

September 8, 2011

VIA FAX (202-514-1009)

Freedom of Information Appeal
Office of Information Policy
U.S. Department of Justice
Suite 11050
1425 New York Avenue, N.W.
Washington, D.C. 20530-0001

RE: Freedom of Information Act Appeal

Dear FOIA Appeals Officer:

This letter constitutes an appeal under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and is submitted to the Federal Bureau of Investigation ("FBI") on behalf of the Electronic Privacy Information Center ("EPIC").

On June 23, 2011, EPIC submitted to the FBI via facsimile a FOIA request regarding the government's identification and surveillance of individuals who have demonstrated support for or interest in WikiLeaks, as well as any documents relating to records obtained from Internet and financial services companies regarding these individuals. Specifically, EPIC requested:

1. All records regarding any individuals targeted for surveillance for support for or interest in WikiLeaks;
2. All records regarding lists of names of individuals who have demonstrated support for or interest in WikiLeaks;
3. All records of any agency communications with Internet and social media companies including, but not limited to Facebook and Google, regarding lists of individuals who have demonstrated, through advocacy or other means, support for or interest in WikiLeaks; and
4. All records of any agency communications with financial services companies including, but not limited to Visa, MasterCard, and PayPal, regarding lists of

individuals who have demonstrated, through monetary donations or other means, support or interest in WikiLeaks.

See Appendix 1 ("EPIC's FOIA Request").

Factual Background

On December 22, 2010, EPIC submitted FOIA requests to the Department of Justice ("DOJ"), the Secret Service, Immigration and Customs Enforcement ("ICE"), and the Financial Crimes Enforcement Network ("FinCEN"). These requests sought communications or agreements between the government and certain corporations regarding donations to WikiLeaks and personally identifiable information for individuals who accessed or attempted to access the WikiLeaks website. The request to the DOJ was referred to the Antitrust Division. As of June 9, 2011, none of the agencies have found or disclosed the records EPIC requested.

On November 28, 2010, WikiLeaks and cooperating news agencies published State Department cables allegedly provided by Pvt. Bradley Manning.¹ On November 29, Attorney General Eric Holder stated that DOJ was conducting a criminal investigation regarding WikiLeaks.² The government filed a sealed request pursuant to 18 U.S.C. § 2703(d) with federal magistrate judge Theresa C. Buchanan in the Eastern District of Virginia in Alexandria.³ On December 14, 2010, Judge Buchanan issued an order ("Twitter Order") pursuant to § 2703(d) compelling Twitter to disclose customer account information, including Internet Protocol addresses and addressing information associated with communications, for Julian Assange, Bradley Manning, Rop Gonggrijp, and Birgitta Jónsdóttir.⁴

The Twitter Order prohibited Twitter from disclosing the existence of the application or order to anyone.⁵ After contesting the seal, Twitter convinced the federal district court to unseal the order and allow Twitter to notify its users of the government's request for their information.⁶ On January 26, 2011, the Electronic Frontier Foundation and the American Civil Liberties Union filed a motion in the Eastern District of Virginia to overturn the Twitter Order, on behalf of Rop Gonggrijp, Birgitta Jónsdóttir, and Jacob Appelbaum (the only U.S. citizen among the plaintiffs).⁷ This litigation remains pending.⁸

¹ Robert Booth, *WikiLeaks Cables: Bradley Manning Faces 52 Years in Jail*, The Guardian, November 30, 2010, <http://www.guardian.co.uk/world/2010/nov/30/wikileaks-cables-bradley-manning>.

² Mark Memmott, *WikiLeaks Update: Justice Investigating*, National Public Radio, Nov. 29, 2010, <http://www.npr.org/blogs/thetwo-way/2010/11/29/131669228/wikileaks-update-justice-investigating>.

³ See *In re Application of the United States for an Order Pursuant to 18 U.S.C. § 2703(d)*, Misc. No. 10GJ3793 (E.D. Va. Dec. 14, 2010).

⁴ *Id.*

⁵ See *id.*

⁶ Order to Unseal the Order Pursuant to 18 U.S.C. § 2703(D), Misc. No. 10GJ3793 (E.D. Va. Jan. 5, 2011).

