



September 25, 2013

VIA CERTIFIED MAIL

Jonathan Cantor, Chief FOIA Officer
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Re: Freedom of Information Act Request

Dear Mr. Cantor,

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”) to the Department of Homeland Security (“DHS”).

EPIC seeks records related to the Hemisphere Program, as detailed below.

Background

Earlier this month, the *New York Times* reported on a previously secret government program called “Hemisphere,” which has been in operation since at least 2007.¹ Hemisphere 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.² The data is accessed primarily for counternarcotics investigations, but is also used for a variety of other law enforcement activities.³ The program is funded by the Drug Enforcement Agency (“DEA”) and the White House’s Office of National Drug Control Policy.⁴

Details of the Hemisphere program are set out in a PowerPoint training presentation.⁵ The PowerPoint explains that Hemisphere supplies “electronic call detail records (CDRs)” in response to both administrative and grand jury subpoenas.⁶ Every day, AT&T adds 4 billion new

¹ 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

² 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/>

³ Shane & Moynihan, *supra* note 1.

⁴ 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/>

⁵ Shane & Moynihan, *supra* note 1.

⁶ PowerPoint: *Los Angeles Hemisphere, High Intensity Drug Trafficking Area*, at 2, available at <http://s3.documentcloud.org/documents/782287/database.pdf>

records to the Hemisphere database.⁷ Hemisphere participants are supplied with training modules⁸ and fill out standardized subpoena request forms.⁹

A government subpoena to AT&T will retrieve CDRs on calls made as recently as one hour before the request was approved, and as far back as 1987.¹⁰ For the period and region covered by the PowerPoint, 96 percent of requests came from either the DEA or DHS.¹¹

Hemisphere is the largest telephone record collection program reported to date.¹² The program includes extensive location information.¹³ Hemisphere allows law enforcement to gather extensive electronic information from U.S. citizens while instructing program participants to “wall off” any reference to Hemisphere in any public document.¹⁴

While all records are stored by a private company,¹⁵ four of that company’s employees are paid by the government.¹⁶ Additionally, the government uses an algorithm, untethered to judicial authority, to determine which phone records to subpoena,¹⁷ raising questions about how often records are retrieved for people not under investigation.¹⁸

Documents Requested

EPIC requests copies of the following agency records:

- 1) All Hemisphere training modules, request forms, and similar final guidance documents that are used in the day-to-day operation of the program.
- 2) Any analyses, memos, opinions, or other communications that discuss the legal basis of the program.
- 3) Any analyses, memos, opinions, or other communications that discuss the privacy impact of the program.
- 4) Any presentations, analyses, memos, opinions or other communications for Congress that cover Hemisphere’s operations.

⁷ Perez, *supra* note 2.

⁸ *Id.* at 8.

⁹ *Id.* at 6.

¹⁰ *Id.* at 3.

¹¹ *Id.* at 16.

¹² Shane & Moynihan, *supra* note 1.

¹³ PowerPoint, *supra* note 6, at 3.

¹⁴ PowerPoint, *supra* note 6, at 12.

¹⁵ 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>

¹⁶ Perez, *supra* note 2. An ACLU Spokesperson points out that “to the extent that this is a government program, it’s subject to the Fourth Amendment.”

¹⁷ *Id.*

¹⁸ Johnson & Sullivan, *supra* note 15.

Request for Expedited Processing

Expedited processing is justified because the request: 1) is made by an organization “primarily engaged in disseminating information”; and 2) covers information 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); *Al-Fayed v. CIA*, 254 F.3d 306 (D.C. Cir. 2001).

EPIC is an organization “primarily engaged in disseminating information.” *American Civil Liberties Union v. Department of Justice*, 321 F. Supp. 2d 24, 29 n.5 (D.D. Cir. 2004).

There is an “urgency to inform the public” about Hemisphere, which is an “actual government activity.” News of the Hemisphere Program broke on the front page of the *New York Times* on September 2¹⁹ and it has also been covered by ABC News,²⁰ NBC News,²¹ Fox News,²² CNN,²³ the *Philadelphia Enquirer*,²⁴ and the Associated Press.²⁵ Internationally, both the *Guardian* of London²⁶ and the *Daily Mail*²⁷ featured stories on the program. Summarizing the view of civil libertarians quoted in these stories, the American Civil Liberties Union explains that “the NSA’s untethered snooping is eclipsed by [the Hemisphere Program]... “[A]s with so many of government surveillance programs, Hemisphere raises serious constitutional questions...”²⁸

The U.S. Congress is currently debating the scope of government surveillance. For example, since June 11, no fewer than fifteen bills that that would limit the scope of government

¹⁹ Shane & Moynihan, *supra* note 1. (“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.”).

²⁰ Levine, *supra* note 4. (“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.”).

²¹ 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-nsas?lite> (“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...”).

²² *Drug agents reportedly have access to bigger phone database than NSA’s*, Fox News, <http://www.foxnews.com/politics/2013/09/02/drug-agents-reportedly-have-access-to-bigger-phone-database-than-nsa/>

²³ Perez, *supra* note 2. (“The documents surface amid controversy over government surveillance programs ... that collect phone, e-mail and other records in an effort to thwart terror attacks.”).

²⁴ *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 (“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.”).

²⁵ Johnson & Sullivan, *supra* note 15. (“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.”).

