

VIA FACSIMILE

March 24, 2020

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Attn: FOIA Officer

Dear Ms. Leonard:

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 Office of Science and Technology Policy (“OSTP”).

EPIC seeks records concerning the OTSP’s plans to make use of cell phone location data to track the coronavirus. EPIC requests the agency conduct its search of records from December 2019 to present.

### Documents Requested

- (1) Any responses to a March 19, 2020 letter from Senator Ed Markey asking about the White House’s plans to use Americans’ location data with the federal government’s COVID-19 response;<sup>1</sup>
- (2) All policies, proposals, and guidance documents for the collection of cell phone location data in connection with the coronavirus;
- (3) Any privacy assessments, including but not limited to privacy threshold assessments and privacy impact assessments, related to the collection of cell phone location data in connection with the coronavirus.

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<sup>1</sup> Letter from Senator Edward J. Markey, to Michael Kratsios, Chief Tech. Officer of the U.S., Office of Sci. and Tech. Policy (Mar. 19, 2020), <https://www.markey.senate.gov/imo/media/doc/Markey%20Letter%20-%20OSTP%20Location%20Data%203.18.20.pdf>.

## Background

COVID-19 is a disease caused by a new strain of coronavirus that began spreading in people in December 2019.<sup>2</sup> The World Health Organization officially declared this novel coronavirus outbreak a pandemic.<sup>3</sup>

To combat the health crisis, the U.S. government has sought the assistance of technology companies. On March 11, 2020, U.S. Chief Technology Officer Michael Kratsios convened meetings with tech companies including Apple, Cisco, Google, IBM, Microsoft, Twitter, and Facebook.<sup>4</sup> Kratsios stated, “[c]utting edge technology companies and major online platforms will play a critical role in this all-hands-on-deck effort.”<sup>5</sup> For example, Amazon, at a recent White House meeting, argued that its cloud computing tools could help federal authorities in tasks such as tracking travelers.<sup>6</sup>

The *Washington Post* also reported that government officials are speaking with tech companies, such as Facebook, Apple, and Google, about how the government can use cell phone location data to combat coronavirus.<sup>7</sup> In a private meeting on March 15, 2020, a coronavirus task force represented by tech executives, entrepreneurs, and investors discussed ideas about disease mapping and telehealth.<sup>8</sup> According to the *Washington Post* reporting, smartphone location data may help officials map the spread of infection, predict the next hotspots, or decide where to allocate health resources.<sup>9</sup> According to an OSTP official, the government is “encouraged by American technology companies looking to leverage aggregated, anonymized data to glean key insights for covid-19 modeling efforts.”<sup>10</sup>

Other countries have employed technology to combat the COVID-19 crisis but have not limited its use to protect the privacy of its citizens. For instance, in South Korea, the government issues health alert texts that detail a patient’s age, gender, and locations visited before

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<sup>2</sup> World Health Org., *Q&A on Coronaviruses (COVID-19)* (Mar. 9, 2020), <https://www.who.int/news-room/q-a-detail/q-a-coronaviruses>.

<sup>3</sup> Dr. Tedros Adhanom Ghebreyesus, Dir. Gen., World Health Org., Opening Remarks at the Media Briefing on COVID-19 (Mar. 11, 2020), <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>.

<sup>4</sup> Emily Birnbaum, *White House Seeks Assistance from Tech Companies in Fight Against Coronavirus*, The Hill (Mar. 11, 2020), <https://thehill.com/policy/technology/487034-white-house-seeks-assistance-from-tech-companies-in-fight-against>.

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

<sup>6</sup> Tony Romm, *White House Asks Silicon Valley for Help to Combat Coronavirus, Track Its Spread, and Stop Misinformation*, Wash. Post (Mar. 11, 2020), <https://www.washingtonpost.com/technology/2020/03/11/white-house-tech-meeting-coronavirus/>.

<sup>7</sup> Tony Romm, Elizabeth Dvoskin, & Craig Timberg, *U.S. Government, Tech Industry Discussing Ways to Use Smartphone Location Data to Combat Coronavirus*, Wash. Post (Mar. 17, 2020), <https://www.washingtonpost.com/technology/2020/03/17/white-house-location-data-coronavirus/>.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

hospitalization.<sup>11</sup> This system has resulted in the tracing of movements of individuals who have tested positive for coronavirus and fueled social stigma.<sup>12</sup> Israel has authorized tapping into a vast trove of cell phone data, intended for use in counterterrorism, to trace the movements of individuals testing positive for COVID-19 and to identify people for quarantine.<sup>13</sup> Iran launched an app that claims to detect whether an individual is infected with coronavirus, but once users download the app, the government simply collected the users' location data for real-time tracking.<sup>14</sup> China has increased its mass collection of personal data for public monitoring and has even implemented facial recognition technology that claims to identify individuals with elevated temperatures and to identify individuals not wearing a face mask.<sup>15</sup>

If the U.S. government is considering the use of cell phone data to address the public health crisis, it should first consider whether the use is lawful. It must then follow all appropriate steps, including the completion of a privacy impact assessment, before collection occurs and new uses are undertaken.

