



August 1, 2013

VIA FACSIMILE 202-514-0563

Office of Legal Counsel  
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**Re: Freedom of Information Act Appeal No. FY13-055**

Dear Ms. Farris:

This letter represents an appeal under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and is submitted to the Office of Legal Counsel ("OLC") by the Electronic Privacy Information Center ("EPIC").

On June 6, 2013, EPIC submitted a FOIA request, via facsimile, for the following:

1. All final legal analyses, memoranda, and opinions regarding the PRISM program, including, but not limited to, records addressing the Foreign Intelligence Surveillance Act, 50 U.S.C. §§ 1801 *et seq.*, and the Fourth Amendment to the U.S. Constitution.<sup>1</sup>

Factual Background

*The PRISM program*

On June 6, 2013, the Washington Post reported that the NSA and the FBI "are tapping directly into the central servers of nine leading U.S. Internet companies, extracting audio, video, photographs, e-mails, documents and connection logs that enable analysts to track a person's movements and contacts over time."<sup>2</sup>

This program, called PRISM, has reportedly been in operation since 2007. It allows direct access by the FBI and NSA, in real-time, to data held by Microsoft, Yahoo, Google, Facebook,

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<sup>1</sup> Appendix 1.

<sup>2</sup> Barton Gellman and Laura Poitras, *U.S. intelligence mining data from nine U.S. Internet companies in broad secret program*, Wash. Post, June 6, 2013, [http://www.washingtonpost.com/investigations/us-intelligence-mining-data-from-nine-us-internet-companies-in-broad-secret-program/2013/06/06/3a0c0da8-cebf-11e2-8845-d970ccb04497\\_story.html](http://www.washingtonpost.com/investigations/us-intelligence-mining-data-from-nine-us-internet-companies-in-broad-secret-program/2013/06/06/3a0c0da8-cebf-11e2-8845-d970ccb04497_story.html).

PalTalk, AOL, Skype, YouTube, and Apple.<sup>3</sup> According to news reports, PRISM data accounts for nearly one in seven intelligence reports and was cited in 1,477 articles in the President's Daily Brief.<sup>4</sup> The program "routinely collects a great deal of American [citizens'] content."<sup>5</sup> According to news reports, in 2008 Congress gave the Justice Department the authority to seek orders from the Foreign Intelligence Surveillance Court ("FISC") to compel private companies to comply with the PRISM program.<sup>6</sup> PRISM is run by the Special Source Operations division of the NSA.<sup>7</sup>

The Guardian newspaper reports that "[t]he program facilitates extensive, in-depth surveillance on both live communications and stored information. . . . It also opens the possibility of communications made entirely within the US being collected without warrants."<sup>8</sup>

### *The Foreign Intelligence Surveillance Act*

The Foreign Intelligence Surveillance Act ("FISA"), 50 U.S.C. §§ 1801 *et. seq.*, authorizes electronic surveillance of "foreign intelligence information" between "foreign powers" and "agents of foreign powers." The purpose of the FISA is to allow the Intelligence Community to participate *foreign* intelligence gathering, not domestic.<sup>9</sup> The purpose of the FISC is to ensure that FISA investigations remain focused on foreign agents, not U.S. persons. As the Supreme Court explained just a few months ago, "Congress enacted the Foreign Intelligence Surveillance Act (FISA) to authorize and regulate certain governmental electronic surveillance of communications for foreign intelligence purposes. . . . In FISA, Congress authorized judges of the Foreign Intelligence Surveillance Court (FISC) to approve electronic surveillance for foreign intelligence purposes. . . ."<sup>10</sup>

For the PRISM program to be lawful, it would have to meet the legal requirements of both the FISA and, more generally, the Fourth Amendment of the Constitution.<sup>11</sup> The Fourth Amendment protects against government searches both when the party being searched has a "reasonable expectation of privacy"<sup>12</sup> and also "[w]hen 'the Government obtains information by physically intruding' on persons, houses, papers, or effects."<sup>13</sup>

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

<sup>4</sup> *Id.*

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

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> Glenn Greenwald and Ewen MacAskill, "NSA Taps in to Internet Giants' Systems to Mine User Data, Secret Files Reveals, The Guardian, June 6, 2013, <http://www.guardian.co.uk/world/2013/jun/06/us-tech-giants-nsa-data>.

<sup>9</sup> "This legislation is in large measure a response to the revelations that warrantless electronic surveillance in the name of national security has been seriously abused." S. Rep. No. 95-604(I) at 7 (1977), *reprinted in* 1978 U.S.C.C.A.N. 3904, 3908.

