

September 29, 2010

VIA FAX  
 FOIA/PA Mail Referral Unit  
 Department of Justice  
 Room 115  
 LOC Building  
 Washington, DC 20530-0001

1718 Connecticut Ave NW  
 Suite 200  
 Washington DC 20009  
 USA  
 +1 202 483 1140 [tel]  
 +1 202 483 1248 [fax]  
 www.epic.org

**RE: Freedom of Information Act Request and Request for Expedited Processing**

To The Department of Justice 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 concerning the draft bill described in the September 27, 2010 New York Times article entitled “U.S. Tries to Make it Easier to Wiretap the Internet.”<sup>1</sup>

Background

On September 27, 2010, the New York Times reported that the Department of Justice (“DOJ”), the Federal Bureau of Information (“FBI”), and the National Security Agency (“NSA”) are currently developing new regulations for the Internet that would require “all services that enable communications — including encrypted e-mail transmitters like BlackBerry, social networking Web sites like Facebook, and software that allows direct “peer to peer” messaging like Skype — to be technically capable of complying if served with a wiretap order.”<sup>2</sup> This mandate would require that services allow the federal government to intercept and unscramble encrypted messages.<sup>3</sup>

The Washington Post corroborated the NY Times account and reported that law enforcement officials want social networking services to enable real-time access to content.<sup>4</sup> According to this article, law enforcement officials also want firms that offer

<sup>1</sup> Charlie Savage, *U.S. Tries to Make it Easier to Wiretap the Internet*, New York Times, September 27, 2010, [http://www.nytimes.com/2010/09/27/us/27wiretap.html?\\_r=1&ref=technology](http://www.nytimes.com/2010/09/27/us/27wiretap.html?_r=1&ref=technology).

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

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

<sup>4</sup> Ellen Nakashima, *U.S. Seeks Ways to Wiretap the Internet*, Washington Post, September 28, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/09/27/AR2010092706637.html>

encrypted communications to be able to provide them with decrypted "clear text," as well as design a service to allow interception of peer-to-peer communications, such as Skype.<sup>5</sup>

### Documents Requested

EPIC requests the following agency records in the possession of your agency:

1. The "draft bill" or "proposal" discussed in the September 27, 2010 New York Times article entitled "U.S. Tries to Make it Easier to Wiretap the Internet"<sup>6</sup> and;
2. All memorandums, communications, or analysis concerning this "draft bill" or "proposal."

### Request for Expedited Processing

This request warrants expedited processing because it is made by "a person primarily engaged in disseminating information ..." and 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. CIA*, 254 F.3d 300, 306 (D.C. Cir. 2001).

EPIC is "primarily engaged in disseminating information." *American Civil Liberties Union v. Department 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 this bill as it will be submitted to Congress in just a few months and potentially impacts all forms of electronic communications. The bill raises important questions about the security and privacy of Internet communications, and these documents are necessary in order for a proper public debate to occur.

### Request for "News Media" Fee Status

EPIC is a "representative of the news media" for fee waiver purposes. *EPIC 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 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.

### Upholding the President's Commitment to Transparency

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<sup>5</sup> *Id.*

<sup>6</sup> Charlie Savage, *U.S. Tries to Make it Easier to Wiretap the Internet*, New York Times, September 27, 2010, [http://www.nytimes.com/2010/09/27/us/27wiretap.html?\\_r=1&ref=technology](http://www.nytimes.com/2010/09/27/us/27wiretap.html?_r=1&ref=technology).

It is of particular concern that the Department of Justice process the EPIC FOIA request as expeditiously as possible

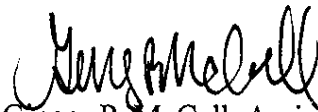
President Obama has made transparency and openness important goals of the administration.<sup>7</sup> The President has stated, "We will achieve our goal of making this administration the most open and transparent administration in history . . . by shining a light on the business conducted inside it."<sup>8</sup> The President also specifically declared that FOIA "should be administered with a clear presumption: In the face of doubt, openness prevails."<sup>9</sup>

Attorney General Eric Holder has made clear the obligation of federal agencies to fully implement a more transparent government.<sup>10</sup> The Attorney General stated, "An agency shall not withhold records merely because it can demonstrate, as a technical matter, that the records fall within the scope of a FOIA exemption."<sup>11</sup> The Attorney General also explained that if an "agency determines it cannot make full disclosure of a requested record, it must consider whether it can make partial disclosure," and that agencies must "work proactively and respond to requests promptly."<sup>12</sup>

EPIC's FOIA request regarding information in the possession of your agency that will impact the privacy and security of millions of Internet users is a test of this administration's commitment to openness and the rule of law.

We expect that you will respond to our request within ten (10) calendar days. 6 C.F.R. § 5.5(d)(4),

Sincerely,



Ginger P. McCall, Assistant Director  
EPIC Open Government Program

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<sup>7</sup> Department of Homeland Security, *Proactive Disclosure and Departmental Compliance with Subsection (a)(2) of the Freedom of Information Act (FOIA)*, [www.dhs.gov/xlibrary/assets/foia/foia\\_proactive\\_disclosure.pdf](http://www.dhs.gov/xlibrary/assets/foia/foia_proactive_disclosure.pdf).

<sup>8</sup> Id.

<sup>9</sup> Memorandum for the Heads of Executive Departments and Agencies, [http://www.whitehouse.gov/the\\_press\\_office/FreedomofInformationAct/](http://www.whitehouse.gov/the_press_office/FreedomofInformationAct/).

<sup>10</sup> Memorandum for the Heads of Executive Departments and Agencies, from The Attorney General, [www.justice.gov/ag/foia-memo-march2009.pdf](http://www.justice.gov/ag/foia-memo-march2009.pdf).

<sup>11</sup> Id.

<sup>12</sup> Id.