⁷ Motion to Vacate Dec. 14, 2010 Order, Misc. No. GJ3793 (E.D. Va. Jan. 26, 2011).

⁸ See *Government Demands for Twitter Records of Birgitta Jonsdottir*, Electronic Frontier Foundation, June 2, 2011, <https://www.eff.org/cases/government-demands-twitter-records>.

As evidence of surveillance of WikiLeaks supporters, Jacob Appelbaum, U.S. WikiLeaks spokesperson, and David House, close friend of Bradley Manning, have been stopped at the border by Customs and Border Patrol (“CBP”) agents when entering the United States and specifically questioned about their involvement with WikiLeaks.⁹ Appelbaum has been questioned at least twice at the border, and his electronic devices have been confiscated. The first time was on July 29, 2010 upon reentering the United States from the Netherlands.¹⁰ When he was questioned a second time on January 10, 2011 upon return from Iceland, he traveled with no electronic equipment, causing the customs agents to be “visibly unhappy.”¹¹ The CBP agents also indicated they had viewed his Twitter feed ahead of his flight to obtain his flight details.¹² On July 31, 2010, plainclothes FBI agents questioned Appelbaum after he gave a speech at Defcon.¹³ All of the questioning by FBI and DHS focused on his personal views on and work with WikiLeaks.¹⁴

The Washington Post reported that DHS agents at Chicago O'Hare International Airport detained David House and seized his laptop on November 3, 2010.¹⁵ David House created the Bradley Manning Support Network, a defense fund for Bradley Manning.¹⁶ An agent from the FBI Joint Terrorism Task Force questioned David House about his relationship with Manning and WikiLeaks.¹⁷ In an interview with *The Washington Post*, David House claimed he had been stopped and questioned at the border seven times since September and he believes his name is on a government watchlist.¹⁸

There has been widespread suspicion that other online services such as Facebook and Google were served with similar court orders requesting information on WikiLeaks supporters, though neither company has confirmed the existence of such an order.¹⁹ The broad nature of the Twitter Order and the silence of other companies that were likely served with a similar sealed order suggest that DOJ, FBI, DHS, and CBP may be conducting surveillance of WikiLeaks supporters.

⁹ Glenn Greenwald, *Government Harrassing and Intimidating Bradley Manning Supporters*, Salon, Nov. 9, 2010, http://www.salon.com/news/opinion/glenn_greenwald/2010/11/09/manning.

¹⁰ Elinor Mills, *Researcher Detained at U.S. Border, Questioned about WikiLeaks*, CNET, July 31, 2010, http://news.cnet.com/8301-27080_3-20012253-245.html

¹¹ Xenii Jardin, *Wikileaks Volunteer Detained and Searched (again) by US Agents*, Boing Boing, Jan. 12, 2011, <http://www.boingboing.net/2011/01/12/wikileaks-volunteer-1.html>.

¹² *Id.*

¹³ Elinor Mills, *Researcher Detained at U.S. Border, Questioned about WikiLeaks*, CNET, July 31, 2010, http://news.cnet.com/8301-27080_3-20012253-245.html

¹⁴ *Id.*

¹⁵ Ellen Nakashima, *Activist Who Supports Soldier in WikiLeaks Case Sues U.S. over Seizure of Laptop*, *The Washington Post*, May 13, 2011, http://www.washingtonpost.com/national/activist-who-supports-soldier-in-wikileaks-case-sues-us-over-seizure-of-laptop/2011/05/11/AFxxzf1G_story.html.

¹⁶ Glenn Greenwald, *Government Harrassing and Intimidating Bradley Manning Supporters*, Salon, Nov. 9, 2010, http://www.salon.com/news/opinion/glenn_greenwald/2010/11/09/manning.

¹⁷ *Id.*

¹⁸ Nakashima, *supra* note 15.

¹⁹ Peter Beaumont, *WikiLeaks Demands Google and Facebook Unseal US Subpoenas*, *The Guardian*, Jan. 8, 2011, <http://www.guardian.co.uk/media/2011/jan/08/wikileaks-calls-google-facebook-us-subpoenas>.

