

VIA EMAIL

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Dear Mr. Koch:

This letter constitutes a request under the Freedom of Information Act (“FOIA”), 5 U.S.C. §552(a)(3), and is submitted on behalf of the Electronic Privacy Information Center (“EPIC”) to the Office of the Director of National Intelligence (“ODNI”).

**EPIC requests the public release of the ODNI-led report on the government’s purchase of data.** Information about the government’s purchase of data is critical to the public debate over government surveillance as Congress decides whether to reform Section 702 of the Foreign Intelligence Surveillance Act (“FISA”), 50 U.S.C. §1881a and other related intelligence authorities this year.

## Background

On March 8, during a Senate Select Committee on Intelligence (SSCI) hearing, Sen. Ron Wyden revealed that DNI Haines had “convened an outside panel to study and make recommendations related to the government’s purchase of data, including sensitive data on Americans” and that the panel had produced a “lengthy report” on that issue.<sup>1</sup> DNI Haines committed to having that report reviewed for the purpose of public release, noting that it absolutely should be released as long as there is not classified information contained therewithin.<sup>2</sup>

The government’s purchase of data about Americans is of widespread concern. Government agencies’ collection of personal data enables them to ability to track, arrest, deport, incarcerate, and even kill individuals. It is for precisely this reason that the government’s ability to collect personal data has been traditionally bound by constitutional restraints like the Fourth Amendment’s warrant requirement or statutory regimes like the Electronic Communications Privacy Act, the Stored Communications Act, or the Foreign Intelligence Surveillance Act.

As private companies have stockpiled more personal data—and increasingly sensitive types of personal data—intelligence agencies have increasingly relied on the private sector as a conduit through which it can obtain Americans’ information without traditional legal process. According to

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<sup>1</sup> *Worldwide Threats Before the Sen. Select Comm. on Intel.*, 118th Cong. (2023), available at <https://www.intelligence.senate.gov/hearings/open-hearing-worldwide-threats-3> [hereinafter SSCI Worldwide Threats Hearing].

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

media reports, government agencies buy significant amounts of data, including sensitive information about Americans.<sup>3</sup> Most recently, Federal Bureau of Investigations (FBI) Director Christopher Wray admitted that the FBI had previously purchased commercial database information that includes location data derived from internet advertising as part of a pilot program.<sup>4</sup>

In several rulings over the past decade, the Supreme Court has acknowledged the potential for total or near perfect surveillance using many of these types of personal data, and has reaffirmed Fourth Amendment protections in the context of an individual’s digital privacy. However, at least one intelligence agency—the Defense Intelligence Agency (“DIA”)—has interpreted recent Supreme Court quite narrowly, viewing these constitutional protections as inapplicable where the agency purchases Americans’ data.<sup>5</sup> The DIA is far from the only intelligence agency reported to have purchased Americans’ data, indicating that this artificially narrow interpretation may be shared by other agencies. However, there is no public transparency surrounding any interpretation by the ODNI regarding the applicability of Fourth Amendment protections to different types of data, nor any procedures relating to the purchase, retention, and use of purchased data. There is also no transparency into how the government estimates the unique value of purchased data, nor how it weighs any value derived from purchase data against the privacy and civil liberties risks associated with these purchases.

The public has a right to transparency concerning the Federal Government’s purchase of data, including sensitive data on Americans.

### Request for Expedited Processing

EPIC is entitled to expedited processing of this request under the FOIA.<sup>6</sup> Specifically, EPIC’s request satisfies the agency regulation 32 C.F.R. § 1700.12(c)(2) because it involves “[a]n urgency to inform the public about an actual or alleged Federal Government activity,” and because the request is “made by a person who is primarily engaged in disseminating information.”<sup>7</sup>

First, there is an “urgency to inform the public about an actual or alleged Federal Government activity.”<sup>8</sup> Recent events create a patent “urgency to inform the public” about the federal government’s purchase of data, including sensitive data about Americans. There is growing media scrutiny of government data purchases.<sup>9</sup> In response to these concerns, members of Congress

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<sup>3</sup> See Dell Cameron, *The FBI Just Admitted It Bought US Location Data*, WIRED (Mar. 8, 2023), <https://www.wired.com/story/fbi-purchase-location-data-wray-senate/>; Charlie Savage, *Intelligence Analysts Use U.S. Smartphone Location Data Without Warrants, Memo Says*, N.Y. TIMES (Jan. 22, 201), <https://www.nytimes.com/2021/01/22/us/politics/dia-surveillance-data.html>; Joseph Cox, *How the U.S. Military Buys Location Data from Ordinary Apps*, MOTHERBOARD (Nov. 16, 2020), <https://www.vice.com/en/article/jgqm5x/us-military-location-data-xmode-locate-x>.

<sup>4</sup> SSCI Worldwide Threats Hearing, *supra* note 1.

<sup>5</sup> See Savage, *supra* note 3.

<sup>6</sup> 5 U.S.C. §§ 552(a)(6)(E)(i)(I), 552(a)(6)(E)(v)(II).

<sup>7</sup> 32 C.F.R. §1700.12(c)(2).

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

<sup>9</sup> See *supra* note 3.

have introduced restrictions on the federal government’s ability to purchase certain types of data.<sup>10</sup> Additionally, government data purchases are a key part of Congress’s discussions surrounding FISA Section 702 and related intelligence surveillance ahead of Section 702’s expiration at the end of 2023. EPIC’s request thus satisfies the first standard for expedited processing because there is an urgency to inform the public of the report and recommendations arising out of ODNI’s review of government data purchases.

