

VIA E-MAIL

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Kevin Krebs, Assistant Director, FOIA/Privacy Staff
Executive Office for United States Attorneys
Department of Justice
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Dear Mr. Krebs,

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 Executive Office for United States Attorneys (“EOUSA”).

EPIC seeks records related to the federal use of 18 U.S. C. § 2703(d) orders to obtain cell site location information (“CSLI”). Next term, the Supreme Court will review whether CSLI may be accessed without warrant.¹ However, key information about federal use of 2703(d) orders to access CSLI, including the rate at which these orders are obtained by law enforcement officials, still has not been released to the public.

Documents Requested

The first page of all 2703(d) orders for production of cell site location information during 2016.

Background

The Electronic Communications Privacy Act, enacted in 1986, protects a wide range of electronic communication transit and at rest.² 18 U.S.C. §2703(d), a part of ECPA’s Stored Communications Act,³ authorizes the government to compel a provider of electronic communication services to disclose customer records.⁴ 2703(d) orders require only a showing of

¹ *United States v. Carpenter*, 819 F.3d 880 (6th Cir. 2016), *cert. granted*, No. 16-402, 2017 WL 2407484 (U.S. Jan. 27, 2017).

² EPIC, THE PRIVACY LAW SOURCEBOOK 2016: UNITED STATES LAW, INTERNATIONAL LAW, AND RECENT DEVELOPMENTS 258 (Marc Rotenberg ed., 2016)

³ 18 U.S.C. §§ 2701–2712 (2012).

⁴ §2703(c)(1); *see* Brief for the United States in Opposition at 3, *Carpenter v. United States*, No. 16-402 (U.S. Jan. 27, 2017).

“specific and articulable facts” that the records are “relevant” to an ongoing investigation, rather than the “probable cause” standard of a warrant.⁵

Federal law enforcement uses 2703(d) orders to collect detailed cell site location information (“CSLI”) – “information collected as a cell phone identifies its location to nearby cell towers.”⁶ In some cases, the government compiled as much as 221 days worth of CSLI, without obtaining a warrant.⁷

The legal regime for law enforcement access to CSLI implicates privacy interests of nearly all U.S. persons. Today, cell phones are ubiquitous, and “unless a person is willing to live ‘off the grid’, it is nearly impossible to avoid” generating CSLI “just to navigate daily life.”⁸ Between 1986, the year the Electronic Communications Privacy Act was passed, and 2016, the number of cell phone subscriptions in the United States has increased by 58,000%.⁹ Today, “more than 90% of American adults...own a cell phone,”¹⁰ and 80% consider their wireless service indispensable.¹¹ Most cell owners also keep their phones in close physical proximity throughout the day.¹² As a result, CSLI can reveal the most intimate details of everyday life: trips a place of worship, attendance at a political protest, or a visit to a medical specialist. Indeed, cell site location records obtained by the government are “even more comprehensive than...GPS records,” and this precision only increases as a result of technological advances.¹³

The constitutionality of law enforcement access to CSLI through 2703(d) orders is contested. Next term, the Supreme Court will review whether the Fourth Amendment permits the government to obtain cell site location records without a warrant in *Carpenter v. United States*.¹⁴ However, key information about the government’s use of these orders, including the frequency with which the orders are obtained on the federal level, is still unknown.

Request for Expedition

EPIC is entitled to expedited processing of this request. 5 U.S.C. § 552(a)(6)(E)(v)(II). Under the DOJ’s FOIA regulations, a FOIA request should be granted expedited processing when 1) there is an “urgency to inform the public about an actual or alleged federal government

⁵ 18 U.S.C. § 2703(d).

⁶ https://www.law.berkeley.edu/wp-content/uploads/2015/04/2016-06-07_Cell-Tracking-Primer_Final.pdf

⁷ In that case, a total of around 29,000 location data points were generated per defendant. *See United States v. Graham*, 824 F.3d 421, 446-47 (4th Cir. 2016) (en banc) (Wynn, J., dissenting)

⁸ *United States v. Davis*, 785 F.3d 498, 525 (11th Cir. 2015) (en banc) (Rosenbaum, J., concurring).

⁹ *See Cell Phone Subscribers in the U.S., 1985-2010*, INFOPLEASE, <http://www.infoplease.com/science-health/cellphone-use/cell-phone-subscribers-us-1985a2010> (last visited June 9, 2017); *Americans’ Wireless Data Usage Continues to Skyrocket*, CTIA., <https://www.ctia.org/industry-data/ctia-annual-wireless-industry-survey> (last updated May 2017).

¹⁰ Petition for a Writ of Certiorari at 18, *Carpenter v. United States*, No. 16-402 (U.S. Sept. 26, 2016) (quoting *Riley v. California*, 134 S.Ct. 2473 (2014)); *see also Mobile Fact Sheet*, PEW RESEARCH CENTER (Jan. 12, 2017), <http://www.pewinternet.org/fact-sheet/mobile>. (stating 95% ownership rate)

¹¹ CTIA, WIRELESS SNAPSHOT 2017, at 4, <https://www.ctia.org/docs/default-source/default-document-library/ctia-wireless-snapshot.pdf>.

¹² *Riley v. California*, 134 S.Ct. 2473, 2490 (2014)

¹³ Brief of Amicus Curiae Electronic Privacy Information Center Urging Affirmance at 16-17, *In re: Applications of the United States of America for Historical Cell-Site Data*, 724 F.3d 600 (5th Cir. 2013) (No. 11-20884).