Procedural Background

On June 23, 2011, EPIC sent EPIC's FOIA Request to the Federal Bureau of Investigation. *See* Appendix 1. The FOIA Request was sent via facsimile to (240) 868-4997. *See* Appendix 2 ("Fax Receipt"). The FBI received EPIC's FOIA Request on June 23, 2011. *See* Appendix 2.

On July 11, 2011, the FBI mailed a letter to EPIC in response to EPIC's FOIA Request. *See* Appendix 3 ("FBI Letter"). The FBI Letter assigned the request the Request Number 1169306-000 and stated that the agency's search of the indices of its Central Records System for "Wikileaks" did not return responsive main file records. *See* Appendix 3.

EPIC Appeals the FBI's Failure to Disclose Records

EPIC is appealing the FBI's failure to disclose relevant records in its possession. The FBI Letter states that the agency conducted a search of the indices of its Central Records Systems for the term "Wikileaks" but did not "identify responsive main file records." *See* Appendix 3. Because the FBI possesses records relevant to EPIC's FOIA Request, the agency's failure to disclose any relevant records is evidence of an insufficient search.

As described in detail above, the FBI possesses records relevant to EPIC's FOIA Request. On November 29, 2010, Attorney General Eric Holder publicly announced that the Department of Justice had initiated a criminal investigation regarding WikiLeaks.²⁰ On December 14, 2010, Judge Buchanan of the U.S. District Court for the Eastern District of Virginia issued an order pursuant to 18 U.S.C. § 2703(d) compelling Twitter to disclose customer account information associated with WikiLeaks supporters Rop Gonggrijp, Birgitta Jónsdóttir, and Jacob Appelbaum.²¹ On June 15, 2011, David House appeared before a grand jury convened in the U.S. District Court for the Eastern District of Virginia and a U.S. Attorney questioned him about his alleged support for WikiLeaks. Because the FBI is the "principle investigative arm of the United States Department of Justice," there is a substantial likelihood that the FBI possesses records related to the Department of Justice's criminal investigation of individuals associated with WikiLeaks.²²

Contact between the FBI and WikiLeaks supporters is further evidence that the FBI possesses records relevant to EPIC's FOIA Request. The *New York Times* reported in December 2010 that FBI agents seized a hard drive from Adrian Lamo, an individual

²⁰ Mark Memmott, *WikiLeaks Update: Justice Investigating*, National Public Radio, Nov. 29, 2010, <http://www.npr.org/blogs/thetwo-way/2010/11/29/131669228/wikileaks-update-justice-investigating>.

²¹ *See In re Application of the United States for an Order Pursuant to 18 U.S.C. § 2703(d)*, Misc. No. 10GJ3793 (E.D. Va. Dec. 14, 2010).

²² Federal Bureau of Investigation, About Us: Frequently Asked Questions, <http://www2.fbi.gov/aboutus/faqs/faqsone.htm> (last visited Aug. 1, 2011).

who had communicated with Bradley Manning online, as part of the Department of Justice's WikiLeaks investigation.²³ David House, who is associated with the Bradley Manning Support Network, claims that on November 3, 2010, an FBI Joint Terrorism Task Force agent stopped him at Chicago O'Hare International Airport, seized his laptop, and asked him questions about WikiLeaks.²⁴ In addition, Jacob Appelbaum has alleged that FBI agents questioned him about WikiLeaks on July 31, 2010, after he spoke at Defcon.²⁵ The FBI possesses records related to the contact its agents have had with WikiLeaks supporters, and these records are responsive to EPIC's FOIA Request.

