February 16, 2012

VIA UPS

IRS FOIA Request
Headquarters Disclosure Office
CL:GLD:D
1111 Constitution Avenue, NW.
Washington, DC 20224

AMERICAN CIVIL LIBERTIES UNION FOUNDATION
NATIONAL OFFICE
125 BROAD STREET, 18TH FL.
NEW YORK, NY 10004-2400
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OFFICERS AND DIRECTORS
SUSAN N. HERMAN
PRESIDENT

ANTHONY D. ROMERO
EXECUTIVE DIRECTOR

Re: REQUEST UNDER FREEDOM OF INFORMATION ACT

To Whom It May Concern:

Pursuant to the Freedom of Information Act, the American Civil Liberties Union Foundation requests records regarding the government's access to the contents of individuals' private electronic communications.

I. Background

Recent court decisions and media reports reveal that federal officials are accessing the contents of private electronic communications, including email, instant messages, and text messages, without a warrant.[1] This practice raises serious privacy concerns.[2] A federal appeals court has held that warrantless searches of the content of electronic communications violate the Fourth Amendment.[3]

For many Americans, private electronic communications have supplanted use of the telephone and postal service. Seventy percent of American adults communicate by email, while sixty percent use text

[1] *See e.g. United States v. Warshak*, 631 F.3d 266 (6th Cir. 2010); Miguel Helft & Claire Cain Miller, *1986 Privacy Law is Outrun by the Web,* N.Y. Times, Jan. 9, 2011, at A1, *available at* http://www.nytimes.com/2011/01/10/technology/10privacy.html?_r=1&hp=&pagewanted=all; Editorial, *Want My Email? Get a Warrant*, Sci. Am., Jan. 11, 2012, *available at* http://www.scientificamerican.com/article.cfm?id=read-my-e-mail-get-a-warrant.

[2] Orin S. Kerr, *Applying the Fourth Amendment to the Internet: A General Approach*, 62 Stan. L. Rev. 1005, 1043 (2010) (concluding that §2703 orders permitting access to contents of electronic communications with less process than a warrant are unconstitutional); Patricia L. Bellia & Susan Freiwald, *Fourth Amendment Protection for Stored E–Mail,* 2008 U. Chi. Legal F. 121, 135-40 (2008) (same).

[3] *Warshak*, 631 F.3d at 288.

messaging.[4] The widespread reliance on these methods to communicate with friends, family, and colleagues creates a strong public interest in determining to what extent the government is accessing private electronic communications without a warrant based on probable cause. The government's expansive view of its surveillance powers has already prompted congressional hearings and proposed amendments to the federal electronic communications surveillance laws.[5]

II. The Request for Records

The ACLU seeks disclosure of records regarding:

1. Policies, procedures, and practices followed to obtain the contents of private electronic communications for law enforcement purposes.

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2. Policies, procedures, and practices followed to obtain the contents of private electronic communications without obtaining a warrant based upon probable cause for law enforcement purposes.

3. Any violations of the policies, procedures, and practices to obtain private electronic communications identified in (1) or (2).

4. Court opinions and orders authorizing or denying disclosure of the contents of private electronic communications for law enforcement purposes.

5. All records discussing the impact of *United States v. Warshak*, 631 F.3d 266 (6th Cir. 2010) and *Quon v. Arch Wireless Operating Co.*, 529 F.3d 892 (9th Cir. 2008), on the government's ability to obtain the content of private electronic communications for law enforcement purposes.

6. Communications with Internet service providers and mobile carriers regarding obtaining the contents of private electronic communications, including: (a) company manuals, pricing, and data access policies, (b) invoices reflecting payments, and (c) instances in which Internet

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[4] Lee Rainie, Pew Research Center Internet and American Life Project, *Internet, Broadband, and Cell Phone Statistics* (2010), *available at* http://www.pewinternet.org/~/media//Files/Reports/2010/PIP_December09_update.pdf; Aaron Smith, Pew Research Center Internet and American Life Project, *Americans and Text Messaging* (2011), *available at* http://www.pewinternet.org/~/media//Files/Reports/2011/Americans%20and%20Text%20Messaging.pdf.

