broad enough to cover communications “across all of the newsgathering activities undertaken by the AP during a two-month period.”⁶ The records sought included work and personal phone numbers of reporters, general phone lines of AP bureaus in New York, Washington, and Hartford.⁷ The DOJ even obtained telephone records from the AP number used by reporters in the House of Representatives.⁸

While USA Machen did not specify why the DOJ sought these telephone records from the AP, officials have acknowledged in public testimony that there is a criminal investigation into the release of information “contained in a May 7, 2012 AP story about a foiled terror plot.”⁹ According to Central Intelligence Agency Director John O. Brennan, a leak occurred “when someone informed the Associated Press that the U.S. Government had intercepted an IED (improvised explosive device) that was supposed to be used in an attack” and had it in its possession for analysis.¹⁰ However, the AP delayed reporting the story at the request of government officials, and waited to publish it until they were assured that it no longer endangered national security.

Subsequent to the AP story, other news organizations reported that the U.S. had a spy planted within the Yemen-based Al Qaeda group, a revelation likely traceable to Central Intelligence Agency Director John O. Brennan’s briefing with former counter-terrorism advisers after the original AP story.¹¹ At the Senate confirmation hearing for Director Brennan, he responded to accusations that he had disclosed classified information about the double agent, admitting that he “told the commentators that the United States had ‘inside

⁴ EPIC, Freedom of Information Act Work on the National Security Agency’s Warrantless Wiretapping Surveillance Program, <https://epic.org/privacy/nsa/foia/>.

⁵ Letter from Gary Pruitt, Chief Executive Officer, Associated Press to Attorney General Eric Holder (May 13, 2013).

⁶ *Id.*

⁷ Kim Zetter, *Obama Administration Secretly Obtains Phone Records of AP Journalists*, WIRED – THREAT LEVEL (May 13, 2013), <http://www.wired.com/threatlevel/2013/05/doj-got-reporter-phone-records/>.

⁸ *Id.*

⁹ Mark Sherman, *Gov’t Obtains Wide AP Phone Records in Probe*, ASSOCIATED PRESS (May 13, 2013), <http://bigstory.ap.org/article/govt-probe-obtains-wide-swath-ap-phone-records/>.

¹⁰ *Id.*

¹¹ Mark Hosenball, *Exclusive: Did White House “Spin” Tip a Covert Op?*, REUTERS (May 18, 2012), <http://www.reuters.com/article/2012/05/18/us-usa-security-plot-spin-idUSBRE84H0OZ20120518>.

control’ of the operation,” but denying that he revealed classified information.¹² Still there is no public evidence that the AP was the source of a leak regarding the double agent in Yemen.

The resulting investigation into the confidential telephone records of the AP is a clear example of executive branch overreach that goes against the clear guidance of both Congress and the Department of Justice.

(2) Congress Made Clear in the Privacy Protection Act of 1980 That a Free Press Requires Limitation on the Power of Government to Search News Media Sources

The Department of Justice has recognized, “freedom of the press can be no broader than the freedom of reporters to investigate and report the news.”¹³ Congress passed the Privacy Protection Act in 1980 to provide protections to journalists in pursuit of investigations. The law followed the Supreme Court’s holding in *Zurcher v. Stanford Daily*, that the Constitution does not protect against seizure of journalist’s work product as evidence.¹⁴ The Privacy Protection Act of 1980, therefore, established that Journalists must be free to gather information and report to the public on controversial public issues without fear of government interference.¹⁵

The Department of Justice has since established a set of policies to “provide protection for the news media from forms of compulsory process... which might impair the news gathering function.”¹⁶ This process seeks to protect both the freedom of the press and the interests of law enforcement by requiring any subpoena sought for journalists’ records to be narrowly tailored and issued only after all other reasonable alternative sources of information have been exhausted.¹⁷

The DOJ’s rules do not reasonably condone untargeted fishing expeditions into possible sources of evidence, but rather targeted requests for specific information about specific individuals.¹⁸ Where, as here, the requested records consist of telephone toll records, there must be an affirmative finding that notice to the journalists would “pose a substantial

¹² Mark Mazzetti & Scott Shane, *Drones Are Focus as C.I.A. Nominee Goes Before Senators*, N.Y. TIMES, Feb. 7, 2013, at A1.