¹⁴ *Carpenter v. United States*, SCOTUSBlog, <http://www.scotusblog.com/case-files/cases/carpenter-v-united-states-2/>.

activity,” and 2) where the request is “made by a person who is primarily engaged in disseminating information.” § 16.5(e)(1)(ii). This request satisfies both requirements.

First, there is an “urgency to inform the public about an actual or alleged federal government activity.” § 16.5(e)(1)(ii). The “actual... federal government activity” at issue is federal law enforcement access to CSLI under 18 U.S.C. §2703(d). This activity is not in dispute. Federal use of 2703(d) orders to obtain CSLI has been the subject of numerous Circuit Court rulings.¹⁵

“Urgency” to inform the public about this activity is clear because of the constitutional uncertainty of 2703(d) orders used to access CSLI. Despite the fact that the Supreme Court has yet to rule on the constitutionality of obtaining CSLI with less than a warrant supported by probable cause, law enforcement demands for CSLI under § 2703(d) continue. Indeed, the Court long recognized that that GPS location data, which generates “a precise, comprehensive record of a person’s public movements that reflects a wealth of detail about... familial, political, professional, religious, and sexual associations,” requires a a warrant.¹⁶ The public has a right to know full details concerning law enforcement access to CSLI without a warrant. Further, despite an impending Supreme Court ruling on the constitutionality of 2703(d) orders to obtain CLSI, critical information about the federal practice is still unknown. Thus, any new information about the practice must be released to the public, and released quickly, in order to foster robust, meaningful public debate about the constitutional and privacy implications of obtaining CLSI without a warrant.

EPIC is an organization “primarily engaged in disseminating information.” § 16.5(e)(1)(ii). As the Court explained in *EPIC v. Dep’t of Def.*, “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).

In submitting this detailed statement in support of expedited processing, I certify that this explanation is true and correct to the best of my knowledge and belief.

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 duplication fees assessed. 5 U.S.C. § 552(a)(4)(A)(ii)(II). *See also* 28 C.F.R. § 16.10(c).

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. 28 C.F.R. § 16.10(k)(1); §

¹⁵ *See, e.g., United States v. Graham*, 824 F.3d 421, 428 (4th Cir. 2016) (en banc) (majority opinion); *United States v. Carpenter*, 819 F.3d 880, 884 (6th Cir. 2016), *cert. granted*, No. 16-402, 2017 WL 2407484 (U.S. June 5, 2017); *United States v. Davis*, 785 F.3d 498, 500 (11th Cir. 2015) (en banc); *In re: Applications of the United States of America for Historical Cell-Site Data*, 724 F.3d 600 (5th Cir. 2013)

¹⁶ *United States v. Jones*, 565 U.S. 400, 415 (2012) (Sotomayor, J., concurring).

552(a)(4)(A)(iii). EPIC's request satisfies the three considerations for the DOJ components to grant a fee waiver. § 16.10(k)(2).

DOJ components, including EOUSA, evaluate the three considerations to determine whether this requirement is met: (i) the "subject of the request must concern identifiable operations or activities of the Federal Government with a connection that is direct and clear, not remote or attenuated"; (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." §§ 16.10(k)(2)(i)–(iii).

First, disclosure of information about 2703(d) orders issued in 2016 "concerns identifiable operations or activities of the Federal Government with a connection that is direct and clear, not remote or attenuated." § 16.10(k)(2)(i). The requested documents self-evidently relate to federal government activities. These records are court orders produced based on a showing from federal law enforcement officials in connection with a federal criminal investigation.

Second, disclosure would be "would be likely to contribute significantly to public understanding of those operations or activities" according to the two sub-factors. § 16.10(k)(2)(ii)(A-B). As to the first sub-factor, disclosure would be "meaningfully informative about government operations or activities" because the total scope and breadth of federal use of 2703(d) court orders to obtain cell site location data is unknown, § 16.10(k)(2)(ii)(A). In court proceedings, orders often only become public years after they were obtained.¹⁷ In cases resolved with a plea deal, 2703(d) orders obtained by federal officials will never be revealed to the public. As to the second sub-factor, disclosure will "contribute to the understanding of a reasonably broad audience of persons interested in the subject," because, as stated in the relevant FOIA regulations, components will "presume that a representative of the news media will satisfy this consideration." § 16.10(k)(2)(ii)(B).

Finally, disclosure of the requested information is not "primarily in the commercial interest" of EPIC according to the two sub-factors. § 16.10(k)(2)(iii)(A-B). As to the first sub-factor, EPIC has no "commercial interest...that would be furthered by the requested disclosure." § 16.10(k)(2)(iii)(A). EPIC is a registered non-profit organization committed to privacy, open government, and civil liberties.¹⁸ As to the second sub-factor, "the component must determine whether that is the primary interest furthered by the request" because, as stated in the FOIA regulations, 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." § 16.10(k)(2)(iii)(B). As already described above, EPIC is a news media requester and satisfies the public interest standard.

For the above reasons, a fee waiver should be granted.

¹⁷ See cases cited *supra* note 33.

¹⁸ About EPIC, <https://epic.org/epic/about.html>.

Conclusion

Thank you for your consideration of this request. I anticipate your determination on our request within ten calendar days. 5 U.S.C. § 552(a)(6)(E)(ii)(I).

For questions regarding this request I can be contacted at 202-483-1140 x111. Please submit all e-mails to both Kyriakides@epic.org and FOIA@epic.org, or, alternately write via mail to the address in the first page's header.

Respectfully submitted,

Brendan Heath
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EPIC IPIOP Clerk