

## COMMENTS OF THE ELECTRONIC PRIVACY INFORMATION CENTER

to the

### FEDERAL COMMUNICATIONS COMMISSION

Information Collections Being Reviewed by the Federal Communications Commission Under  
Delegated Authority

[OMB 3060–0076, OMB 3060–0166]

May 13, 2019

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By notice published March 13, 2017, the Federal Communications Commission (“FCC”) proposes to extend the regulation for telephone companies to retain call data for another three years.<sup>1</sup> Telephone companies are currently subject to an eighteen-month bulk retention requirement. (“the Data Retention Regulation”). In 2015 EPIC, joined by a coalition of civil society organizations, legal scholars, technology experts, and filed a petition with the FCC asking the Commission to repeal the Data Retention Regulation.<sup>2</sup> The FCC noticed the petition but failed to undertake the proposed comment process.<sup>3</sup> EPIC submits these comments now to ensure that the FCC will end the Data Retention Regulation.. As EPIC explains below, (1) the

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<sup>1</sup> *Information Collections Being Reviewed by the Federal Communications Commission Under Delegated Authority*, 84 Fed. Reg. 9121 (March 13, 2019) (hereafter “Data Retention Mandate Extension”).

<sup>2</sup> *See, e.g.*, EPIC, et. al, Petition to Repeal 47 C.F.R. § 42.6 (Aug. 4, 2015), <https://epic.org/privacy/fcc-data-retention-petition.pdf> [hereinafter Repeal Petition].

<sup>3</sup> FCC, *Comment Sought on EPIC et al Petition For Rulemaking To Repeal 47 C.F.R. § 42.6* (“Retention of Telephone Records”), Public Notice, Docket No. 17-130, (May 17, 2017), [http://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2017/db0517/DA-17-472A1.pdf](http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0517/DA-17-472A1.pdf).

Data Retention Regulation is burdensome, ineffectual, and threatens privacy and security of American consumers, and (2) the FCC regulation is contrary regional and international law.

EPIC is a public interest research center in Washington, D.C. EPIC was established in 1994 to focus public attention on emerging privacy and civil liberties issues and to protect privacy, freedom of expression, and democratic values in the information age.<sup>4</sup> EPIC routinely comments on FCC data collections and data systems,<sup>5</sup> and, for years, has called on the FCC to end the data retention regulation in a petition,<sup>6</sup> comments,<sup>7</sup> and letters to the agency.<sup>8</sup> EPIC has also played a pivotal role in the international development of privacy law and policy. EPIC established the Public Voice project in 1996 to enable civil society participation in decisions concerning the future of the Internet,<sup>9</sup> and publishes the Privacy Law Sourcebook, a comprehensive review of privacy laws from around the world.<sup>10</sup>

EPIC has repeatedly called on the FCC to repeal 47 C.F.R. § 42.6, the regulation that requires telephone companies to retain the detailed call records of their customers, explaining the regulation is unduly burdensome, ineffectual, and threatens privacy and security.

Backed by a coalition of civil society organizations, legal scholars, technology experts, EPIC first called for repeal on August 4, 2015 in a petition to the FCC.<sup>11</sup> The petition made

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<sup>4</sup> EPIC, *About EPIC*, <https://epic.org/epic/about.html>

<sup>5</sup> See, e.g., Comments of EPIC to FCC on “A National Broadband Plan for Our Future” (June 8, 2009), [https://epic.org/privacy/pdf/fcc\\_broadband\\_6-8-09.pdf](https://epic.org/privacy/pdf/fcc_broadband_6-8-09.pdf)

<sup>6</sup> Repeal Petition, *supra* note 1.

<sup>7</sup> See, e.g., Comments of EPIC to FCC on “In the Matter of Protecting the Privacy of Customers of Broadband ) WC Docket No. 16-106 and Other Telecommunications Services” (May 27, 2016), <https://epic.org/apa/comments/EPIC-FCC-Privacy-NPRM-2016.pdf>.

<sup>8</sup> See, e.g., Letter from EPIC to FCC (Aug. 3, 2018), <https://epic.org/privacy/EPIC-FCC-Data-Retention-Petition-Carpenter.pdf>.

<sup>9</sup> See *About the Public Voice*, The Public Voice, <http://thepublicvoice.org/about-us/>.

