



May 14, 2013

**VIA FACSIMILE 202-514-0563**

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**Re: EPIC FOIA Request and Request for Expedited Processing –  
 Surveillance of Reporters**

Dear Ms. Farris:

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"). As detailed below, EPIC seeks Office of Legal Counsel ("OLC") memorandums and opinions concerning government access to electronic and text-based communications (including email and text messaging) under the Privacy Protection Act of 1980, 42 U.S.C. § 2000aa et. seq., 28 C.F.R. 50.10, and the Department of Justice statement of policy regarding the issuance of subpoenas to members of the news media, subpoenas for telephone toll records of members of the news media, and the interrogation, indictment, or arrest of, members of the news media" 28 C.F.R. § 50.10, 45 FR 76436 (1980).

**Background**

*Department of Justice Surveillance of the Associated Press*

On May 13, 2013, the Associated Press ("AP") reported that the United States Department of Justice ("DOJ") had secretly obtained two months of telephone records of AP journalists working in New York City, Washington, and Hartford.<sup>1</sup> The records included the work and personal phone numbers of individual reporters, general AP office phone numbers, and the AP phone number for its House of Representatives press gallery office. The DOJ seized records for over twenty phone lines, used in offices containing over one hundred journalists working on a

<sup>1</sup> *Gov't Secretly Obtained AP Phone Records in Probe*, Associated Press (May 13, 2013), available at <http://talkingpointsmemo.com/news/govt-secretly-obtained-wide-ap-phone-records-in-probe.php>. See also Mark Sherman, *Gov't Probe Obtains Wide Swath of AP Phone Records*, Associated Press (May 14, 2013), <http://bigstory.ap.org/article/govt-probe-obtains-wide-swath-ap-phone-records>; Charlie Savage and Leslie Kaufman, *Phone Records of Journalists Seized by U.S.*, N.Y. Times at A1 (May 14, 2013); Sari Horwitz, *Justice Dept. seized phone records of AP journalists*, Wash. Post at A1 (May 14, 2013).

massively broad array of subjects.<sup>2</sup> These reporters and editors routinely work on stories concerning government activities and many other matters.

While the government has not disclosed why it is seeking such a broad array of journalist's records, officials have previously discussed investigations into leaks and whistleblowing related to AP reporting.<sup>3</sup> The DOJ notified the AP on May 10, 2013 that it had obtained the records, but did not explain why. The DOJ's notification and AP's report do not indicate whether or not the government sought additional electronic communications records, such as emails or text-messages between reporters and sources.

"There can be no possible justification for such an overbroad collection of the telephone communications of The Associated Press and its reporters. These records potentially reveal communications with confidential sources across all the newsgathering activities undertaken by the AP during a two-month period, provide a road map to AP's newsgathering operations and disclose information about AP's activities and operations that the government has no conceivable right to know," said AP Chief Executive Officer Gary Pruitt in a letter of protest to Attorney General Eric Holder.<sup>4</sup>

Following the AP's disclosure of the DOJ's surveillance, many other news media organizations across the nation immediately reported on this massive invasive of journalist's privacy and independence, including The New York Times, Washington Post, USA Today, Boston Globe, NPR, Chicago Tribune, and Politico, among others.<sup>5</sup>

#### *The Privacy Protection Act of 1980 and DOJ Regulations on News Media Investigations*

The Privacy Protection Act of 1980 ("PPA"), codified at 42 U.S.C. § 2000aa et seq., protects journalists from being required to turn over to law enforcement any work product and documentary materials, including sources, before it is disseminated to the public. Journalists who most need the protection of the PPA are those that are working on stories that are highly controversial or about criminal acts because the information gathered may also be useful for law enforcement. For instance, a criminal suspect may talk openly to a journalist who promises not to print her name, but will not go to law enforcement for fear of arrest. While law enforcement

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<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> Mark Sherman, *Gov't Probe Obtains Wide Swath of AP Phone Records*, Associated Press (May 14, 2013), <http://bigstory.ap.org/article/govt-probe-obtains-wide-swath-ap-phone-records>.