The use of aggregate and statistical data should be encouraged. That is the material of evidence-based policy. But the collection of location data that identifies particular individuals can reveal the most intimate details of a person's life: a trip to a place of worship, attendance at a political protest, or a visit to a medical specialist. The collection of location data also poses the risks that a new system of mass surveillance will be established in the United States.

The public has the right to know whether federal agencies are addressing these concerns in the policymaking process.

### Request for Expedition

EPIC is entitled to expedited processing of this request under the FOIA and the OSTP's FOIA regulations. 5 U.S.C. § 552(a)(6)(E)(v)(II); 32 C.F.R. § 2402.5(d). Specifically, this request is entitled to expedited processing because, first, there is an "urgency to inform the public concerning actual or alleged Federal Government activity," and second, because the request is "made by a person primarily engaged in disseminating information." 32 C.F.R. § 2402.5(d)(1)(ii).

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<sup>11</sup> Nemo Kim, 'More Scary Than Coronavirus': South Korea's Health Alerts Expose Private Lives, The Guardian (Mar. 5, 2020), <https://www.theguardian.com/world/2020/mar/06/more-scary-than-coronavirus-south-koreas-health-alerts-expose-private-lives>.

<sup>12</sup> *Id.*

<sup>13</sup> David M. Halbfinger, Isabel Kershner, & Ronen Bergman, *To Track Coronavirus, Israel Moves to Tap Secret Trove of Cellphone Data*, N.Y. Times (Mar. 18, 2020), <https://www.nytimes.com/2020/03/16/world/middleeast/israel-coronavirus-cellphone-tracking.html>.

<sup>14</sup> David Gilbert, *Iran Launched an App That Claimed to Diagnose Coronavirus. Instead, It Collected Location Data on Millions of People*, Vice (Mar. 14, 2020), [https://www.vice.com/en\\_us/article/epgkmz/iran-launched-an-app-that-claimed-to-diagnose-coronavirus-instead-it-collected-location-data-on-millions-of-people](https://www.vice.com/en_us/article/epgkmz/iran-launched-an-app-that-claimed-to-diagnose-coronavirus-instead-it-collected-location-data-on-millions-of-people).

<sup>15</sup> Lily Kuo, 'The New Normal': China's Excessive Coronavirus Public Monitoring Could Be Here To Stay, The Guardian (Mar. 8, 2020), <https://www.theguardian.com/world/2020/mar/09/the-new-normal-chinas-excessive-coronavirus-public-monitoring-could-be-here-to-stay>.

First, there is an “urgency to inform the public about an actual or alleged Federal Government activity” § 2402.5(d)(1)(ii). The “actual . . . federal government activity” at issue is the OSTP convening meetings with technology companies to discuss using location data from cell phones to combat coronavirus. Tech giants such as Facebook and Google have confirmed that they have been in conversation with the government to use location information to fight against coronavirus.<sup>16</sup>

The urgency to inform the public about this activity is clear: the World Health Organization has declared COVID-19 a pandemic, and cities and states across the U.S. are on lockdown. The U.S. government is seeking to work with the technology sector to combat this public health crisis, and tech companies have been featured prominently in the White House’s response to fighting coronavirus.<sup>17</sup>

Lawmakers, however, have expressed privacy concerns over these partnerships. For instance, Senator Ed Markey (D-MA) raised concerns about the privacy risks in the collection of location data to fight coronavirus. Senator Markey stated, “[W]e cannot embrace action that represents a wholesale privacy invasion, particularly when it involves highly sensitive and personal location information. I urge [OSTP] to balance privacy with any data-driven solutions to the current public health crisis.”<sup>18</sup> Similarly, some members of congress urged the government to implement procedures that protect the privacy of all Americans when using location data to combat the coronavirus.<sup>19</sup> The lawmakers stated, “prohibiting government intrusion into the private lives of Americans is, and has always been part of the DNA of our country, enshrined in the Fourth Amendment of our Constitution.”<sup>20</sup>

Second, EPIC is an organization “primarily engaged in disseminating information to the public.” § 2402.5(d)(1)(ii). As the Court explained in *EPIC v. DOD*, “EPIC satisfies the definition of ‘representative of the news media’” entitling it to preferred fee status under the FOIA. 241 F. Supp. 2d 5, 15 (D.D.C. 2003). EPIC’s primary purposes is to focus public attention on emerging privacy and civil liberties issues and frequently disseminates information obtained through the FOIA on its website, EPIC.org,

In submitting this request for expedited processing, EPIC certifies that this explanation is true and correct to the best of its knowledge and belief. 5 U.S.C. § 552(a)(6)(E)(vi); 32 C.F.R. § 2402.5(d)(2).

