

June 13, 2017

Federal Bureau of Investigation  
Attn: FOI/PA Request  
Record/Information Dissemination Section  
170 Marcel Drive  
Winchester, VA 22602-4843  
Fax: (540) 868-4391

Dear FOIA Officer,

This letter constitutes a request under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552(a)(3), and is submitted on behalf of the Electronic Privacy Information Center (“EPIC”) to the Federal Bureau of Investigation (“FBI”).

On June 30, 2016, *The Intercept* published the FBI’s rules for targeting members of the news media using National Security Letters (“NSLs”) under the Domestic Investigations and Operations Guide (“DIOG”), Appendix G.12.<sup>1</sup>

EPIC seeks all versions of the DIOG Appendix G updated after October 16, 2013 and supporting documents for the FBI’s use of NSLs to obtain records of members of the press.

### Documents Requested

- 1) All versions of the DIOG Appendix G.12 produced after October 16, 2013;
- 2) Presentations, guidance, training materials, and legal analyses concerning the FBI’s use of National Security Letters to obtain records of members of the news media or news organizations;
- 3) Records regarding FBI compliance with the Privacy Protection Act of 1980, 42 U.S.C. § 2000aa et seq.

### Background

NSLs authorized by 18 U.S.C. § 2709 permit agencies, including the FBI, to compel the production of information merely when it is “relevant” to national security investigations. This legal process empowers the FBI to compile customer records held by telephone service companies, banks, Internet service provider, and others - all without prior judicial approval. These institutions

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<sup>1</sup> Cora Currier, *Secret Rules Make It Pretty Easy for FBI to Spy on Journalists*, *The Intercept* (June 30, 2016), <https://theintercept.com/2016/06/30/secret-rules-make-it-pretty-easy-for-the-fbi-to-spy-on-journalists/>.

are also typically prohibited, or “gagged,” from revealing their receipt of the NSL, though under the USA Freedom Act companies may now disclose how many NSLs they have received and the DOJ must periodically review gag orders and terminate those that are no longer justified.<sup>2</sup>

The Department of Justice has frequently offered assurances of its respect for the freedom of press.<sup>3</sup> Yet the recent uptick in the prosecution of government whistleblowers dating back to the Obama administration, simultaneously ratcheting up tactics against journalists.<sup>4</sup> While the DOJ’s media rules were reigned in following these incidents.<sup>5</sup> However, the FBI’s procedures for using NSLs to obtain journalists’ records were not modified.

The DIOG Appendix G.12 governs the FBI’s use of NSLs involving journalists records. A version of the Appendix updated on October 16, 2013 was published *The Intercept*.<sup>6</sup> Under these rules, the procedural protections NSL for journalists’ records remain remarkably weak. The Appendix reveals these NSLs typically only require the signoff of by two FBI officials- the Executive Assistant Director of the National Security Branch (“EAD-NSB”) and the General Counsel.<sup>7</sup> A third layer of approval by the Assistant Attorney General for the DOJ’s National Security Division is required only where “the purpose of the NSL is to identify confidential news media sources.”<sup>8</sup> If the journalist is deemed to be a 1) “suspected or known intelligence officer” 2) “affiliated with a news organization that is associated with a foreign intelligence” or 3) “otherwise working on behalf of a foreign power,” special approval is only required if the NSL seeks to identify a confidential news media source.<sup>9</sup>

Journalists are not only entitled to First Amendment protections, but also protections under the Privacy Protection Act of 1980 (“PPA”), codified at 42 U.S.C. § 2000aa et seq. The PPA protects journalists from being required to turn over to law enforcement any work product and documentary materials, including sources, before it is disseminated to the public. In passing the PPA, Congress broadly recognized the need of journalists to gather and disseminate the news without fear of government interference. Government officers and employees are obligated to comply with the PPA.

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<sup>2</sup> USA FREEDOM Act of 2015, Pub. L. 114-23, §502, 129 Stat. 268 (2015).

<sup>3</sup> Department of Justice, Report on Review of News Media Policies (2013), <https://www.justice.gov/iso/opa/resources/2202013712162851796893.pdf>

<sup>4</sup> Charlie Savage, *Holder Tightens Rules on Getting Reporters’ Data*, New York Times (July 12, 2013), [http://www.nytimes.com/2013/07/13/us/holder-to-tighten-rules-for-obtaining-reporters-data.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2013/07/13/us/holder-to-tighten-rules-for-obtaining-reporters-data.html?pagewanted=all&_r=0).

