

September 10, 2003

BY FACSIMILE - (202) 616-6478

Marie A. O'Rourke, Assistant Director
FOIA/Privacy Unit
Executive Office for United States Attorneys
Department of Justice
Room 7300, 600 E Street, N.W.
Washington, DC 20530-0001

RE: Freedom of Information Act Request
And Request for Expedited Processing

Dear Ms. O'Rourke:

This letter constitutes an expedited request under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and Department of Justice regulation 28 CFR § 16.5(d)(1)(ii), and is submitted on behalf of the Electronic Privacy Information Center ("EPIC").

We are seeking the following agency records (including but not limited to electronic records):

1. The August 14, 2003 memorandum from Guy A. Lewis, director of the Executive Office for United States Attorneys, to federal prosecutors addressing the amendment to H.R. 2799 sponsored by Rep. C.L. "Butch" Otter;
2. Any attachments to the memorandum;
3. Any assessments, analyses, or evaluations of legal issues that might govern or restrict contacts by U.S. Attorneys with members of Congress, as proposed in the August 14 memorandum;
4. All records submitted by U.S. Attorney's Offices in response to the memorandum, including (but not limited to) schedules, reports, forms, and electronic mail; and
5. All records regarding any contacts that U.S. Attorney's Offices have had with members of Congress as a result of the August 14 memorandum.

Request for Expedited Processing

This request warrants expedited processing because it pertains to a matter about which there is an "urgency to inform the public about an actual or alleged federal government activity," and the request is made by "a person primarily engaged in disseminating information." 28 CFR § 16.5(d)(1)(ii).

The government activity at issue here -- the Justice Department urging prosecutors to influence members of Congress -- raises serious questions about the propriety of political appointees and has received considerable media attention in recent days. The Washington Post first reported on August 22, 2003 that:

[t]he Justice Department has urged U.S. attorneys to contact congressional representatives who voted against a key anti-terrorism provision of the USA Patriot Act, part of a broad-based publicity campaign on behalf of the law, according to internal documents. As Aug. 14 memorandum from Guy A. Lewis, director of the executive office for United States Attorneys, encourages federal prosecutors "to call personally or meet with . . . congressional representatives" to discuss "the potentially deleterious effects" of an amendment approved in the House last month that would cut off funding for "sneak and peek" warrants in terrorism cases. Attached to the memo is a list of names and telephone numbers of House members, with an asterisk next to the names of those who voted in favor of the amendment sponsored by C.L. "Butch" Otter (R-Idaho).

Dan Eggen, Prosecutors Are Urged to Press Congress, Washington Post, August 22, 2003, at A19.

Since then, a number of news outlets have reported and editorialized on the memorandum. A search in the Lexis-Nexis U.S. newspaper and wire database for articles on this subject between August 14, 2003, when the memorandum was issued, and September 10, 2003 returns 31 results

from newspapers throughout the country (see attached search results).

A New York Times editorial published on August 28, 2003, pinpointed a crucial concern about the legality of the memorandum urging prosecutors to contact members of Congress by noting that:

[o]ne member of Congress, Representative John Conyers Jr., a Michigan Democrat, has charged that Mr. Ashcroft's lobbying campaign, in which United States attorneys have been asked to participate, may violate the law prohibiting members of the executive branch from engaging in grassroots lobbying for or against Congressional legislation Instead of spin-doctoring the problem, Mr. Ashcroft should work with the [PATRIOT Act's] critics to develop a law that respects Americans' fundamental rights.

An Unpatriotic Act, N.Y. Times, August 25, 2003, at A14.

There is a particular urgency for the public to obtain information about the DOJ's efforts to influence Congress. The Washington Post noted in an editorial on August 23, 2003, that the memorandum is troubling on a number of levels:

[T]here's something a little unsettling about this mass deployment. Perhaps it's the wholesale and seemingly involuntary nature of the enterprise: the U.S. attorneys aren't requested to contact lawmakers or hold public meetings but instructed to do so, and given a handy form on which to report on their sessions with members Perhaps it's the sense that the prosecutors, while political and a part of a Republican administration, also ought to be at some remove from partisan politics Perhaps it's that the administration hasn't been nearly so accommodating about the importance of educating lawmakers and the public when it involves folks on the other side This campaign . . . uncomfortably blurs the line between law and politics.

Washington Post Editorial, August 23, 2003 at A22. It is vital, therefore, that the public obtain as much information about the DOJ's efforts to encourage federal prosecutors to contact Congress as possible to promote effective government oversight.

The purpose of EPIC's request is to obtain information directly relevant to the legitimacy of the DOJ's campaign to sway members of Congress. The records requested involve the manner in which the DOJ is engineering and conducting this campaign and clearly meet the standard for expedited processing.

Further, as I explain below in support of our request for "news media" treatment, EPIC is "primarily engaged in disseminating information."

Request for "News Media" Fee Status

EPIC is a non-profit, educational organization that routinely and systematically disseminates information to the public. This is accomplished through several means. First, EPIC maintains a heavily visited Web site (www.epic.org) that highlights the "latest news" concerning privacy and civil liberties issues. The site also features scanned images of documents EPIC obtains under the FOIA. Second, EPIC publishes a bi-weekly electronic newsletter that is distributed to over 15,000 readers, many of whom report on technology issues for major news outlets. The newsletter reports on relevant policy developments of a timely nature (hence the bi-weekly publication schedule). It has been published continuously since 1996, and an archive of past issues is available at our Web site. Finally, EPIC publishes and distributes printed books that address a broad range of privacy, civil liberties and technology issues. A list of EPIC publications is available at our Web site.

For the foregoing reasons, EPIC clearly fits the definition of "representative of the news media" contained in the FOIA and the DOJ regulations. Indeed, the U.S. District Court for the District of Columbia has held that EPIC is a "news media" requester under the FOIA. See Electronic Privacy Information Center v. Department of Defense, 241 F. Supp. 2d 5 (D.D.C. 2003). Based on our status as a "news media" requester, we are entitled to receive the requested records with only

duplication fees assessed under 28 CFR § 16.11(c)(2). Further, because disclosure of this information will "contribute significantly to public understanding of the operations or activities of the government," as described above, any duplication fees should be waived.

Thank you for your consideration of this request. As applicable Department regulations provide, I will anticipate your determination on our request for expedited processing within ten (10) calendar days. Should you have any questions about this request, please feel free to call me at 202-483-1140 ext. 112.

Under penalty of perjury, I hereby affirm that the foregoing is true and correct to the best of my knowledge.

Sincerely,

Marcia Hofmann
Staff Counsel*
DC Bar admission pending