¹³ 28 C.F.R. § 50.10, *supra* n. 2; *see also* U.S. Department of Justice, A Review of the Federal Bureau of Investigation’s Use of Exigent Letters and Other Informal Requests for Telephone Records (Oversight and Review Division Office of the Inspector General, Jan. 2010) at 89-122, *available at* <http://www.justice.gov/oig/special/s1001r.pdf>.

¹⁴ *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978), *available at* <http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=case&court=us&vol=436&invol=547>.

¹⁵ 42 U.S.C. § 2000aa, *supra* n. 1; *see also* 28 C.F.R. § 50.10, *supra* n. 2 (“the prosecutorial power of the government should not be used in such a way that it impairs a reporter’s responsibility to cover as broadly as possible controversial public issues.”).

¹⁶ 28 C.F.R. § 50.10, *supra* n. 2.

¹⁷ *Id.*

¹⁸ 28 C.F.R. § 50.10(c)-(d), *supra* n. 2. The rules indicate that the DOJ should negotiate with the media in all cases in which a subpoena is contemplated, indicating that the negotiations “should attempt to accommodate the interests of the trial or grand jury with the interests of the media.” This language imagines a situation where the DOJ has identified a particular wrongdoer and is moving forward with charges.

threat to the integrity of the investigation in connection with which the records are sought.”¹⁹ Once an Assistant Attorney General has found that notice is unnecessary, the Attorney General then must authorize the subpoena.²⁰ This requires the Attorney General to establish there exist reasonable grounds to believe that the information sought is essential to the investigation of a prior criminal act.²¹

The subpoena requested must be “directed at relevant information regarding a limited subject matter and should cover a reasonably limited time period.”²² The DOJ’s Media Subpoena form requires the requester to include the responses to five different questions in order for the subpoena to be granted, including “an explanation as to how the proposed subpoena will be narrowly fashioned to obtain the necessary information in a minimally intrusive and burdensome manner.”²³ As part of the subpoena process the DOJ is further required to attempt to obtain voluntary cooperation of the journalist or provide an explanation of the reasons why such negotiations did not occur.²⁴ However, in no instance, can the DOJ not inform the journalist of the existence of the subpoena at a maximum of 90 days after they receive the subpoenaed records.²⁵

(3) The Subpoena Was Overbroad and Unjustifiable Under the DOJ Guidelines

The DOJ guidelines and policies clearly indicate that issuing a subpoena for news media communications records is a method of last resort and only acceptable in limited circumstances. Any news media subpoenas issued must be strictly narrowed to the relevant materials sought and must have the express approval of the Attorney General.²⁶ And in every case, members of the DOJ must “strike the proper balance between the public’s interest in effective law enforcement and the fair administration of justice.”

¹⁹ 28 C.F.R. § 50.10(d), *supra* n. 2.

²⁰ 28 C.F.R. § 50.10(e), *supra* n. 2.

²¹ 28 C.F.R. § 50.10(g)(1), *supra* n. 2.

²² *Id.*

²³ Department of Justice Policy and Statutory Enforcement Unit, Office of Enforcement Operations Criminal Division, Media Subpoena 28 C.F.R. § 50.10 USAM 9-13.400, *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00299.pdf. (“The request must contain the following:

- A summary of the facts of the prosecution or investigation as it relates to the information sought to be subpoenaed.
- An explanation as to how the information sought to be subpoenaed is essential to the investigation or prosecution.
- A discussion of possible alternative non-media sources and/or alternative investigative steps that were or could be employed to obtain the information sought to be subpoenaed.
- A description of the attempts to obtain the voluntary cooperation of the news media through negotiations. Negotiations typically should have occurred prior to submission of the request to the PSEU. If negotiations have not occurred, please provide the reasons why.
- An explanation as to how the proposed subpoena will be narrowly fashioned to obtain the necessary information in a minimally intrusive and burdensome manner.”).

