

**FOIA REQUEST APPEAL**

November 20, 2013

VIA CERTIFIED MAIL

Executive Office of the President
 Office of National Drug Control Policy
 Office of Legal Counsel
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Re: Freedom of Information Act Appeal

Dear FOIA Officer:

This letter constitutes an appeal under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and is submitted on behalf of the Electronic Privacy Information Center ("EPIC") to the White House Office of National Drug Control Policy ("ONDCP").

EPIC seeks documents concerning Hemisphere, which is a U.S. government program that allows law enforcement personnel in multiple agencies to access billions of phone records of AT&T customers, as well as any non-customers whose communication is routed through an AT&T switch.¹ Hemisphere is the largest telephone record collection program reported to date.²

EPIC submitted a FOIA Request to ONDCP on September 25,³ which was received by the Agency on October 1.⁴ As of November 20, EPIC has not received any response or acknowledgment from the agency. EPIC is appealing the failure of ONDCP to respond to EPIC's FOIA Request.

ONDCP's Lack of Responsiveness Violates Executive Branch Policy

On his second day in office, President Barack Obama issued a memorandum about the Freedom of Information Act in which he declared, "In our democracy, the Freedom of Information Act (FOIA), which encourages accountability through transparency, is the most prominent expression of a profound national commitment to ensuring an open Government. At the heart of that commitment is the idea that accountability is in the interest of the Government

¹ Evan Perez, *DEA Program Linked to Vast AT&T Database*, CNN, Sept. 2, 2013, <http://security.blogs.cnn.com/2013/09/02/dea-program-linked-to-vast-att-database-documents-show/>

² Scott Shane & Colin Moynihan, *Drug Agents Use Vast Phone Trove, Eclipsing N.S.A.'s*, N.Y. TIMES, Sept. 2, 2013, at A1, also available at http://www.nytimes.com/2013/09/02/us/drug-agents-use-vast-phone-trove-eclipsing-nsas.html?pagewanted=all&_r=0

³ Appendix 1.

⁴ Appendix 2.

and the citizenry alike.” Memorandum of January 21, 2009—Transparency and Open Government, 74 Fed. Reg. No. 15, 4681-4682 (January 26, 2009).⁵ On the issue of timeliness, the President stated that “[i]n responding to requests under the FOIA, executive branch agencies (agencies) should act promptly and in a spirit of cooperation, recognizing that such agencies are servants of the public.” *Id.*

Echoing the President’s commitment to transparency and timeliness, Attorney General Eric Holder followed up not two months later, declaring that “[o]pen government requires agencies to work proactively and respond to requests promptly. ... When information not previously disclosed is requested, agencies should make it a priority to respond in a timely manner. Timely disclosure of information is an essential component of transparency.” Memorandum from Attorney General Eric Holder for the Heads of Executive Departments and Agencies re: Transparency and Open Government (Mar. 19, 2009).

ONDCP’s non-responsiveness violates the policy of the executive branch, as stated by the President and Attorney General of the United States.

ONDCP’s Lack of Responsiveness Violates the Agency’s Legal Obligation

The FOIA provides that ONDCP must “determine within 20 days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall [1] immediately notify the person making such request of such determination and [2] the reasons therefor, and [3] of the right of such person to appeal to the head of the agency any adverse determination.” 5 U.S.C. § 552 (a)(6)(A)(i).

Similarly, ONDCP regulations provide that “[t]he General Counsel, or designee, will determine within 20 days (excepting Saturdays, Sundays and legal public holidays) after the receipt of a FOIA request whether it is appropriate to grant the request and will provide written notification to the person making the request. If the request is denied, the written notification will include the names of the individuals who participated in the determination, the reasons for the denial, and that an appeal may be lodged within the Office of National Drug Control Policy.” 21 C.F.R. § 1401.7

The D.C. Circuit has examined this element of the FOIA and confirmed that the plain meaning of the statute is the legal meaning, stating in *Citizens for Responsibility & Ethics in Washington v. FEC*, 711 F.3d 180, 186 (D.C. Cir. 2013), that “within [20 days], the agency must at least [1] inform the requester of the scope of the documents that the agency will produce, as well as [2] the scope of the documents that the agency plans to withhold under any FOIA exemptions.” The Court further explained that “the agency must at least: (i) gather and review the documents; (ii) determine and communicate the scope of the documents it intends to produce and withhold, and the reasons for withholding any documents; and (iii) inform the requester that it can appeal whatever portion of the ‘determination’ is adverse.” *Id.* at 188.

⁵ Available at http://www.whitehouse.gov/the_press_office/FreedomofInformationAct/.

ONDCP has not made a determination regarding EPIC's FOIA request within the statutorily required twenty-day period, which passed on November 14, 2013.⁶ More specifically, the Agency has not notified EPIC of: 1) the documents it will produce; 2) the scope of the documents it plans to withhold; or 3) EPIC's right to appeal the adverse portions of the Agency's determination.

Thus, as of November 20, ONDCP has not made a determination on this request, as required by statute, and has therefore failed to comply with the FOIA.