<sup>10</sup> EPIC, *The Privacy Law Sourcebook 2018*, Epic.org, <https://epic.org/bookstore/pls2018/>

<sup>11</sup> Repeal Petition, *supra* note 1.

clear:

- The mass retention of telecommunications records implicates privacy and freedom of association of millions of Americans who are suspected of no wrongdoing.
- The retention of sensitive phone records increases the likelihood of large-scale data breaches like the OPM data breach in 2015
- Modern non-measured, bundled phone billing makes the rule unnecessary.
- The US data retention requirement for telephone records is at odds with international law and fundamental rights

By notice published on May 17, 2017, the FCC requested public comment on EPIC's petition.<sup>12</sup>

Every comment submitted to the FCC expressed support for repealing the data retention regulation.<sup>13</sup>

Nearly four years have passed since EPIC and the coalition filed the petition to repeal the outdated data retention regulation, and the coalition arguments against the regulation still hold. In fact, in 2018 when EPIC again wrote to the Commission calling attention to the docketed petition, EPIC explained that the legal argument for repeal of the data retention regulation has only strengthened following the Supreme Court ruling in *United States v. Carpenter*.<sup>14</sup> *Carpenter*, which declared cell phone location records are protected under the Fourth Amendment, elevated the retention of cell phone data to a constitutional interest.<sup>15</sup>

**I. The data retention regulation is unnecessary and ineffectual, and threatens competition, privacy, and security.**

The data retention regulation implicates fundamental privacy rights, creating a detailed

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<sup>12</sup> FCC, *supra* note 2.

<sup>13</sup> Docket 17-130, *Petition for Rulemaking to Repeal 47 C.F.R. 42.6* (Retention of Telephone Records), [https://www.fcc.gov/ecfs/search/filings?proceedings\\_name=17-130&sort=date\\_disseminated,DESC](https://www.fcc.gov/ecfs/search/filings?proceedings_name=17-130&sort=date_disseminated,DESC).

<sup>14</sup> Letter from EPIC to FCC, *supra* note 6.

<sup>15</sup> *Carpenter v. United States*, 138 S. Ct. 2206 (2018).

data trail on Americans without any suspicion of criminal activity. At the same time, the rule is ineffectual, threatens competition, and creates an unnecessary data security risk despite ever-increasing frequency and severity of data breaches.

The FCC data retention regulation implicates the fundamental privacy and civil liberties interests of millions of Americans. Under the rule, telecommunication carriers are required to retain sensitive information on all of their customers, including the name, address, and telephone number of the caller, telephone number called, date, time and length of the call, on an ongoing basis.<sup>16</sup> The bulk collection of cell phone metadata builds a deeply revealing portrait of one's associations and interests, without any suspicion of criminal activity. As the coalition stated in the original Petition:

The call toll records currently retained under the FCC Section 42.6 are not specifically tailored or limited to a particular investigation; carriers are required to retain data for 18 months for all subscribers. Since 90% of American adults have a cell phone, this equates to sensitive data being retained for nearly every American adult, even when they are under no suspicion of wrongdoing.

These records can divulge “close contacts and associates, and confidential relationships between individuals and their attorneys, doctors, or elected representatives.”<sup>17</sup> And, after the Supreme Court ruled in 2018 that cell phone location records are protected under the Fourth Amendment, the government requirement to retain cell phone records in bulk touches on a Constitutional interest.<sup>18</sup>

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<sup>16</sup> FCC Retention of Telephone Toll Records, 47 C.F.R. § 42.6.

<sup>17</sup> See Letter from 28 Privacy & Civ. Liberties Organizations to President Barak Obama and Eric Holder, U.S. Attorney Gen. (June 17, 2014), <https://www.epic.org/privacy/Coalition-Ltr-to-End-NSA-BulkCollection.pdf>;

<sup>18</sup> *Carpenter*, 138 S. Ct. at 2223.

Nonetheless, today the 18-month data retention rule serves little purpose.<sup>19</sup> The DOJ originally petitioned the FCC to retain data for 18 months in 1985, contending that telephone toll records played a significant role in criminal investigations.<sup>20</sup> By 2006, the DOJ concluded “the efficacy of the Commission’s current Section 42.6 requirement to meet law enforcement needs has been significantly eroded”<sup>21</sup> since the type of data covered no longer matched carrier billing practices.<sup>22</sup>

The rule also restricts innovation and competition. As the coalition made clear in the Petition, carriers opposed the 18-month retention regulation on a competitive basis.<sup>23</sup> They contended the regulation prevented industry from developing cost efficient recordkeeping systems and failed to keep pace with consumer demand for bundled, comprehensive billing packages.<sup>24</sup>

Finally, the bulk retention of data unnecessarily risks the security of Americans’ personal information. American consumers face unprecedented privacy and security threats. Unbounded collection and storage of personal data has led to staggering increases in identity theft, security breaches, and financial fraud in the United States.<sup>25</sup> The 2017 Equifax data breach, exposing the

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<sup>19</sup> Repeal Petition, *supra* note 1, at 2.

