



U.S. Department of Justice

Criminal Division

Washington, D.C. 20530

CRM - 200601001F

DEC 18 2008

Marcia Hofmann
Staff Attorney
1875 Connecticut Avenue, NW
Suite 650
Washington, DC 20009

Dear Ms. Hofmann:

This is in response to your request of September 22, 2006, for access to records concerning all guidance issued; all inquiries; and all reports concerning the "content" of the pen register statute, 18 U.S.C. §§ 3121-3127.

We located records (items 1-42) in the Criminal Division within the scope of your request. We have processed your request under the Freedom of Information Act and will make all records available to you whose release is either required by that statute, or considered appropriate as a matter of discretion.

In light of our review, we have determined to release the enclosed items in full and to withhold certain items, as described on the enclosed schedule, in full. We are withholding the records indicated pursuant to one or more of the following FOIA exemptions set forth in 5 U.S.C. 552(b):

- (5) which permits the withholding of inter-agency or intra-agency memorandums or letters which reflect the predecisional, deliberative processes of the Department, and/or which consist of attorney work product prepared in anticipation of litigation; and
- (7) which permits the withholding of records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information...
- (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law.

We found records originated by Office of Legislative Affairs. Pursuant to Department practice, we have referred these records to the originating offices for their review and direct response to you.

Also, we found records originated by the Office (or Offices) of an United States Attorney. Pursuant to Department practice, we have referred these records to the Executive Office for United States Attorneys (which processes such records) for its review and direct response to you.

You have a right to an administrative appeal of this partial denial of your request. Your appeal should be addressed to: The Office of Information and Privacy, United States Department of Justice, 1425 New York Ave., NW, Suite 11050, Washington, DC 20530-0001. Both the envelope and the letter should be clearly marked with the legend "FOIA Appeal." Department regulations provide that such appeals must be received by the Office of Information and Privacy within sixty days of the date of this letter. 28 C.F.R. 16.9. If you exercise this right and your appeal is denied, you also have the right to seek judicial review of this action in the federal judicial district (1) in which you reside, (2) in which you have your principal place of business, (3) in which the records denied are located, or (4) for the District of Columbia. If you elect to file an appeal, please include, in your letter to the Office of Information and Privacy, the Criminal Division file number that appears above your name in this letter.

Sincerely,



Rena Y. Kim, Chief
Freedom of Information/Privacy Act Unit
Office of Enforcement Operations
Criminal Division

Schedule of Records Withheld in Full
(Refer to Body of Letter for Full Description of Exemptions)

5. Draft document; 75 pages. Withheld pursuant to 5 U.S.C. 552(b)(5) and (7)(E).
6. Draft document, 140 pages. Withheld pursuant to 5 U.S.C. 552(b)(5) and (7)(E).
7. Draft Sealed Application with attachments, 45 pages. Withheld pursuant to 5 U.S.C. 552(b)(5).
8. Draft responses to Leahy 11/1 questions, 4 pages. Withheld pursuant to 5 U.S.C. 552(b)(5).
9. Documents depicting slides of presentation, 120 pages. Withheld pursuant to 5 U.S.C. 552(b)(5).
10. Draft Memorandum, 2/20/02, Martha Stansell-Gamm (Criminal Division) to Michael Chertoff (Assistant Attorney General); 80 pages. Withheld pursuant to 5 U.S.C. 552(b)(5).
11. Memorandum, Michael Chertoff (Assistant Attorney General) to Deputy Attorney General, 7 pages. Withheld pursuant to 5 U.S.C. 552(b)(5).
12. Memorandum, Martha Stansell-Gamm (Criminal Division) to Michael Chertoff (Assistant Attorney General); 5 pages. Withheld pursuant to 5 U.S.C. 552(b)(5).
13. Memorandum prepared by Richard W. Downing, 11/8/01; 2 pages. . Withheld pursuant to 5 U.S.C. 552(b)(5).
14. Field Guidance on New Authorities That Relate to Computer Crime and Electronic Evidence Enacted in the USA Patriot Act of 2001, 14 pages. . Withheld pursuant to 5 U.S.C. 552(b)(5) and (7)(E).
15. Preliminary Analysts of the Computer Crime and Electronic Evidence Provisions of USA Patriot Act of 2001, 32 pages. Withheld pursuant to 5 U.S.C. 552(b)(5) and (7)(E).
16. Analysis of Sections of the USA Patriot Act of 2001 that relate to Computer Crime and Electronic Evidence, October, 2001, Richard Downing (Criminal Division); 84 pages. Withheld pursuant to 5 U.S.C. 552(b)(5) and (7)(E).
17. Analysis of Sections of the Anti-Terrorism Act of 2001 that relate to Computer Crime and Electronic Evidence, October, 2001, Richard Downing; 68 pages. Withheld pursuant to 5 U.S.C. 552(b)(5) and (7)(E).

