

VIA EMAIL

March 24, 2020

Douglas Hibbard
Chief, Initial Request Staff
Office of Information Policy
Department of Justice
6th Floor
441 G St NW
Washington, DC 20530
Email: MRUFOIA.Requests@usdoj.gov

Dear Mr. Hibbard:

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

EPIC seeks from the DOJ records regarding the lawfulness of the use of location data for public health surveillance.¹

Documents Requested

EPIC seeks the following records dating from December 1, 2019 to the date on which the DOJ conducts a search:

All legal memos, analysis, communications, and guidance documents, in the possession of the Department of Justice, concerning the collection or use of GPS data and cell phone location data for public health surveillance;²

If the Office of Information Policy is not the correct DOJ component to process this request, please redirect this request to the proper DOJ FOIA office pursuant to 28 C.F.R. § 16.4(c).

¹ Natasha Singer & Choe Sang-Hun, *As Coronavirus Surveillance Escalates, Personal Privacy Plummet*, N.Y. Times (Mar. 24, 2020), <https://www.nytimes.com/2020/03/23/technology/coronavirus-surveillance-tracking-privacy.html>.

² *Id.*

Background

COVID-19 is a disease caused by a new strain of coronavirus that began spreading in December 2019.³ The World Health Organization has declared the novel coronavirus outbreak a pandemic, and governments worldwide—including many jurisdictions in the United States—have severely restricted public activities to minimize infections and deaths from the virus.⁴

According to the *New York Times*, “the White House recently spoke with Google, Facebook and other tech companies about potentially using aggregated location data captured from Americans’ mobile phones for public health surveillance of the virus.”⁵ Similarly, the *Washington Post* reported that the “U.S. government is in active talks with Facebook, Google and a wide array of tech companies and health experts about how they can use location data gleaned from Americans’ phones to combat the novel coronavirus, including tracking whether people are keeping one another at safe distances to stem the outbreak.”⁶ In a private meeting on March 15, 2020, a coronavirus task force represented by tech executives, entrepreneurs, and investors discussed ideas about disease mapping and telehealth.⁷ According to the *Washington Post* reporting, smartphone location data may help officials map the spread of infection, predict the next hotspots, or decide where to allocate health resources.⁸ EPIC seeks all policies, proposals, and guidance documents concerning the collection and use of cell phone location data in connection with the COVID-19 pandemic.

Other countries have employed technology to combat the COVID-19 crisis but have not limited its use to protect the privacy of its citizens. For instance, in South Korea, the government issues health alert texts that detail a patient’s age, gender, and locations visited before hospitalization.⁹ This system has resulted in the tracing of movements of individuals who have tested positive for coronavirus and fueled social stigma.¹⁰ Israel has authorized tapping into a vast trove of cell phone data, intended for use in counterterrorism, to trace the movements of individuals testing positive for COVID-19 and to identify people for quarantine.¹¹ Iran launched an app that claims to detect whether an individual is infected with coronavirus, but once users download the app, the

³ World Health Org., *Q&A on Coronaviruses (COVID-19)* (Mar. 9, 2020), <https://www.who.int/news-room/q-a-detail/q-a-coronaviruses>.

⁴ Dr. Tedros Adhanom Ghebreyesus, Dir. Gen., World Health Org., Opening Remarks at the Media Briefing on COVID-19 (Mar. 11, 2020), <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>.

⁵ Singer & Sang-Hun, *supra* note 1.

⁶ Tony Romm, Elizabeth Dwoskin, & Craig Timberg, *U.S. Government, Tech Industry Discussing Ways to Use Smartphone Location Data to Combat Coronavirus*, *Wash. Post* (Mar. 17, 2020), <https://www.washingtonpost.com/technology/2020/03/17/white-house-location-data-coronavirus/>.

⁷ *Id.*

⁸ *Id.*

⁹ Nemo Kim, ‘More Scary Than Coronavirus’: South Korea’s Health Alerts Expose Private Lives, *The Guardian* (Mar. 5, 2020), <https://www.theguardian.com/world/2020/mar/06/more-scary-than-coronavirus-south-koreas-health-alerts-expose-private-lives>.