<sup>20</sup> Preservation of Records of Communications Common Carriers, 50 Fed. Reg. 31,395, 31,397 (proposed Aug. 2, 1985).

<sup>21</sup> Dept. of Justice and Homeland Security, Comment Letter on Notice of Rulemaking In the Matter of Implementation of the Telecommunications Act of 1996, at 10 (Apr. 28, 2006), CC Docket No. 96-115.

<sup>22</sup> *Id.* at 11-12.

<sup>23</sup> Repeal Petition, *supra* note 1, at 3.

<sup>24</sup> In the Matter of: Revision of Part 42, Pres. of Records of Comm'n Common Carriers, 60 Rad. Reg. 2d (P & F) ¶ 1529 at 3 (F.C.C. Aug. 22, 1986)

<sup>25</sup> Federal Trade Comm’n, Privacy & Data Security Update (2017) [https://www.ftc.gov/system/files/documents/reports/privacy-data-security-update-2017-overviewcommissions-enforcement-policy-initiatives-consumer/privacy\\_and\\_data\\_security\\_update\\_2017.pdf](https://www.ftc.gov/system/files/documents/reports/privacy-data-security-update-2017-overviewcommissions-enforcement-policy-initiatives-consumer/privacy_and_data_security_update_2017.pdf).

personal information of more than 145 million Americans,<sup>26</sup> and the 2015 Office of Personnel Management breach, comprising sensitive background investigation forms of federal employees,<sup>27</sup> are among the growing number of high-profile hacks that threaten American consumers. Indeed, today large, unchecked troves of data like those demanded by the FCC regulation are the targets of state actors and criminals. This week, the Department of Justice unveiled an indictment against members of a hacking group operating out of China for the breach of Anthem, Inc. in 2015, involving the theft of names, Social Security numbers, income data, and more for close to 80 million individuals.<sup>28</sup> The interests of consumers and national security alike are served by minimizing collection and retention of personal data, not unnecessarily retention.<sup>29</sup>

## **II. The data retention regulation is contrary to regional and international law.**

Without a federal data protection law or data protection authority, the United States has fallen behind other advanced democracies around the world. The failure to limit U.S. privacy practices with personal data historically ratcheted up international tensions and disrupted trade.<sup>30</sup> Yet the data retention regulation is also contrary to regional and international law - a threat U.S. trade relationships, U.S. global leadership, and human rights.

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<sup>26</sup> *Equifax Data Breach*, FTC.gov, <https://www.ftc.gov/equifax-data-breach>.

<sup>27</sup> *Cybersecurity Resource Center*, OPM.gov, <https://www.opm.gov/cybersecurity/cybersecurity-incidents/>.

<sup>28</sup> Press Release, Member of Sophisticated China-Based Hacking Group Indicted for Series of Computer Intrusions, Including 2015 Data Breach of Health Insurer Anthem Inc. Affecting Over 78 Million People (May 9, 2019), <https://www.justice.gov/opa/pr/member-sophisticated-china-based-hacking-group-indicted-series-computer-intrusions-including>.

<sup>29</sup> See Letter from EPIC to Linsey Graham, Chairman, and Dianne Feinstein, Ranking Member, Senate Comm. on the Judiciary (Mar. 11, 2019), <https://epic.org/testimony/congress/EPIC-SJC-GDPRandCCPA-Mar2019.pdf>.

<sup>30</sup> See, e.g., Case C-362/14, *Schrems v. Data Protection Commissioner* [2015] EU:C:2015:650.

For example, the Court of Justice for the European Union (CJEU), the highest court in the EU, ruled that bulk, indiscriminate retention of telephone records violates fundamental rights - precisely the type of blanket requirement that appears in the FCC data retention rule. The CJEU has struck down both the EU wide data retention directive (Digital Rights Ireland, 2014)<sup>31</sup> and British and Swedish legislation (Tele 2/Watson 2016)<sup>32</sup> on traffic and location data retention. The European Court explained that the mandatory retention of metadata is a “wide-ranging and particularly serious interference” with the rights to privacy and data protection<sup>33</sup> and recognized the collection of metadata can allow for “precise conclusions to be drawn concerning the private lives of the persons whose data has been retained.”<sup>34</sup>

The CJEU set out strict conditions that even targeted data retention rules must meet to comply with fundamental rights: clear and precise rules governing the scope and application of retention requirements, imposing retention only for the purpose of fighting serious crime, and implementing data security safeguards must for retained data.<sup>35</sup>

The European Court of Human Rights caselaw requires criminal justice and national security authorities regarding interferes with personal data to cabin officials’ discretion, closely tailored any practices to a legitimate need, and be accompanied by appropriate safeguards.<sup>36</sup>

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<sup>31</sup> Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland v. Minister for Communication Marine and Natural resources & Others and Karnlner Landesregierung and Others* ECLI:EU:C:2014:238.

