



June 11, 2010

VIA CERTIFIED MAIL
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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"). EPIC seeks agency records in the possession of the Department of Justice ("DOJ") concerning the Internet Stopping Adults Facilitating the Exploitation of Today's Youth Act 2009 ("Internet SAFETY Act 2009").¹

Background

In 1999, Eric Holder, the then Deputy Attorney General under the Clinton administration and now the current Attorney General spoke of data retention. Speaking at an International Conference in Vienna, Holder advocated data retention policy.² Holder said "certain data must be retained by ISPs for reasonable periods of time so that it can be accessible to law enforcement."³ The context was means with which to combat child pornography on the Internet.

In March 2001, the US submitted to the European Commission ("EU") "Comments of the United States Government on the European Commission Communication on Combating Computer Crime",⁴ wherein discussing data retention and preservation the DOJ stated "the United States has taken an approach that neither requires the destruction of critical data, nor mandates the general collection and retention of personal information..."⁵ In noting the importance of data retention for the purposes of criminal investigation, the Government highlights the importance of other societal interests including privacy through noting that

"Components within governments must collaborate among themselves to enact

¹ Internet Stopping Adults Facilitating the Exploitation of Today's Youth Act, H.R. 1076, 111 Cong. (2009).
 Internet Stopping Adults Facilitating the Exploitation of Today's Youth Act, S. 436, 111 Cong. (2009).

² Deputy A.G. Eric Holder, Remarks at the International Conference on Combating Child Pornography on the Internet (Sep. 29, 1999), available at <http://www.justice.gov/criminal/cybercrime/dageos.html>.

³ *Id.*

⁴ Department of Justice, *Comments of the United States Government on the European Commission Communication on Combating Computer Crime*, March 2001, available at http://www.cybercrime.gov/intl/USComments_CyberCom_final.pdf.

⁵ *Id.*

policies that strike the proper balance between protecting the public's safety, the privacy interests of our citizens, and the growth of the Internet as a tool for open communication and legitimate commerce.”⁶

In November 2001, Mark Richard of the Criminal Division of the DOJ, spoke at the EU Forum on Cybercrime in Brussels. He reiterated the US' approach to data retention insofar as not to require destruction of critical data and allowing the general collection and retention of personal information.⁷

Initially, the Bush administration generally opposed laws requiring data retention, citing “serious reservations about them.”⁸ After the European Parliament passed the EU Data Retention Directive⁹, administration officials began talking about the practice more favorably. On April 24 2005 officials from the DOJ held a private meeting with ISPs where the concept of data retention “...was raised not once but several times in the meeting, very emphatically,” said Dave McClure, president of the U.S. Internet Industry Association.¹⁰ On April 20, 2006, the then US Attorney General Alberto Gonzales called for reasonable data retention when speaking to staff at the National Center for Missing and Exploited Children headquarters.¹¹ On June 6, 2006, EPIC requested documents from the DOJ pertaining to data retention in light of Attorney General Gonzales's statements on April 20, 2006. On January 15, 2009, the DOJ produced one document to EPIC and withheld the other documents requested. On February 11, 2009 EPIC filed an administrative appeal, which was denied by the DOJ on July 22, 2009. On October 28, 2009, EPIC filed a further appeal, which was also denied by the DOJ on December 16, 2009. EPIC is currently pursuing this action.

In September 2006, Mr. Gonzales stated that Congress should require Internet providers to preserve customer records, noting that prosecutors need them to fight child pornography.¹² Both the Washington Post¹³ and CNet News note that Gonzales and FBI Director Robert Mueller met with several Internet providers on Friday, May 26, 2006, including Time Warner Inc.'s AOL, Comcast Corp., Google Inc., Microsoft Corp. and Verizon Communications Inc.¹⁴ In September 2006 a Data Retention Bill was proposed by Rep. Diana DeGette (D-CO).

It is worthy to note that the constitutional courts of two countries of the European Union have

⁶ *Id.*

⁷ ELECTRONIC PRIVACY INFORMATION CENTER ET. AL., Data Retention available at http://epic.org/privacy/intl/data_retention.html#usgovt.

⁸ *Id.*

⁹ Council Directive 2006/24/ (L/105/54) 1 (EC), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:105:0054:0063:EN:PDF>

¹⁰ Declan McCullagh, *Your ISP as Net Watchdog*, CNETNEWS.COM, June 16, 2005, available at http://news.cnet.com/Your-ISP-as-Net-watchdog/2100-1028_3-5748649.html?tag=mncol:txt.