<sup>10</sup> *Clapper v. Amnesty Int'l USA*, \_\_ U.S. \_\_, 133 S.Ct. 1138, 1143 (2013).

<sup>11</sup> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV.

<sup>12</sup> *Katz v. United States*, 389 U.S. 347 (1967).

<sup>13</sup> *Florida v. Jardines*, 569 U.S. \_\_, slip op. at \*3 (2013).

## *OLC Memorandums and Opinion*

The Office of Legal Counsel definitively interprets the law for the Executive Branch; its legal opinions are binding on all federal agencies.<sup>14</sup> "The Office drafts legal opinions of the Attorney General and also provides its own written opinions and oral advice" in response to Executive Branch requests.<sup>15</sup>

It would be the OLC's responsibility to draft legal memorandums and opinions interpreting the legality of the PRISM program under the Fourth Amendment, FISA, and other statutes. To the extent that the FBI and NSA may access the electronic communications, including content information, of U.S. persons using U.S. internet service providers, it would be the responsibility of the OLC to interpret the legality of those actions.

### Procedural Background

On June 6, 2013, EPIC submitted a request for the preceding documents ("EPIC's FOIA Request"), as well as a request for expedited processing, news media fee status, and a waiver of duplication fees.<sup>16</sup>

The OLC responded on June 14, 2013, acknowledging the receipt of the request, granting expedited processing, stating that the agency had not yet begun the search for the requested documents due to a backlog of requests, and reserving the decision on fee waiver until the agency would determine whether fees would be assessed for the request.<sup>17</sup>

EPIC received no further communication from the OLC in response to this FOIA request. More than twenty working days have passed since the OLC's acknowledged EPIC's FOIA request.

### EPIC Appeals the OLC's Failure to Respond to EPIC's FOIA Request

EPIC hereby appeals the OLC's failure to make a timely determination regarding EPIC's FOIA Request. Typically, an agency must make a determination regarding a FOIA request within twenty working days.<sup>18</sup> A determination must include a list of the documents to which the requester is being denied access and the reasons for withholding said documents.<sup>19</sup> The agency's statutory deadline to respond expired on July 8, 2013. An acknowledgement of the FOIA request is not considered a constructive response, as it does not contain the elements statutorily required for a response, specifically a list of requested documents being disclosed or withheld along with

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<sup>14</sup> See Brief of *Amicus Curiae* EPIC in Support of Appellants, *New York Times Co. v. U.S. Dep't of Justice*, No. 13-0422 (2d. Cir. filed April 22, 2013), available at <https://epic.org/amicus/foia/new-york-times/EPIC-et-al-Amici-Brief.pdf>.

<sup>15</sup> U.S. Dep't of Justice, Off. of Legal Counsel, <http://www.justice.gov/olc/> (March 2013).

<sup>16</sup> Appendix 1.

<sup>17</sup> Appendix 2.

<sup>18</sup> 5 U.S.C. § 552(a)(6).

<sup>19</sup> 5 U.S.C. § 552(a)(6)(A)(i).

the agency's justification for any withholding.<sup>20</sup> An agency nonresponse is considered a constructive denial of the request.<sup>21</sup>

The OLC's failure to respond to EPIC's FOIA Request within the twenty-day time frame constitutes a lack of determination and violates the FOIA.<sup>22</sup>

#### EPIC Renews Its Request for "News Media" Fee Status

EPIC reiterates and renews all arguments that, as a non-profit, educational organization, it is entitled to "news media" fee status. EPIC routinely disseminates information to the public and has been recognized as a representative of the news media.<sup>23</sup>

Additionally, as disclosure of this information will "contribute significantly to public understanding of the operations or activities of the government," EPIC renews its assertion that any duplication fees should also be waived.

#### Conclusion

Thank you in advance for your timely response to this appeal, I expect to receive responsive documents within twenty working days of this appeal. If you have any questions, please feel free to contact me at 202-483-1140 or FOIA@epic.org.

Respectfully Submitted,



Julia Horwitz  
EPIC Open Government Counsel



David Brody  
EPIC Appellate Advocacy Fellow

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<sup>20</sup> *Id.*

<sup>21</sup> *Campaign for Responsible Transplantation v. Food & Drug Admin.*, 511 F.3d 187, 188 (D.C. Cir. 2007).

<sup>22</sup> 5 U.S.C. § 552(a)(6)(A)(ii).

<sup>23</sup> *EPIC v. Department of Defense*, 241 F. Supp. 2d 5 (D.D.C. 2003).