¹⁰ *Id.*

¹¹ David M. Halbfinger, Isabel Kershner, & Ronen Bergman, *To Track Coronavirus, Israel Moves to Tap Secret Trove of Cellphone Data*, *N.Y. Times* (Mar. 18, 2020), <https://www.nytimes.com/2020/03/16/world/middleeast/israel-coronavirus-cellphone-tracking.html>.

government simply collected the users' location data for real-time tracking.¹² China has increased its mass collection of personal data for public monitoring and has even implemented facial recognition technology that claims to identify individuals with elevated temperatures and to identify individuals not wearing a face mask.¹³

The Department of Justice plays a key role advising the President regarding the lawfulness of proposed activities, and particularly the proposed expansion of government authorities during a time of national crisis.¹⁴ And there is a real risk that the initial advice will not be accurate. The Office of Legal Counsel subsequently revised many of the original memos prepared at the Department of Justice, following the 9/11 terrorist attacks.¹⁵

To be clear, the use of aggregate and statistical data should be encouraged. That is the material of evidence-based policy. But the collection of location data that identifies particular individuals can reveal the most intimate details of a person's life: a trip to a place of worship, attendance at a political protest, or a visit to a medical specialist. The collection of location data also poses the risks that a new system of mass surveillance will be established in the United States without the knowledge of the public or even the Congressional oversight committees.¹⁶

If the Department of Justice is considering the use of cell phone data to address the public health crisis, it should first consider whether the use is lawful and that analysis should be made available to the public.

Request for Expedition

EPIC is entitled to expedited processing of this request.¹⁷ Under the DOJ's FOIA regulations, a request "shall be processed on an expedited basis" when (1) there is an "urgency to inform the public about an actual or alleged federal government activity," and (2) where the request is "made by a person who is primarily engaged in disseminating information."¹⁸ This request satisfies both conditions.

First, there is an "urgency to inform the public about an actual or alleged federal government

¹² David Gilbert, *Iran Launched an App That Claimed to Diagnose Coronavirus. Instead, It Collected Location Data on Millions of People*, Vice (Mar. 14, 2020), https://www.vice.com/en_us/article/epgkmz/iran-launched-an-app-that-claimed-to-diagnose-coronavirus-instead-it-collected-location-data-on-millions-of-people.

¹³ Lily Kuo, *'The New Normal': China's Excessive Coronavirus Public Monitoring Could Be Here To Stay*, The Guardian (Mar. 8, 2020), <https://www.theguardian.com/world/2020/mar/09/the-new-normal-chinas-excessive-coronavirus-public-monitoring-could-be-here-to-stay>.

¹⁴ See generally Charlie Savage, *Takeover: The Return of the Imperial Presidency & the Subversion of American Democracy* (2007).

¹⁵ See generally Jack Goldsmith, *The Terror Presidency: Law and Judgment Inside the Bush Administration* (2009).

¹⁶ James Risen & Eric Lichtblau, *Bush Let's U.S. Spy on Callers Without Courts*, N.Y. Times (Dec. 16, 2005), <https://www.nytimes.com/2005/12/16/politics/bush-lets-us-spy-on-callers-without-courts.html>.

¹⁷ 5 U.S.C. § 552(a)(6)(E)(v)(II); 28 C.F.R. § 16.5(e)(1).

¹⁸ 28 C.F.R. § 16.5(e)(1), (e)(1)(ii).

activity.”¹⁹ The “actual . . . federal government activit[ies]” at issue are (1) the government’s development of a system to collect and use cell phone location data for public health surveillance of the COVID-19 pandemic, and (2) the government’s collection and use of the same location data. The urgency to inform the public about these government activities is clear from the extensive press coverage²⁰ and extraordinary privacy implications of instituting universal location tracking in the midst of a global pandemic.