[5] Electronic Communications Privacy Act Amendments Act of 2011, S. 1011, 112th Cong. (2011) (requiring probable cause warrant for a search of contents of electronic communication, except to respond to a call for emergency services); *The Electronic Communications Privacy Act: Government Perspectives on Protecting Privacy in the Digital Age before the S. Comm. on the Judiciary*, 112th Cong. (2011).

service providers and mobile carriers have refused to comply with a request or order.

The term "private electronic communications" should be construed to encompass all communications that are not available to the general public, including email, instant messages, text messages, and social networking communication or feeds, including but not limited to Facebook, Twitter, and Myspace feeds.

With respect to the form of production, *see* 5 U.S.C. § 552(a)(3)(B), the ACLU requests that responsive electronic records be provided electronically in their native file format, if possible. Alternatively, the ACLU requests that the records be provided electronically in a text-searchable, static-image format (PDF), in the best image quality possible, and that the records be provided in separate, bates-stamped files.

III. Request for Waiver or Reduction of Fees

The ACLU requests a waiver or reduction of fees. Disclosure of the requested information will help members of the public understand the privacy risks of using email, text messaging, and other forms of private electronic communication. The constitutional status of warrantless searches of electronic communications is unsettled.[6] Meanwhile, the scale of government searches of private electronic communications is shielded from public view.[7] The requested information will "contribute significantly to public understanding." 26 C.F.R. § 601.702(f)(2)(i). Moreover, as a nonprofit 501(c)(3) organization the disclosure of records is not in the requester's commercial interest.

Further, the ACLU is a news media requester. The ACLU requests a limitation of processing fees pursuant to 5 U.S.C. § 552(a)(4)(A)(ii)(II) ("fees shall be limited to reasonable standard charges for document duplication when records are not sought for commercial use and the request is made by . . . a representative of the news media . . . .").

The ACLU meets the definition of a representative of the news media because it is an "entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience." *Nat'l Sec. Archive v. U.S. Dep't of Def.*, 880 F.2d 1381, 1387 (D.C. Cir. 1989).

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[6] *The Electronic Communications Privacy Act: Government Perspectives on Protecting Privacy in the Digital Age before the S. Comm. on the Judiciary*, 112th Cong. (2011) (testimony of Cameron F. Kerry, General Counsel, United States Department of Commerce).

[7] Ryan Singel, *Google, Microsoft Push Feds to Fix Privacy Laws,* Wired, Mar. 30, 2010, *available at* http://www.wired.com/threatlevel/2010/03/google-microsoft-ecpa ("'We [Microsoft] would like to see more transparency across the industry . . . . But no one company wants to stick its head up to talk about numbers.'").

The ACLU is a national organization dedicated to the defense of civil rights and civil liberties. Dissemination of information to the public is a critical and substantial component of the ACLU's mission and work. Specifically, the ACLU publishes newsletters, news briefings, right-to-know documents, and other educational and informational materials that are broadly disseminated to the public. Such material is widely available to everyone, including individuals, tax-exempt organizations, not-for-profit groups, law students, and faculty, for no cost or for a nominal fee through its public education department and web site. The web site addresses civil rights and civil liberties issues in depth, provides features on civil rights and civil liberties issues in the news, and contains many thousands of documents relating to the issues on which the ACLU is focused. The website specifically includes features on information obtained through the FOIA. For example, the ACLU's "Accountability for Torture FOIA" webpage, http://www.aclu.org/torturefoia, contains commentary about the ACLU's FOIA request for documents related to the treatment of detainees, press releases, analysis of the FOIA documents disclosed, and an advanced search engine permitting webpage visitors to search the documents obtained through the FOIA. *See Judicial Watch, Inc. v. U.S. Dep't of Justice*, 133 F. Supp. 2d 52, 53–54 (D.D.C. 2000) (finding Judicial Watch to be a news-media requester because it posted documents obtained through FOIA on its website).