²⁴ *Id.*

²⁵ 28 C.F.R. § 50.10(g)(2)-(3), *supra* n. 2.

²⁶ 28 C.F.R. § 50.10(e), *supra* n. 2.

The DOJ and USA Machen did not follow the mandatory guidelines in this case. Instead, they sought an “unusual and largely unprecedented” range of AP phone records, including those from multiple offices, general “switchboards numbers” and “an office-wide shared fax line” over a two-month period.²⁷ Such a broad request could not be “as narrowly drawn as possible” under the DOJ guidelines.²⁸

The subpoena was also not properly approved by Attorney General Eric Holder. The DOJ has announced that Attorney General Holder recused himself from the decision to subpoena the AP, and instead “assigned Deputy Attorney General Jim Cole” to handle the case.²⁹ However, the guidelines require that the Attorney General give his “express approval” for any non-consensual subpoena of news media toll records.

(4) Congress Should Make Clear That These and Other Prior Violations by the DOJ Will Not Be Tolerated, and Consider Providing Additional Protections for Electronic Communications

When considering the DOJ’s actions in this matter the DOJ Inspector General previously identified instances of unlawful access to the telephone records of reporters. In January 2010, the DOJ Office of Inspector General issued a comprehensive report outlining FBI abuses of exigent letters and other subpoena requests for telephone records.³⁰ This included three cases where the FBI sought reporters’ telephone records without the required legal approvals.³¹

These protections should be strengthened going forward to ensure that present and past mistakes are not repeated by the DOJ. Specifically, the Committee should:

- Inquire as to whether the government pursued “all reasonable alternative investigation steps” as required by the guidelines;³²
- Inquire as to why the investigators in this case could not negotiate with the AP directly for the release of certain *limited* records related to the investigation;³³
- Take appropriate disciplinary action for the failure of the Department of Justice to receive the express approval of Attorney General Eric Holder before issuing the subpoena;³⁴
- Order the DOJ to update the guidelines, issued in 1980, to protect journalists e-mail records as well as their telephone toll records.³⁵

²⁷ *Gov’t Obtains Wide AP Phone Records in Probe*, *supra* n. 10.

²⁸ 28 C.F.R. § 50.10(g)(1), *supra* n. 2.

²⁹ David Ingram, *Attorney General Holder Recused Himself from Media Subpoena*, REUTERS (May 14, 2013), <http://www.chicagotribune.com/news/sns-rt-us-usa-justice-apbre94c0zw-20130513,0,2384590.story>.

³⁰ Oversight & Review Div., Office of the Inspector General, U.S. Dep’t of Justice, *A Review of the Federal Bureau of Investigation’s Use of Exigent Letters and Other Informal Requests for Telephone Records* (Jan. 2010), available at <http://www.justice.gov/oig/special/s1001r.pdf>.

³¹ *See Id.* at 89-121.

³² *See* 28 C.F.R. § 50.10(g)(1); § 50.10(b), *supra* n. 2.

³³ *See* 28 C.F.R. § 50.10(d); § 50.10(g)(3), *supra* n. 2.

³⁴ 28 C.F.R. § 50.10(n), *supra* n. 2.

We would welcome an opportunity to discuss these matters in more detail in testimony before the Committee.

Sincerely,

Marc Rotenberg,
EPIC Executive Director

Alan Butler,
EPIC Appellate Advocacy Counsel

Amie Stepanovich,
EPIC Domestic Surveillance Counsel

Cc: Chairman Patrick Leahy, Senate Judiciary Committee
Ranking Member Chuck Grassley, Senate Judiciary Committee

³⁵ Electronic communication records are currently obtained pursuant to the Stored Communications Act, 18 U.S.C. § 2703, but that law does not provide the necessary additional protections for news media records.