EPIC Renews Its Request for Expedited Processing

Both the FOIA and ONDCP regulations require "that a determination of whether to provide expedited processing shall be made, and notice of the determination shall be provided to the person making the request, within 10 days after the date of the request." 5 U.S.C. § 552(a)(6)(E)(ii). See also 21 C.F.R. § 1401.6

Expediting processing is to be granted where two conditions are met. First, the request must be made by an organization "primarily engaged in disseminating information." 5 U.S.C. § 552(a)(6)(E)(v)(II); *Al-Fayed v. CIA*, 254 F.3d 300, 306 (D.C. Cir. 2001) ("*Al-Fayed*"). Second, the request must cover information about which there is an "urgency to inform the public about an actual or alleged federal government activity." *Id.*

First, EPIC is an organization "primarily engaged in disseminating information." *ACLU v. DOJ*, 321 F. Supp. 2d 24, 29 n.5 (D.D.C. 2004) (finding that EPIC is a "representative of the news media" because it "gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into distinct work, and distributes that work to an audience").

Second, the D.C. Circuit Court has stated that in determining whether there is an urgency to inform the public about government activity, and thus a compelling need for exigent disclosure, three factors are relevant: "(1) whether the request concerns a matter of current exigency to the American public; (2) whether the consequences of delaying a response would compromise a significant recognized interest; and (3) whether the request concerns federal government activity." *Al-Fayed* at 306.

In *Al-Fayed*, the Court found that records related to the deaths of Princess Diana and Dodi Al Fayed did not require urgent release, because "[a]ll of the events and alleged events occurred two to three years before plaintiffs made their requests for expedited processing." *Id.* Additionally, the Court noted that "[t]here [was] no evidence in the record that there is substantial interest, either on the part of the American public or the media, in this particular aspect of plaintiffs' allegations." *Id.* at 311.

Similarly, in *Wadelton v. Department of State (Wadelton)*, 13-0412 ESH, 2013 WL 1760853 (D.D.C. Apr. 25, 2013), a District Court in the D.C. Circuit considered a request for documents related to the dismissal of a Foreign Service officer. In finding that the documents

⁶ EPIC added 11 days for the government shutdown; the technical 20-day statutory deadline expired on Oct. 30.

were not a “matter of a current exigency to the American public,” the court noted that the OIG investigation of the issue was two years old and that media interest was limited to a specialized Blog relevant to only a few thousands Americans.

The *Wadelton* Court noted that “courts have found a ‘compelling need’ to exist when the subject matter of the request was central to a pressing issue of the day,” including “renewal of the USA Patriot Act” (*ACLU v. DOJ*, 321 F.Supp.2d 24 (D.D.C.2004)), “a breaking news story about domestic surveillance of anti-war protesters,” (*ACLU of N. Cal. v. DOD*, No. C 06–1698, 2006 WL 1469418 (N.D.Cal. May 25, 2006)), and “and an active debate over the reauthorization of certain Voting Rights Act provisions” (*Leadership Conference on Civil Rights v. Gonzales*, 404 F.Supp.2d 246 (D.D.C.2005)). *Id.*

The issue of news coverage is especially critical to courts determining whether a “compelling need” exists for expedited FOIA processing. The D.C. Circuit stated in *Al-Fayed* that “the ultimate conclusion will often rest on important underlying facts: for example, the credibility of a claimant’s allegations regarding governmental activity, the existence of a threat to physical safety, or whether an issue is the subject of current news coverage.” *Al-Fayed* at 308 (emphasis added).

The *Wadelton* Court noted that “[i]n cases where compelling need was found, plaintiffs ‘cited numerous articles and reports, including many in mainstream news sources such as the New York Times, the Washington Post, the Los Angeles Times, and/or the San Francisco Chronicle.’” See also *Edmonds v. FBI*, CIV.A. 02-1294 (ESH), 2002 WL 32539613 (D.D.C. Dec. 3, 2002) (a “flurry of articles and television coverage, which has continued at least until last month” indicates “matters of wider public concern”).

EPIC’s request meets the “compelling need” standard for expedited processing, as set out and applied in *Al-Fayed* and its progeny. In contrast to the records requested in *Al-Fayed* and *Wadelton*, but in alignment with the records requested in cases where courts have found a compelling need, Hemisphere is “breaking news of the day” similar to renewal of the USA Patriot Act, surveillance of anti-war protesters, and reauthorization of elements of the Voting Rights Act. There are current Congressional hearings and a Presidential panel looking at electronic surveillance, and there has been extensive and recent news media coverage of Hemisphere at the highest levels, including the front page of the *New York Times*.⁷

As discussed in more detail in EPIC’s FOIA request,⁸ the U.S. Congress is currently debating the scope of government surveillance. At least fifteen bills that that would limit the scope of government surveillance have been introduced in Congress, members of Congress have released numerous press releases about the issue, and Congressional hearings are ongoing in multiple committees.

Electronic government surveillance is of immediate concern in the executive branch as well. President Obama has convened “a high-level group of outside experts to review our entire intelligence and communications technologies [to] make sure that there absolutely is no abuse in

⁷ Shane & Moynihan, *supra* note 2.