<sup>32</sup> Joined Cases C-203/15 and C- 698/15 *Tele 2 Sverige AB v. Post-och telestyrelsen and Secretary of State for the Home Department v. Tom Watson & Ors* ECLI:EU:C:2016:970.

<sup>33</sup> Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland*, § 65.

<sup>34</sup> Joined Cases C-203/15 and C- 698/15 *Watson*, § 99.

<sup>35</sup> Joined Cases C-203/15 and C- 698/15 *Watson*, §§ 102, 107-11, 122

<sup>36</sup> *See, e.g., Liberty and Others v. the United Kingdom*, no. 58243/00, §§ 64—70, 1 July 2008. (Concluding U.K. law authorizing interception of non-domestic communications violated Article 8 where “extremely broad discretion” was granted to intercept external communications and to the selection of communications for examination, and where the procedures for examining and utilizing data were not public.)

Most relevant to data retention requirements, the legal provision must appropriately limit duration, include procedures for examining, using and storing data, and indicate circumstances in which data must be erased or destroyed.<sup>37</sup> Based on these requirements, for example, the Court of Human Rights faulted the data retention requirements in Russian surveillance regime in *Zakharov v. Russia*, rejecting the law mandatory six-month storage of irrelevant data collected by authorities and the unbounded discretion of trial judges to store data used in evidence even after the conclusion of a trial.<sup>38</sup>

An inconsistent policy in the United States and Europe on data retention could well lead to disruption in digital trade. Last year, European Parliament called for the suspension of the EU-U.S. Privacy Shield, outlining several problems with the U.S.'s current enforcement of Privacy Shield: the delayed Federal Trade Commission enforcement against Facebook for the Cambridge Analytica scandal, overbroad foreign intelligence surveillance, failure to appoint key privacy positions, among the topics.<sup>39</sup> The joint annual review of the deal will again occur this fall.<sup>40</sup> And the failure of the U.S. to keep pace with international law regarding data retention raises red flags for U.S. global leadership on human rights. Today, members of Congress on both sides of the aisle, industry leaders, and advocates agree that the U.S. must update privacy safeguards for the

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<sup>37</sup> *Weber and Saravia v. Germany* (dec.), no. 54934/00, § 95, ECHR 2006-X.

<sup>38</sup> *Roman Zakharov v. Russia* [GC], no. 47143/06, §§ 255-256, ECHR 2015.

<sup>39</sup> *European Parliament Resolution on the Adequacy of the Protection Afforded by the E.U.-U.S. Privacy Shield*, Eur. Parliament ¶ 12 (Jun. 26, 2018), <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+MOTION+B8-2018-0305+0+DOC+PDF+V0//EN>, [here after *E.U. Resolution*]

<sup>40</sup> Press Release, EU-U.S. Privacy Shield: Second review shows improvements but a permanent Ombudsperson should be nominated by 28 February 2019 (Dec. 19, 2018), [http://europa.eu/rapid/press-release\\_IP-18-6818\\_en.htm](http://europa.eu/rapid/press-release_IP-18-6818_en.htm).



modern era.<sup>41</sup> Repealing the data retention regulation is a meaningful step to advance U.S. data protection and privacy policy.

### III. Conclusion

Against a backdrop of expanding threats to consumer privacy and U.S. failure to keep step with regional and international privacy developments, the FCC must act to repeal the data retention regulation. Every comment that the agency received from the public on this proposal in 2017 was in opposition.

EPIC urges the FCC to promptly begin a Rulemaking to repeal 47 C.F.R. § 42.6 ("Retention of Telephone Records") in its entirety.

Respectfully submitted,

/s/ Marc Rotenberg

Marc Rotenberg  
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/s/ Eleni Kyriakides

Eleni Kyriakides  
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<sup>41</sup> See, e.g., Letter from Sen. Josh Hawley to FTC (Mar. 11, 2019), <https://games-cdn.washingtonpost.com/notes/prod/default/documents/b0a472ac-82bb-4942-aeb3-46f121ab9761/note/e5b7c1a2-95e1-4307-a350-6f082b317a9d.pdf>.