EPIC has attached copies of press releases made available on the FBI web site on January 27, 2011, and July 19, 2011. *See* Appendix 4 ("January 27 Press Release"); Appendix 5 ("July 19 Press Release"). The January 27 Press Release and July 19 Press Release are evidence of an ongoing FBI investigation of WikiLeaks supporters that commenced prior to January 27, 2011. The January 27 Press Release stated that the FBI executed more than forty search warrants in the investigation regarding cyber attacks "in protest" of actions of U.S. companies, referring to the activities of WikiLeaks supporters.²⁶ The July 19 Press Release, issued by the U.S. Attorney's Office for the Northern District of California states that FBI agents arrested sixteen individuals for alleged involvement in a cyber attack against PayPal "in retribution for PayPal's termination of WikiLeaks' donation account." *See* Appendix 5. Furthermore, MSNBC reported that, on December 15, 2010, PayPal provided to the FBI a list of approximately 1,000 Internet protocol addresses associated with cyber attacks against PayPal.²⁷ This "collaboration" between PayPal and the FBI led to the FBI's arrests of sixteen WikiLeaks supporters on July 19, 2011.²⁸

The examples provided above are sufficient to establish that the FBI has failed to fulfill its statutory obligation under FOIA to provide records in its possession responsive to the request. *See* 5 U.S.C. § 552(a)(3)(A). Because the FBI is conducting an investigation of WikiLeaks supporters and information about this investigation—including explicit references to WikiLeaks—appears on the FBI web site, the failure of the FBI to find and disclose records related to this investigation demonstrates that the search the agency conducted was insufficient. The FBI is required to comply with FOIA and disclose responsive documents.

²³ Charlie Savage, *U.S. Tries to Build Case for Conspiracy by WikiLeaks*, N.Y. Times, Dec. 15, 2010, <http://www.nytimes.com/2010/12/16/world/16wiki.html>.

²⁴ Ellen Nakashima, *Activist Who Supports Soldier in WikiLeaks Case Sues U.S. over Seizure of Laptop*, The Washington Post, May 13, 2011, http://www.washingtonpost.com/national/activist-who-supports-soldier-in-wikileaks-case-sues-us-over-seizure-of-laptop/2011/05/11/AFxxzf1G_story.html.

²⁵ Elinor Mills, *Researcher Detained at U.S. Border, Questioned about WikiLeaks*, CNET, July 31, 2010, http://news.cnet.com/8301-27080_3-20012253-245.html

²⁶ Charlie Savage, *F.B.I. Warrants Into Service Attacks by WikiLeaks Supporters*, N.Y. Times, Jan. 27, 2011, <http://www.nytimes.com/2011/01/28/us/28wiki.html>.

²⁷ Athima Chansanchai, *PayPal Sent FBI List That Led to Anonymous Raids*, MSNBC.com, Aug. 1, 2011, http://technolog.msnbc.msn.com/_news/2011/08/01/7180192-paypal-sent-fbi-list-that-led-to-anonymous-raids.

²⁸ *Id.*

It is the burden of the FBI to conduct a sufficient search. A single search for the term "Wikileaks" within the main file records of the FBI's Central Records System is insufficient to comply with the requirements of the Freedom of Information Act, 5 U.S.C. § 552. Although the FBI Letter directs EPIC to provide "additional information" and the agency will conduct an "additional search," it is not EPIC's responsibility to determine the specific search terms and databases that must be used to find the records relevant to EPIC's FOIA Request. *See* Appendix 3. However, as described in EPIC's FOIA Request, relevant records may include terms such as "Julian Assange," "Rop Gonggrijp," "Birgitta Jónsdóttir," "Jacob Appelbaum," "David House," "PayPal," "Visa," "MasterCard," "Twitter," "Google," and "Facebook." It should be noted that these search terms are provided as examples and are not presented as an all-inclusive list of search terms that the FBI must employ in order to comply with EPIC's FOIA Request.

EPIC Renews Its Request for "News Media" Fee Status

EPIC is a non-profit, educational organization that routinely and systematically disseminates information to the public. EPIC is a representative of the news media. *Elec. Privacy Info. Ctr. v. U.S. Dep't of Def.*, 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 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.

Conclusion

Thank you for your prompt response to this appeal. As provided in 5 U.S.C. § 552(a)(6)(A)(ii), I anticipate that you will produce responsive documents within twenty (20) working days of receipt of this appeal. If you have any questions, please feel free to contact Ginger McCall at (202) 483-1140 or mccall@epic.org.

Respectfully submitted,

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Open Government Counsel, EPIC