⁸ Appendix I.

terms of how these surveillance technologies are used.” Interview with the News Media, 2013 DCPD 00562 (August 9, 2013) (emphasis added).⁹ That group is currently working on a report that is due by year’s end, with a goal of explaining “how these programs impact our security, our privacy, and our foreign policy.” *Id.*

Some of the most prominent media outlets in the United States have noted the immediate importance of Hemisphere to the national discussion about government surveillance. For example, the Associated Press stated, “The details of the Hemisphere Project come amid a national debate about the federal government’s access to phone records, particularly the bulk collection of phone records for national security purposes.”¹⁰ NBC News explained, “The pool grows by billions of calls a day, includes information on the location of callers, and is larger than the controversial database maintained by the NSA...”¹¹ According to CNN, “The documents surface amid controversy over government surveillance programs ... that collect phone, e-mail and other records in an effort to thwart terror attacks.”¹² ABC News was concerned that AT&T customers who were under surveillance were not aware of subpoenas for their records and could not challenge them.¹³ The *New York Times* explained, “The scale and longevity of the data storage appears to be unmatched by other government programs, including the N.S.A.’s gathering of phone call logs under the Patriot Act ... Daniel C. Richman, a law professor at Columbia ... said the program at least touched on an unresolved Fourth Amendment question: whether mere government possession of huge amounts of private data, rather than its actual use, may trespass on the amendment’s requirement that searches be ‘reasonable.’ Even though the data resides with AT&T, the deep interest and involvement of the government in its storage may raise constitutional issues, he said.”¹⁴ The *Philadelphia Inquirer* opined about Hemisphere, “The net [spy agencies] use to troll for information is too wide, and too likely to cause unwarranted violations of Americans’ right to privacy. Now comes news that it isn’t just the National Security Agency that, in its pursuit of terrorists possibly plotting mayhem, uses this scattershot approach to domestic targets.”¹⁵

In order to comment on the privacy and other issues raised by Hemisphere as the conversation about government electronic surveillance continues across the country and at the highest levels, the public should have expeditious access to information about the scope of and legal authority for the program, as well as how call detail records are used, the adequacy of privacy safeguards, and other privacy implications.

⁹ Available at <http://www.whitehouse.gov/the-press-office/2013/08/09/remarks-president-press-conference>.

¹⁰ Gene Johnson & Eileen Sullivan, *Drug Agents Plumb Vast Database of Call Records*, ASSOCIATED PRESS, Sept. 3, 2013, <http://www.businessweek.com/ap/2013-09-02/drug-agents-plumb-vast-database-of-call-records..>

¹¹ Richard Esposito, *DEA phone call database bigger than NSA’s*, NBC NEWS, Sept. 2, 2013, <http://investigations.nbcnews.com/news/2013/09/02/20293683-dea-phone-call-database-bigger-than-nsa?lite>.

¹² Perez, *supra* note 1.

¹³ Mike Levine, *DEA Puts Phone Company Inside Government Offices*, ABC NEWS, Sept. 1, 2013, <http://abcnews.go.com/blogs/headlines/2013/09/dea-program-puts-phone-company-inside-government-offices/> (“Asked whether AT&T customers should have more of an opportunity to respond to subpoenas for their information under Hemisphere, the official noted that AT&T can challenge a subpoena under Hemisphere, just as the company can with subpoenas outside Hemisphere. In those cases, the customer is not immediately aware of the subpoena to challenge it either.”).

¹⁴ Shane & Moynihan, *supra* note 2.

¹⁵ *Inquirer Editorial: Data trolling violates rights*, PHILADELPHIA ENQUIRER, Sept. 5, 2013, http://articles.philly.com/2013-09-05/news/41769068_1_phone-records-phone-call-drug-dealers.

EPIC Renews Its Request for News Media Fee Status

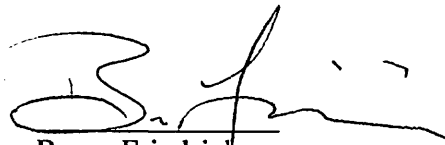
EPIC is a representative of the news media. *EPIC v. DOD*, 241 F.Supp. 2d 5 (D.D.C. 2003). Based on our status as a news media requester, we are entitled to receive the requested records with only duplication fees assessed.

Further, because disclosure of this information will “contribute significantly to public understanding of the operations or activities of the government,” 5 U.S.C. § 552(a)(4)(A)(iii), as described above, any duplication fees should be waived.

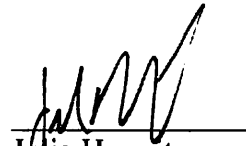
Conclusion

Thank you for your prompt response to this appeal. As the FOIA provides, we anticipate that you will produce responsive documents within twenty (20) calendar days. We can be contacted at 202-483-1140, x 120, or FOIA@epic.org.

Sincerely,



Bruce Friedrich
EPIC Extern



Julia Horwitz
EPIC Open Government Coordinator

Attachments:

Appendix 1: EPIC's FOIA Request.

Appendix 2: Confirmation of Agency Receipt.