<sup>5</sup> Charlie Savage and Leslie Kaufman, *Phone Records of Journalists Seized by U.S.*, N.Y. Times at A1 (May 14, 2013); Sari Horwitz, *Justice Dept. seized phone records of AP journalists*, Wash. Post at A1 (May 14, 2013); Roger Yu, *Feds Seize AP phone records for criminal probe*, USA Today (May 13, 2013), <http://www.usatoday.com/story/news/2013/05/13/justice-department-associated-press-telephone-records/2156521/>; Mark Sherman, *Gov't obtains wide AP phone records in probe*, Boston Globe (May 13, 2013), <http://www.boston.com/business/technology/2013/05/13/gov-obtains-wide-phone-records-probe/OaDUaBwhciiH1t0ZM4nk3N/story.html>; *Gov't Obtains Wide AP Phone Records in Probe*, NPR (May 13, 2013), <http://www.npr.org/templates/story/story.php?storyId=183700073>; Tabassum Zakaria and Susan Cornwell, *In uproar over U.S. seizure of AP records, focus turns to Holder*, Chicago Tribune (May 14, 2013), <http://www.chicagotribune.com/news/sns-rt-us-usa-justice-apbre94c0zw-20130513,0,2384590.story>; *Government seizes AP phone records*, Politico (May 13, 2013), <http://www.politico.com/blogs/media/2013/05/govt-seizes-ap-reporters-phone-records-163862.html>.

would like to obtain this type of information from a journalist, the PPA protects the journalist's freedom to publish such information under the First Amendment without government intrusion. Specifically, the PPA states that "[n]otwithstanding any other law, representatives of the government may not search a newsroom for the purpose of obtaining work product or documentary materials relating to a criminal investigation or criminal offense, if there is reason to believe that the work product belongs to someone who will publish it in a "public communication, in or affecting interstate or foreign commerce."<sup>6</sup>

The DOJ has issued regulations relating to subpoenaing records from journalists.<sup>7</sup> These regulations state, "Because freedom of the press can be no broader than the freedom of reporters to investigate and report the news, the prosecutorial power of the government should not be used in such a way that it impairs a reporter's responsibility to cover as broadly as possible controversial public issues."<sup>8</sup> The DOJ's regulations require law enforcement to use "all reasonable attempts" to obtain information without subpoenaing news media records, to negotiate with the news media, and to accommodate the interests of news media and the public. The Attorney General must expressly authorize all subpoenas for news media records and the material sought must be essential to an ongoing investigation. "The subpoena should not be used to obtain peripheral, nonessential, or speculative information."<sup>9</sup> The government must notify the subpoenaed news media member after their records have been collected.

#### *OLC Memorandums and Opinion*

The Office of Legal Counsel definitively interprets the law for the Executive Branch; its legal opinions are binding on all federal agencies.<sup>10</sup> "The Office drafts legal opinions of the Attorney General and also provides its own written opinions and oral advice" in response to Executive Branch requests.<sup>11</sup>

It would be the OLC's responsibility to draft legal memorandums and opinions interpreting the PPA and DOJ's news media regulations. In fact, OLC has written at least one opinion on 28 C.F.R. 50.10, dated January 15, 2009.<sup>12</sup>

To the extent that the DOJ may subpoena, either publically or in secret, journalist's communications beyond merely telephone records, such as emails or text messages, it would be the responsibility of the OLC to interpret the legality of those actions. In particular, it would be the responsibility of the OLC to interpret how requests for electronic and text-based

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<sup>6</sup> See also EPIC, *The Privacy Protection Act of 1980*, <https://epic.org/privacy/ppa/>.

<sup>7</sup> 28 C.F.R. 50.10 (2013).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at (f)(1).

<sup>10</sup> See Brief of *Amicus Curiae* EPIC in Support of Appellants, *New York Times Co. v. U.S. Dep't of Justice*, No. 13-0422 (2d. Cir. filed April 22, 2013), available at <https://epic.org/amicus/foia/new-york-times/EPIC-et-al-Amici-Brief.pdf>.

<sup>11</sup> U.S. Dep't of Justice, Off. of Legal Counsel, <http://www.justice.gov/olc/> (March 2013).

