



VIA EMAIL
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November 18, 2016

FOIA/PA Unit
Criminal Division
Department of Justice
Suite 1127, Keeney Building
Washington, DC 20530-0001

Re: Freedom of Information Act Request

Dear FOIA Officer:

This letter constitutes a request under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and is submitted on behalf of the Electronic Privacy Information Center ("EPIC") to the Criminal Division in the Department of Justice.

Background

According to news reports, officials from the United States and the United Kingdom have developed a data transfer agreement (the "Agreement") that "enable[s] the British government to serve wiretap orders directly on U.S. communication firms for live intercepts in criminal and national security investigations involving its own citizens."¹ The Agreement also enables the British government "to serve orders [on US firms] to obtain stored data, such as emails."² According to the Washington Post, the Justice Department, along with the State Department, is responsible for negotiating the Agreement with the British government.³

¹ Ellen Nakashima and Andrea Peterson, *The British want to come to America — with wiretap orders and search warrants*, Wash. Post (Feb. 4, 2016), https://www.washingtonpost.com/world/national-security/the-british-want-to-come-to-america--with-wiretap-orders-and-search-warrants/2016/02/04/b351ce9e-ca86-11e5-a7b2-5a2f824b02c9_story.html. See also Jennifer Daskal, *A New UK-US Data Sharing Agreement: A Tremendous Opportunity, If Done Right*, Just Security (Feb. 8, 2016), <https://www.justsecurity.org/29203/british-searches-america-tremendous-opportunity/>; Alan Travis, *Secret report urges treaty forcing US web firms' cooperation in data sharing*, The Guardian (June 2, 2015), <https://www.theguardian.com/world/2015/jun/02/web-firms-data-sharing-secret-treaty>.

² *Id.*

³ Nakashima and Peterson ("[T]he White House gave the State and Justice departments the green light to begin the formal negotiations.").

The Washington Post, which reviewed a copy of the Agreement, reports that the text is “silent on the legal standard the British government must meet to obtain a wiretap order or a search warrant for stored data,” and that the British system “does not require a judge to approve search and wiretap warrants for surveillance based on probable cause.”⁴ “Instead,” noted the Post, “the home secretary, who oversees police and internal affairs, approves the warrant if that cabinet member finds that it is ‘necessary’ for national security or to prevent serious crime and that it is ‘proportionate’ to the intrusion.”⁵

Disclosure of the Agreement is critical to the understanding of how foreign governments access user data from US firms. Absent full disclosure of the Agreement, the public cannot be assured that, for example, data on US persons will not be collected by the British government.⁶

Documents Requested

EPIC seeks records pertaining to a data transfer agreement between the United States and the United Kingdom (the “Agreement”). Specifically, EPIC requests:

1. The final text of the Agreement;
2. All memoranda, policies, procedures, and guidelines for discussing, analyzing, and evaluating the Agreement;

Request for “News Media” Fee Status and Fee Waiver

EPIC is a “representative of the news media” for fee classification purposes.⁷ Based on EPIC’s status as a “news media” requester, EPIC is entitled to receive the requested record with only duplication fees assessed.⁸

Further, because disclosure of this information will “contribute significantly to public understanding of the operations or activities of the government,” any duplication fees should be waived.⁹ EPIC’s request satisfies the DOJ’s factors for granting a fee waiver.¹⁰ First, disclosure “is not primarily in [EPIC’s] commercial interest.”¹¹ EPIC is a registered non-profit organization committed to privacy, open government, and civil liberties.

Second, disclosure of the Agreement is “in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the

⁴ Nakashima and Peterson, *supra* note 1.

⁵ *Id.*

⁶ Daksal, *supra* note 1.

⁷ *EPIC v. Department of Defense*, 241 F. Supp. 2d 5 (D.D.C. 2003).

⁸ 5 U.S.C. § 552(a)(4)(A)(ii)(II).

⁹ § 552(a)(4)(A)(iii).

¹⁰ 28 C.F.R. § 16.10(k).

¹¹ § 16.10(k)(1)(ii).

government.”¹² Because this request pertains to an agreement with the US government, it speaks to “identifiable operations or activities of the Federal government.” Disclosure of records pertaining to the Agreement would be “meaningfully informative about government operations or activities,” because disclosure of responsive records, which are not in the public domain, would inform US firms about their legal obligations under the Agreement. Disclosure also “will contribute to the understanding of a reasonably broad audience of persons interested in the subject” because the Agreement impacts the obligations of all US firms that maintain international data. These obligations impact firms’ responsibility to adhere to their legal requirements, as well as their commitments to users on the privacy and security of data. Further, as the DOJ’s regulations note, “[i]t shall be presumed that a representative of the news media will satisfy this consideration.”¹³ As noted, EPIC is a “news media” organization under the FOIA. Lastly, because release of the Agreement and associated records will reveal law enforcement and national security obligations faced by US firms, as well as the implications of the privacy of user data on US soil, disclosure of the responsive records will enhance the public’s understanding “to a significant extent.”

For these reasons, a fee waiver should be granted.

Conclusion

Thank you for your consideration of this request. As provided in 5 U.S.C. § 552(a)(6)(E)(ii)(I), we will anticipate your determination on our request within 20 business days. For questions regarding this request we can be contacted at 202-483-1140 x123 or FOIA@epic.org.

Respectfully submitted,

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¹² § 16.10(k)(1)(i).

¹³ § 16.10(k)(2)(iii).