Second, as the Court explained in *EPIC v. DOD*, “EPIC satisfies the definition of ‘representative of the news media’” entitling it to preferred fee status under FOIA.<sup>11</sup> EPIC is a non-profit organization committed to privacy, open government, and civil liberties that consistently discloses documents obtained through FOIA on its website, EPIC.org, and its online newsletter, the *EPIC Alert*.<sup>12</sup>

In submitting this request for expedited processing, EPIC certifies that this explanation is true and correct to the best of its knowledge and belief.<sup>13</sup>

#### Request for “News Media” Fee Status and Fee Waiver

EPIC is a “representative of the news media” for fee classification purposes.<sup>14</sup> Based on EPIC’s status as a “news media” requester, EPIC is entitled to receive the requested record with only duplications fees assessed.<sup>15</sup>

In addition, because EPIC’s request satisfies each of the two alternative standards in 32 C.F.R. §1700.6(b) for granting a fee waiver, any duplication fees should also be waived.<sup>16</sup>

EPIC satisfies §1700.6(b)(1) because the “interest of the United States Government would be served.”<sup>17</sup> Given criticism of the Intelligence Community for misuse and abuse of surveillance technology, the fullest understanding of the government’s policies and procedures governing the purchase of Americans’ data is vital to securing U.S. confidence in the Intelligence Community.<sup>18</sup>

In the alternative, EPIC also satisfies §1700.6(b)(2) because disclosure is “in the public interest because it is likely to contribute significantly to public understanding of the operations or

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<sup>10</sup> Press Release, Ron Wyden, Wyden, Paul and Bipartisan Members of Congress Introduce the Fourth Amendment Is Not for Sale Act (Apr. 21, 2021), <https://www.wyden.senate.gov/news/press-releases/wyden-paul-and-bipartisan-members-of-congress-introduce-the-fourth-amendment-is-not-for-sale-act>.

<sup>11</sup> 241 F. Supp. 2d 5, 15 (D.D.C. 2003).

<sup>12</sup> See EPIC, *About EPIC*, <https://epic.org/epic/about.html>.

<sup>13</sup> 5 U.S.C. § 552(a)(6)(E)(vi); 32 C.F.R. §1700.12(b).

<sup>14</sup> *EPIC v. DOD*, 241 F. Supp. 2d 5, 15 (D.D.C. 2003).

<sup>15</sup> 5 U.S.C. § 552(a)(4)(A)(ii)(II); 32 C.F.R. §1700.6(i)(2).

<sup>16</sup> 32 C.F.R. §1700.12(b); 5 U.S.C. § 552(a)(4)(A)(iii).

<sup>17</sup> 32 C.F.R. §1700.6(b)(1).

<sup>18</sup> See Ashley Belanger, *Congressman Confronts FBI Over “Egregious” Unlawful Search of His Personal Data*, ARSTECHNICA (Mar. 10, 2023), <https://arstechnica.com/tech-policy/2023/03/congressman-confronts-fbi-over-egregious-unlawful-search-of-his-personal-data/>; Jule Pattison-Gordon, *Calls Mount for Blocking Warrantless Mass Data Collection*, GOV’T TECH. (July 20, 2022), <https://www.govtech.com/public-safety/calls-mount-for-blocking-warrantless-mass-data-collection>.

activities of the United States Government and is not primarily in the commercial interests of” EPIC, the requester.<sup>19</sup>

First, disclosure is “likely to contribute significantly to public understanding of the operations or activities of the United States Government.”<sup>20</sup> Because the request pertains to a report published by the ODNI regarding United States Government data purchases, it speaks to “operations or activities of the Federal government.”<sup>21</sup> Disclosure would “contribute significantly to public understanding” of those operations because there is no publicly available information about the scope and scale of government data purchases.<sup>22</sup> Disclosure of the records requested will provide the public with a better and more comprehensive understanding of the nature of the Federal Government’s purchases of Americans’ data. Disclosure will also provide the public with an insight into how federal agencies take into account Americans’ electronic privacy and Supreme Court precedent in weighing whether to purchase personal data and what safeguards to have in place.

Second, disclosure of the requested information is “not primarily in the commercial interest” of EPIC.<sup>23</sup> Again, EPIC is a non-profit organization committed to privacy, open government, and civil liberties.<sup>24</sup> As demonstrated above, EPIC is a news media requester and satisfies the public interest standard under agency regulations.

For these reasons, a fee waiver should be granted.

### Conclusion

Thank you for your consideration of this request. EPIC anticipates your determination on its request within ten calendar days.<sup>25</sup> For questions regarding this request contact Jeramie Scott at 202-483-1140 x108 or FOIA@epic.org, cc: [jscott@epic.org](mailto:jscott@epic.org).

Respectfully submitted,

/s Jeramie Scott

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<sup>19</sup> 5 U.S.C. § 552(a)(4)(A)(iii); 32 C.F.R. §1700.6(b)(2).

<sup>20</sup> 32 C.F.R. §1700.6(b)(2).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> See EPIC, *supra* note 12.

<sup>25</sup> 5 U.S.C. § 552(a)(6)(E)(ii)(I); 32 C.F.R. §1700.12(b).