<sup>12</sup> See U.S. Dep't of Justice, Off. of the Inspector General, Oversight and Rev. Div., *A Review of the Federal Bureau of Investigation's Use of Exigent Letters and Other Informal Requests for Telephone Records*, at 112-113 (January 2010), available at <http://www.justice.gov/oig/special/s1001r.pdf>.

communications, such as emails and text messages, fit into the legal regime created by the PPA and the DOJ's news media regulations.

### Requested Documents

1. All legal analyses, memoranda, opinions, final decisions, and related records regarding the Privacy Protection Act of 1980, 42 U.S.C. § 2000aa et. seq., and electronic communications, including email and text messaging.
2. All legal analyses, memoranda, opinions, final decisions, and related records regarding 28 C.F.R. 50.10 and electronic communications, including email and text messaging.
3. All legal analyses, memoranda, opinions, final decisions, and related records regarding the ability of a law enforcement agency to access, subpoena, or otherwise obtain electronic communications of journalists and news media organizations, including email and text messaging.
4. The Office of Legal Counsel's January 15, 2009 opinion regarding 28 C.F.R. 50.10.

### Request for Expedited Processing

This request warrants expedited processing because it is made by “a person primarily engaged in disseminating information...” and because it pertains to a matter about which there is an “urgency to inform the public about an actual or alleged federal government activity.” 5 U.S.C. § 552(a)(6)(E)(v)(II) (2008); *Al-Fayed v. Cent. Intelligence Agency*, 254 F.3d 300, 306 (D.C. Cir. 2001).

EPIC is “primarily engaged in disseminating information.” *Am. Civil Liberties Union v. Dep't of Justice*, 321 F. Supp. 2d 24, 29 n.5 (D.D.C. 2004).

There is a particular urgency for the public to obtain information about the legal authority of law enforcement to obtain electronic communications of journalists. The DOJ's revelation that it has seized the telephone records of the Associated Press goes to the heart of the independence of the news media and their ability to inform the public on the activities of the government. The public's interest is evident from the many news stories that followed the AP's initial report.<sup>13</sup>

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<sup>13</sup> See, e.g., Charlie Savage and Leslie Kaufman, *Phone Records of Journalists Seized by U.S.*, N.Y. Times at A1 (May 14, 2013); Sari Horwitz, *Justice Dept. seized phone records of AP journalists*, Wash. Post at A1 (May 14, 2013); Roger Yu, *Feds Seize AP phone records for criminal probe*, USA Today (May 13, 2013), <http://www.usatoday.com/story/news/2013/05/13/justice-department-associated-press-telephone-records/2156521/>; Mark Sherman, *Gov't obtains wide AP phone records in probe*, Boston Globe (May 13, 2013), <http://www.boston.com/business/technology/2013/05/13/gov-obtains-wide-phone-records-probe/OaDUaBwhciiH1t0ZM4nk3N/story.html>; *Gov't Obtains Wide AP Phone Records in Probe*, NPR (May 13, 2013), <http://www.npr.org/templates/story/story.php?storyId=183700073>; Tabassum Zakaria and Susan Cornwell, *In uproar over U.S. seizure of AP records, focus turns to Holder*, Chicago Tribune (May 14, 2013), <http://www.chicagotribune.com/news/sns-rt-us-usa-justice-apbre94c0zw-20130513,0,2384590.story>; *Government seizes AP phone records*, Politico (May 13, 2013), <http://www.politico.com/blogs/media/2013/05/govt-seizes-ap-reporters-phone-records-163862.html>.

Given the urgency of the situation, it is vital that the public understand the DOJ's legal authority to obtain these records as well.

Request for "News Media" Fee Status

EPIC is a "representative of the news media" for fee waiver purposes. *EPIC v. Dep't 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 record 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," any duplication fees should be waived.

Conclusion

Thank you for your consideration of this request. As 5 U.S.C. § 552(a)(6)(E)(ii)(I) provides, I will anticipate your determination on our request within ten (10) calendar days. I can be contacted at 202-483-1140 x 123 or brody@epic.org.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'DB', with a long horizontal line extending to the right.

David Brody  
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