<sup>5</sup> Office of the Attorney General, Updated Policy Regarding Obtaining Information from, or Records of, Members of the News Media; and Regarding Questioning, Arresting, or Charging Members of News Media (2015), <https://www.justice.gov/file/317831/download>; Lynn Oberlander, *Holder’s New Rulse for Pursuing Reporters*, New Yorker (July 13, 2013), <http://www.newyorker.com/news/news-desk/holders-new-rules-for-pursuing-reporters>.

<sup>6</sup> DIOG Appendix G.12

<sup>7</sup> DIOG Appendix G.12

<sup>8</sup> DIOG Appendix G.12

<sup>9</sup> DIOG Appendix G.12

## Request for Expedition

EPIC is entitled to expedited processing of this request. 5 U.S.C. § 552(a)(6)(E)(v)(II). To warrant expedited processing, the FOIA request must concern a matter of (1) “urgency to inform the public about an actual or alleged federal government activity,” and, (2) the request must be “made by a person who is primarily engaged in disseminating information.” 28 C.F.R. § 16.5(e)(1)(ii). This request satisfies both requirements.

First, there is an “urgency to inform the public about an actual or alleged federal government activity.” § 16.5(e)(1)(ii). The “actual...federal government activity” at issue is FBI’s use of National Security Letters to obtain telephone records of members of the media. The FBI has conceded this activity by publishing a heavily redacted version of the 2013 DIOG which includes portions of Appendix G.<sup>10</sup>

“Urgency” to inform the public about this activity is clear given rising prosecutions of government whistleblowers, simultaneously ramping up aggressive tactics against reporters and risking chilling the freedom of press. Obama administration:

“prosecuted nine cases involving whistle-blowers and leakers, compared with only three by all previous administrations combined, ... [and]... repeatedly used the Espionage Act... not to prosecute spies but to go after government officials who talked to journalists.”<sup>11</sup>

Indeed, members of the press themselves have been subpoenaed to “force them to reveal their sources and testify in criminal cases.” Among other incidents, the government also sought communications records of the Associated Press and named Fox Journalist James Rosen “an unindicted co-conspirator” in violation of the Espionage Act.<sup>12</sup> All this occurred under an administration that espoused support for the free press.<sup>13</sup>

Yet now, mere months into a new administration, the President has publicly labeled the press the “enemy of the American People,”<sup>14</sup> the administration has barred disfavored organizations from a White House press briefing,<sup>15</sup> and the White House Chief of Staff stated

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<sup>10</sup> Fed. Bureau of Investigations, Domestic Investigations and Operations Guide (2013), <https://vault.fbi.gov/FBI%20Domestic%20Investigations%20and%20Operations%20Guide%20%28DIOG%29/fbi-domestic-investigations-and-operations-guide-diog-2013-version/FBI%20Domestic%20Investigations%20and%20Operations%20Guide%20%28DIOG%29%202013%20Version%20Part%2001%20of%2001/view>.

<sup>11</sup> James Risen, *If Donald Trump Targets Journalists, Thanks Obama*, N.Y. Times (Dec. 30, 2016), [https://www.nytimes.com/2016/12/30/opinion/sunday/if-donald-trump-targets-journalists-thank-obama.html?\\_r=0](https://www.nytimes.com/2016/12/30/opinion/sunday/if-donald-trump-targets-journalists-thank-obama.html?_r=0).

<sup>12</sup> *Id.*; see also Josh Gerstein, *Holder walks fine line on prosecuting journalists*, Politico (May 20, 2013), <http://www.politico.com/blogs/under-the-radar/2013/05/holder-walks-fine-line-on-prosecuting-journalists-164367>.

<sup>13</sup> *Id.*

<sup>14</sup> @realDonaldTrump, Twitter (Feb. 17, 2017), <https://twitter.com/realDonaldTrump/status/832708293516632065>.

<sup>15</sup> Ryan Goodman, *9 Top First Amendment Experts React to White House Press Briefing Ban on CNN, NYT, Others*, Just Security (Feb. 27, 2017), <https://www.justsecurity.org/38173/top-amendment-experts-react-white-house-press-briefing-ban-cnn-nyt/>

revising libel laws was “something we’ve looked at.”<sup>16</sup> Against this backdrop, the upmost transparency in the government’s use of legal process to target journalists is required. To ensure proper public oversight and robust debate about an otherwise largely secret NSL program, the public must know, and know immediately, the full details of how the FBI uses NSLs to obtain records of members of the media.