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<sup>16</sup> Romm, et al., *supra* note 7.

<sup>17</sup> Steven Overly, *Washington’s New Tone: Help Us, Silicon Valley*, Politico (Mar. 18, 2020), <https://www.politico.com/news/2020/03/18/washington-tech-industry-coronavirus-135428>.

<sup>18</sup> Letter from Senator Ed Markey, *supra* note 1.

<sup>19</sup> Letter from Congresswoman Anna G. Eshoo, Suzan K. DelBene, & Senator Ron Wyden, to President Donald Trump & Vice President Mike Pence (Mar. 19, 2020), <https://eshoo.house.gov/sites/eshoo.house.gov/files/documents/Eshoo-Wyden-DelBene%20-%20Letter%20to%20Pres%20%26%20VP%20about%20coronavirus%20privacy%20-%2003.19.20.pdf>.

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

## Request for “News Media” Fee Status and Fee Waiver

EPIC is a “representative of the news media” for fee classification purposes. *EPIC v. DOD*, 241 F. Supp. 2d 5 (D.D.C. 2003). Based on EPIC’s status as a “news media” requester, EPIC is entitled to receive the requested record with only duplication fees assessed. 5 U.S.C. § 552(a)(4)(A)(ii)(II); 32 C.F.R. § 2402.9.

Further, any duplication fees should also be waived because (i) “disclosure of the information is in the public interest because it is likely to contribute significantly to the public understanding of the operations or activities of the government,” and (ii) “disclosure is not primarily in the commercial interest” of EPIC, the requester. 5 U.S.C. § 552(a)(4)(A)(iii); 32 C.F.R. § 2402.9(a). EPIC’s request satisfies this standard based on the OSTP’s considerations for granting a fee waiver. 32 C.F.R. §§ 2402.9(a)(1)–(2).

*(1) Disclosure of the information is in the public interest because it is likely to contribute significantly to the public understanding of the operations or activities of the government.*

First, disclosure of the requested documents is in the public interest because it “is likely to contribute significantly to the public understanding of the operations or activities of the government.” 32 C.F.R. § 2402.9(a)(1). The OSTP’s convening of tech companies and other private sector representatives for meetings at the White House to discuss ways to combat coronavirus indisputably involves “operations or activities of the government.” Disclosure of the requested information is in the public interest and would be meaningfully informative because no details of what was discussed during the meetings, including the potential use of cell phone location data, have been disclosed. Little information has been released to the public about the extent of the government’s coordination with these technology companies and whether there has been any consideration of the associated privacy and civil liberties risks that may be implicated if the government collects and uses cell phone location data in connection with the COVID-19 pandemic.

*(2) Disclosure is not primarily in the commercial interest of the requester*

Second, disclosure of the information “is not primarily in [EPIC’s] commercial interest.” 32 C.F.R. § 2402.9(a)(2). EPIC is a registered non-profit organization committed to privacy, open government, and civil liberties.<sup>21</sup> EPIC intends to disseminate the requested information to a broad spectrum of the public. EPIC consistently publishes critical documents obtained through the FOIA and through litigation on its robust website.<sup>22</sup> EPIC publishes an award-winning email and online newsletter that highlights the critical documents obtained through the FOIA.<sup>23</sup> EPIC has no commercial interest in the requested records and has established that there is significant public interest in the requested records.

For these reasons, EPIC’s request for a full fee waiver should be granted.

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<sup>21</sup> *About EPIC*, EPIC.org, <http://epic.org/epic/about.html>.

<sup>22</sup> EPIC.org, <https://www.epic.org/>.

<sup>23</sup> EPIC, *EPIC Alert*, <https://www.epic.org/alert/>.

Conclusion

Thank you for your consideration of this request. EPIC anticipates your determination on its request within ten calendar days. 5 U.S.C. § 552(a)(6)(E)(ii)(I); 32 C.F.R. § 2402.5(d)(3). For questions regarding this request contact Enid Zhou at 202-483-1140 x104 or Zhou@epic.org, cc: FOIA@epic.org.

Respectfully submitted,

/s Enid Zhou

Enid Zhou

EPIC Open Government Counsel

/s John Davisson

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EPIC Counsel