The ACLU publishes a newsletter at least twice a year that reports on and analyzes civil-liberties-related current events. The newsletter is distributed to approximately 450,000 people. The ACLU also publishes a bi-weekly electronic newsletter, which is distributed to approximately 300,000 subscribers (both ACLU members and non-members) by e-mail. Both of these newsletters often include descriptions and analyses of information obtained from the government through FOIA, as well as information about cases, governmental policies, pending legislation, abuses of constitutional rights, and polling data. *Cf. Elec. Privacy Info. Ctr. v. Dep't of Def.*, 241 F. Supp. 2d 5, 13–14 (D.D.C. 2003) (finding the Electronic Privacy Information Center to be a representative of the news media under Department of Defense regulations because it published a "bi-weekly electronic newsletter that is distributed to over 15,000 readers" about "court cases and legal challenges, government policies, legislation, civil rights, surveys and polls, legislation, privacy abuses, international issues, and trends and technological advancements").

The ACLU also regularly publishes books,[8] "know your rights" publications,[9] fact sheets,[10] and educational brochures and pamphlets

[8] Some of the recent books published by the ACLU include: Susan N. Herman, *Taking Liberties: The War on Terror and the Erosion of American Democracy* (Oxford Univ. Press 2011); Lenora M. Lapidus, Emily J. Martin & Namita Luthra, *The Rights of Women: The Authoritative ACLU Guide to Women's Rights* (NYU Press 4th ed. 2009); Jameel Jaffer & Amrit Singh, *Administration of Torture: A Documentary Record from Washington to Abu*

designed to educate the public about civil liberties issues and governmental policies that implicate civil rights and liberties. These materials are specifically designed to be educational and widely disseminated to the public. *See Elec. Privacy Info. Ctr.*, 241 F. Supp. 2d at 11 (finding the Electronic Privacy Information Center to be a news-media requester because of its publication and distribution of seven books on privacy, technology, and civil liberties).

Depending on the results of this request, the ACLU plans to "disseminate the information" it receives "among the public" through these kinds of publications in these kinds of channels. The ACLU is therefore a news media entity. Any information disclosed by the ACLU as a result of this FOIA will be available to the public at no cost.

Thank you for your prompt attention to this matter. Please furnish all applicable records to:

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION

Catherine Crump
Staff Attorney
American Civil Liberties Union Foundation
125 Broad Street, 17th floor
New York, NY 10004
(212) 519-7806

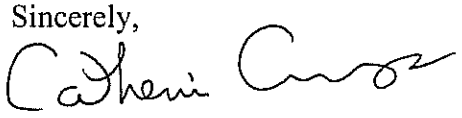
Please make copies and furnish them to us without our conducting a prior inspection.

Ghraib and Beyond (Columbia Univ. Press 2007) (a book based on documents obtained through FOIA).

[9] Some of the more recent "know your rights" publications include: ACLU, *Know Your Rights: Demonstrations and Protests* (Nov. 2011), *available at* http://www.aclu.org/files/assets/kyr_protests.pdf; ACLU, *Gender-Based Violence & Harassment: Your School, Your Rights* (May 2011), *available at* http://www.aclu.org/files/assets/genderbasedviolence_factsheet_0.pdf; ACLU, *Know Your Rights: What to Do If You're Stopped by Police, Immigration Agents or the FBI* (June 2010), *available at* http://www.aclu.org/files/assets/bustcard_eng_20100630.pdf.

[10] *See, e.g.*, ACLU, *Military Abortion Ban in Cases of Rape and Incest (Factsheet)* (2011), *available at* http://www.aclu.org/reproductive-freedom/military-abortion-ban-cases-rape-and-incest-factsheet; ACLU, *The Facts About "The No Taxpayer Funding For Abortion Act"* (2011), *available at* http://www.aclu.org/files/assets/Chris_Smith_bill-_ACLU_Fact_Sheet-_UPDATED-4-30-11.pdf; ACLU, *Fact Sheet on H.R. 3, the No Taxpayer Funding for Abortion Act* (2011), *available at* http://www.aclu.org/reproductive-freedom/fact-sheet-hr-3-no-taxpayer-funding-abortion-act.

Sincerely,



Catherine Crump
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American Civil Liberties Union

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