Second, EPIC is an organization “primarily engaged in disseminating information.” § 16.5(e)(1)(ii). As the Court explained in *EPIC v. Dep’t of Def.*, “EPIC satisfies the definition of ‘representative of the news media’” entitling it to preferred fee status under FOIA. 241 F. Supp. 2d 5, 15 (D.D.C. 2003).

In submitting this detailed statement in support of expedited processing, I certify that this explanation is true and correct to the best of my knowledge and belief.

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

EPIC is a “representative of the news media” for fee classification purposes. *EPIC v. Dep’t of Def.*, 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).

Further, any duplication fees should also be waived because disclosure of the requested information “is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest” of EPIC. 28 C.F.R. § 16.10(k)(1); § 552(a)(4)(A)(iii). EPIC’s request satisfies the FBI’s three factors for granting a fee waiver. § 16.10(k)(2).

The DOJ FOIA regulations direct components to evaluate the three considerations to determine whether fee waiver is warranted: (i) the “subject of the request must concern identifiable operations or activities of the Federal Government with a connection that is direct and clear, not remote or attenuated”; (ii) disclosure must be “likely to contribute significantly to public understanding of those operations or activities”; and (iii) “disclosure must not be primarily in the commercial interest of the requester.” §§ 16.10(k)(2)(i)–(iii).

First, disclosure of any revisions or updates to DIOG Appendix G.12 and the requested supporting documents, self-evidently “concerns identifiable operations or activities of the Federal Government with a connection that is direct and clear, not remote or attenuated.” § 16.10(k)(2)(i). The FBI is, of course, the lead federal investigative agency, and the DIOG and these requested supporting documents describes standards procedures for carrying out those domestic investigations.

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<sup>16</sup> @ABC News, Twitter (Apr. 30, 2017), [https://twitter.com/ABC/status/858679639195107329?ref\\_src=twsrc%5Etfw&ref\\_url=http%3A%2F%2Fwww.gq.com%2Fstory%2Fdonald-trump-libel-laws](https://twitter.com/ABC/status/858679639195107329?ref_src=twsrc%5Etfw&ref_url=http%3A%2F%2Fwww.gq.com%2Fstory%2Fdonald-trump-libel-laws).

Second, disclosure “would be likely to contribute significantly to public understanding of those operations or activities” according to the two sub-factors. § 16.10(k)(2)(ii)(A-B). As to the first sub-factor, disclosure would be “meaningfully informative about government operations or activities” because neither any updates or revisions to the DIOG Appendix G.12 on or after 10/17/2013 nor any other official documentation about how the FBI uses these provisions in practice have been made public. § 16.10(k)(2)(ii)(A). Indeed, the FBI itself has thus far refused to release the 2013 edition of the DIOG Appendix G.12 in full.<sup>17</sup> Any additional information about how the FBI uses NSLs where members of the press are concerned will, therefore, meaningfully and significantly inform the public understanding of key FBI activities. As to the second sub-factor, disclosure will “contribute to the understanding of a reasonably broad audience of persons interested in the subject,” because, as stated in the relevant FOIA regulations, components will “presume that a representative of the news media will satisfy this consideration.” § 16.10(k)(2)(ii)(B).

Third, disclosure of the requested information is not “primarily in the commercial interest” of EPIC according to the two sub-factors. § 16.10(k)(2)(iii)(A-B). As to the first sub-factor, EPIC has no “commercial interest...that would be furthered by the requested disclosure.” § 16.10(k)(2)(iii)(A). EPIC is a registered non-profit organization committed to privacy, open government, and civil liberties.<sup>18</sup> As to the second sub-factor, “the component must determine whether that is the primary interest furthered by the request” because, as stated in the FOIA regulations, DOJ components “ordinarily will presume that where a news media requester has satisfied [the public interest standard], the request is not primarily in the commercial interest of the requester.” § 16.10(k)(2)(iii)(B). As already described above, EPIC is a news media requester and satisfies the public interest standard.

For these reasons, a fee waiver should be granted.

### Conclusion

Thank you for your consideration of this request. I anticipate your determination on our request within ten calendar days 5 U.S.C. § 552(a)(6)(E)(ii)(I). For questions regarding this request I can be contacted at 202-483-1140 x111 or FOIA@epic.org.

Respectfully submitted,

/s/ Hillary Song

Hillary Song

EPIC IPIOP Clerk

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<sup>17</sup> See Cora Currier, *supra* note 1.

<sup>18</sup> About EPIC, EPIC.org, <http://epic.org/epic/about.html>.