¹¹ Anne Broache, *US Attorney General calls for 'Reasonable' Data Retention*, CNETNEWS.COM, April 20, 2006, available at http://news.cnet.com/U.S.-attorney-general-calls-for-reasonable-data-retention/2100-1030_3-6063185.html?tag=mncol:txt.

¹² Attorney General Alberto R. Gonzales, National Center for Missing and Exploited Children (NCMEC), Alexandria, Va., April 20, 2006, available at http://www.usdoj.gov/ag/speeches/2006/ag_speech0604202.html.

¹³ *Id.*

¹⁴ Declan McCullagh, *Gonzalez pressures ISPs on Data Retention*, CNETNEWS.COM, May 26, 2006, available at http://news.cnet.com/Gonzales-pressure-ISPs-on-data-retention/2100-1028_3-6077654.html?tag=mncol:txt.

overruled data retention laws deeming them unconstitutional. The Romanian constitutional court ruled on October 7, 2009 that a law, which would require mobile operators and ISPs to store communication data for six months, was unconstitutional.¹⁵ The case was brought to court by non-governmental organization Civil Society Commission following a civil court action against mobile operator Orange, the law violated article 28 of the Romanian constitution.¹⁶ Under article 28, "the secrecy of letters, telegrams and other postal communications, of telephone calls and other legal means of communication is inviolable."¹⁷ More recently on March 2, 2010, Germany's constitutional court overruled data retention law¹⁸ that had ordered that all data — except content — from phone calls and e-mail exchanges be retained for six months for possible use by criminal authorities.

On February 13, 2009 two new federal bills, The Internet SAFETY Act 2009 H.R. 1076, 111 Cong. (2009) and the Internet SAFETY Act 2009 S. 436, 111 Cong. (2009), "the bills", were proposed by Sen. John Cornyn (R-TX) and Rep. Lamar Smith (R-TX). The bills were introduced in both chambers without co-sponsors. These bills "require providers of electronic communication or remote computing services to retain certain user records for at least two years."¹⁹ The current status of both bills is as follows- the bill in the House of Representatives was referred to the Subcommittee on Crime, Terrorism, and Homeland Security, and is currently under review. The bill in the Senate has been read twice and is currently under review with the Committee on the Judiciary.

Documents Requested

EPIC requests the following agency records (including but not limited to electronic records):

1. Any internal memoranda and correspondence related to the Internet SAFETY Act 2009 H.R. 1076, 111 Cong. (2009) and the Internet SAFETY Act 2009 S. 436, 111 Cong. (2009).
2. Any legal analyses undertaken by the DOJ related to the Internet SAFETY Act 2009 H.R. 1076, 111 Cong. (2009) and the Internet SAFETY Act 2009 S. 436, 111 Cong. (2009).
3. Any correspondence between the DOJ and Sen. John Cornyn and Rep. Lamar Smith regarding the Internet SAFETY Act 2009 H.R. 1076, 111 Cong. (2009) and the Internet SAFETY Act 2009 S. 436, 111 Cong. (2009).

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

¹⁵ *Romania: Data Retention Law Declared Unconstitutional*, EDRI.ORG, 21 October, 2009, available at <http://www.edri.org/edriagram/number7.20/romania-data-retention-law-unconstitutional>.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Data retention unconstitutional in its present form*, March 2, 2010, available at <http://www.bundesverfassungsgericht.de/en/press/bvg10-011en.html>.

¹⁹ Internet SAFETY Act 2009 H.R. 1076, 111 Cong. § 5 (2009).
Internet SAFETY Act 2009 S. 436, 111 Cong. § 5 (2009).

heavily visited website (<http://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 nearly 20,000 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 website. 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 website.

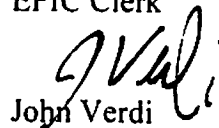
For the foregoing reasons, EPIC clearly fits the definition of “representative of the news media” contained in the FOIA and 6 C.F.R. § 5.11(b)(6). Indeed, the U.S. District Court for the District of Columbia has specifically held that EPIC is “primarily engaged in disseminating information” for the purposes of expedited processing,²⁰ and is a “representative of the news media” for fee waiver purposes.²¹ Based on our status as a “news media” requester, we are entitled to receive the requested records with only duplication fees assessed. 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 the FOIA provides, I will anticipate your determination on our request within twenty (20) working days. Should you have any questions about this request, please feel free to contact me at mcmahon@epic.org.

Sincerely,



Mark McMahon
EPIC Clerk



John Verdi
Director, EPIC Open Government Project

²⁰ *American Civil Liberties Union v. Department of Justice*, 321 F. Supp. 2d 24, 29 n.5 (D.D.C. 2004).

²¹ *Electronic Privacy Information Center v. Department of Defense*, 241 F. Supp. 2d 5 (D.D.C. 2003).