²⁶ James Ball, *US drug agency partners with AT&T for access to ‘vast database’ of call records*, The Guardian, Sept. 2, 2013, <http://www.theguardian.com/world/2013/sep/02/nsa-dea-at-t-call-records-access> (“Unlike the controversial call record accesses obtained by the NSA, the data is stored by AT&T, not the government, but officials can access individual’s phone records within an hour of an administrative subpoena.”).

²⁷ Michael Zennie, *REVEALED: Secret program gives federal agents nearly instant access to BILLIONS of AT&T phone records without a court order*, Daily Mail, Sept. 2, 2013, <http://www.dailymail.co.uk/news/article-2408681/REVEALED-Secret-program-gives-federal-agents-nearly-instant-access-BILLIONS-AT-amp-T-phone-records-court-order.html> (“The Times reports that in many cases, no court order or grand jury subpoena is needed to receive these records - meaning that checks and balances on the process are limited or even non-existent.”).

²⁸ Ezekiel Edwards, *Drug Agents Have an NSA-Style Spying Problem*, ACLU Blog of Rights, Sept. 4, 2013, <https://www.aclu.org/blog/criminal-law-reform-national-security/drug-agents-have-nsa-style-spying-problem>

surveillance have been introduced in the Congress.²⁹ Most recently, on September 20, House Select Committee on Intelligence senior member Rep. Adam Schiff introduced the “Ensuring Adversarial Process in the FISA Court Act.” The goal of the legislation according to Rep. Schiff is to protect “the Fourth Amendment and privacy concerns of ordinary Americans.”³⁰ Last month, two surveillance-inspired bills were introduced that focus on “constitutional and statutory requirements to safeguard individual rights to privacy and liberty.”³¹ Senator Tom Udall, explaining his decision to co-sponsor both bills, stated that “Americans deserve the assurance that their civil liberties are not being swept aside behind closed doors.”³²

Just last month, President Obama acknowledged the need for “clear safeguards to prevent abuse and protect the rights of the American people”³³ with regard to surveillance programs. The President announced specific steps that he was taking to “move the debate [on surveillance] forward.”³⁴ Specifically, he stated that he would: 1) work with Congress to reform the section of the Patriot Act that collects telephone records to add “additional safeguards against abuse”; 2) “direct[] the intelligence community to make public as much information about these programs as possible”; and 3) create “a high-level group of outside experts to review our entire intelligence and communications technologies.”³⁵ The group’s mandate is to “make sure that there absolutely is no abuse in terms of how these surveillance technologies are used.”³⁶ The President explained that the group will “provide an interim report in 60 days and a final report by the end of this year, so that we can move forward with a better understanding of how these programs impact our security, our privacy, and our foreign policy.”³⁷

In order to comment on the privacy and other issues raised by Hemisphere, which are of significant and immediate national concern, the public should have 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.

Request for News Media Fee Status

EPIC is a representative of the news media. *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 records with only duplication fees assessed.

²⁹ H.R.2399, LIBERT-E Act; H.R.2440, FISA Court in the Sunshine Act of 2013; H.R.2475, Ending Secret Law Act; H.R.2586, FISA Court Accountability Act; H.R.2684, Telephone Surveillance Accountability Act of 2013; H.R.2736, Government Surveillance Transparency Act of 2013; H.R.2761, Presidential Appointment of FISA Court Judges Act; H.R.2818, Surveillance State Repeal Act; H.R.2849, Privacy Advocate General Act of 2013; Ensuring Adversarial Process in the FISA Court Act; S.1130, Ending Secret Law Act; S.1215, FISA Accountability and Privacy Protection Act of 2013; S.1452, Surveillance Transparency Act of 2013; S.1460, FISA Judge Selection Reform Act of 2013; S.1467, FISA Court Reform Act of 2013.

³⁰ Press Release, Office of Rep. Adam Schiff, *Rep. Schiff Introduces Legislation to Reform FISA Court and Allow Independent, Public Interest Advocate* (Sept. 20, 2013) (available at <https://schiff.house.gov/press-releases/rep-schiff-introduces-legislation-to-reform-fisa-court-and-allow-independent-public-interest-advocate/>)

³¹ Press Release, Office of Sen. Richard Blumenthal, *Blumenthal Unveils Major Legislation to Reform FISA Courts* (Aug. 1, 2013) (available at <http://www.blumenthal.senate.gov/newsroom/press/release/blumenthal-unveils-major-legislation-to-reform-fisa-courts>).

³² *Id.*

³³ President Barack Obama, *Remarks by the President in a Press Conference* (Aug. 9, 2013) (available at <http://www.whitehouse.gov/the-press-office/2013/08/09/remarks-president-press-conference>).

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

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. 5 U.S.C. § 552(a)(4)(A)(iii).

Thank you for your consideration of our request. As provided in 6 C.F.R. § 5.5(d)(4), we will anticipate your determination on our request for expedited processing within 10 business days. For questions regarding this request, we can be contacted at 202-483-1140, x 120, or FOIA@epic.org.

Sincerely,

A handwritten signature in black ink, appearing to read 'Bruce Friedrich', written over a horizontal line.

Bruce Friedrich
EPIC Extern

A handwritten signature in black ink, appearing to read 'Julia Horwitz', written over a horizontal line.

Julia Horwitz
EPIC Open Government Coordinator