Second, EPIC is an organization “primarily engaged in disseminating information.”²¹ As the court explained in *EPIC v. Department of Defense*, 241 F. Supp. 2d 5 (D.D.C. 2003), “EPIC satisfies the definition of ‘representative of the news media’” entitling it to preferred fee status under FOIA.²²

In submitting this request for expedited processing, EPIC certifies that this explanation is true and correct to the best of EPIC’s knowledge and belief.²³

Request for “News Media” Fee Status and Fee Waiver

EPIC is a “representative of the news media” for fee classification purposes, as the Court held in *EPIC v. Department of Defense*.²⁴ Based on EPIC’s status as a “news media” requester, EPIC is entitled to receive the requested record with only duplication fees assessed.²⁵

Further, any duplication fees should also be waived because disclosure of the requested 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 EPIC, the requester.²⁶ The DOJ evaluates the three factors to determine whether this requirement is met: (i) the “subject of the request must concern identifiable operations or activities of the Federal Government”; (ii) disclosure must be “likely to contribute significantly to public understanding of those operations or activities”; and (iii) “disclosure must not be primarily in the commercial interest of the requester.”²⁷ EPIC’s request satisfies all three factors.

First, the requested records clearly “concern[] identifiable operations or activities of the Federal Government,”²⁸ namely: (1) the government’s development of a system to collect and use cell phone location data for public health surveillance of the COVID-19 pandemic, and (2) the government’s collection and use of the same location data.

Second, disclosure would be “likely to contribute significantly to public understanding of those operations or activities.”²⁹ Disclosure would be “meaningfully informative about government

¹⁹ *Id.*

²⁰ *See, e.g.,* Singer & Sang-Hun, *supra* note 1; Romm et al., *supra* note 7.

²¹ 28 C.F.R. § 16.5(e)(1)(ii).

²² 241 F. Supp. at 15.

²³ *See* 5 U.S.C. § 552(a)(6)(E)(vi); 28 C.F.R. § 16.5(e)(3).

²⁴ 241 F. Supp. 2d 5.

²⁵ 5 U.S.C. § 552(a)(4)(A)(ii)(II).

²⁶ 28 C.F.R. § 16.10(k)(1); *see also* § 552(a)(4)(A)(iii).

²⁷ 28 C.F.R. §§ 16.10(k)(2)(i)–(iii).

²⁸ *Id.* § 16.10(k)(2)(i).

²⁹ 28 C.F.R. §§ 16.10(k)(2)(ii)(A)–(B).

operations or activities” because little is publicly known about the federal government’s plans to collect and use cell phone location data in connection with the COVID-19 pandemic; about the government’s retention of cell phone location data; and about the privacy safeguards in place for such a program.

Disclosure will also “contribute to the understanding of a reasonably broad audience of persons interested in the subject,” because DOJ components must “presume that a representative of the news media,” such as EPIC, “will satisfy this consideration.”³⁰ The requested records will reach a large audience through EPIC’s widely read website, <https://epic.org>, where EPIC routinely posts government documents obtained under the FOIA.

Third, disclosure of the requested information is not “primarily in the commercial interest” of EPIC.³¹ EPIC has no “commercial interest . . . that would be furthered by the requested disclosure.”³² EPIC is a registered non-profit organization committed to open government, privacy, and civil liberties.³³ Moreover, DOJ components “ordinarily will presume that where a news media requester has satisfied [the public interest standard], the request is not primarily in the commercial interest of the requester.”³⁴ As described above, EPIC is a news media requester and satisfies the public interest standard.

For these reasons, a fee waiver should be granted to EPIC’s request.

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); 32 C.F.R. § 2402.5(d)(3). For questions regarding this request contact Enid Zhou at 202-483-1140 x104 or Zhou@epic.org, cc: FOIA@epic.org.

Respectfully submitted,

/s Enid Zhou

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EPIC Open Government Counsel

/s John Davisson

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³⁰ *Id.* § 16.10(k)(2)(ii)(B)

³¹ *Id.* §§ 16.10(k)(2)(iii)(A)–(B).

³² *Id.* §§ 16.10(k)(2)(iii)(A).

³³ EPIC, *About EPIC* (2020), <https://epic.org/epic/about.html>.

³⁴ 28 C.F.R. § 16.10(k)(2)(iii)(B).