18. Field Guidance on New Authorities Enacted in the 2001 Anti-Terrorism Legislation, 32 pages. Withheld pursuant to 5 U.S.C. 552(b)(5) and (7)(E).
19. Field Guidance on New Authorities (Redacted) Enacted in the 2001 Anti-Terrorism Legislation, 30 pages. Withheld pursuant to 5 U.S.C. 552(b)(5) and (7)(E).
20. Memorandum with attachments, Martha Stansell-Gamm (Criminal Division) to Michael Chertoff (Assistant Attorney General), 8 pages. Withheld pursuant to 5 U.S.C. (b)(5).
21. Memorandum, Michael Chertoff (Assistant Attorney General) to Deputy Attorney General; 9 pages. Withheld pursuant to 5 U.S.C. 552(b)(5).
22. Draft Memorandum, Larry D. Thompson (Deputy Attorney General), 5 pages. Withheld pursuant to 5 U.S.C. 552(b)(5).
23. Draft Memorandum, 5/14/02, Larry D. Thompson (Deputy Attorney General), 6 pages. Withheld pursuant to 5 U.S.C. 552(b)(5).
24. Draft, Field Guidance for the use of the Computer Trespasser Exception to the Wiretap Statute, 18 U.S.C. Section 2511(2)(i); 13 pages. Withheld pursuant to 5 U.S.C. 552(b)(5) and (7)(E).
25. Draft Memorandum, 9/23/02, Martha Stansell-Gamm (Criminal Division) to Dan Collins, (Associate Deputy Attorney General); 14 pages. Withheld pursuant to 5 U.S.C. 552(b)(5).
26. Memorandum with attachments, Martha Stansell-Gamm (Criminal Division) to Michael Chertoff (Assistant Attorney General); 7 pages. Withheld pursuant to 5 U.S.C. 552(b)(5).
27. Draft Memorandum, Michael Chertoff (Assistant Attorney General) to Deputy Attorney General, 12 pages. Withheld pursuant to 5 U.S.C. 552(b)(5).
28. Email with attachments, 7/18/02, Julie Samuels (Criminal Division) to Richard Downing (Criminal Division); 13 pages. Withheld pursuant to 5 U.S.C. 552(b)(5).
29. Draft Memorandum, Martha Stansell-Gamm (Criminal Division) to Michael Chertoff (Assistant Attorney General); 52 pages. Withheld pursuant to 5 U.S.C. 552(b)(5).
30. Comments on URL memo, 2 pages. Withheld pursuant to 5 U.S.C. 552(b)(5).
31. Draft documents, 2/3/02, Richard W. Downing; 25 pages. Withheld pursuant to 5 U.S.C. 552(b)(5).

32. Draft Memorandums, Martha Stansell-Gamm (Criminal Division) to Michael Chertoff (Assistant Attorney General); 54 pages. Withheld pursuant to 5 U.S.C. 552(b)(5).
33. Memorandum, 3/8/02, Andrew G. Oosterbaan (Criminal Division) to Julie Samuels (Criminal Division); 2 pages. Withheld pursuant to 5 U.S.C. 552(b)(5).
34. Draft Memorandums, Martha Stansell-Gamm (Criminal Division) to Michael Chertoff (Assistant Attorney General); 78 pages. Withheld pursuant to 5 U.S.C. 552(b)(5).
35. Draft Memorandum, Michael Chertoff (Criminal Division); 8 pages. Withheld pursuant to 5 U.S.C. 552(b)(5).
36. Memorandum, Michael Chertoff (Criminal Division) to Deputy Attorney General; 9 pages. Withheld pursuant to 5 U.S.C. 552(b)(5).
37. Memorandum with attachments, Martha Stansell-Gamm (Criminal Division) to Michael Chertoff (Assistant Attorney General); 3 pages. Withheld pursuant to 5 U.S.C. 552(b)(5).
38. Memorandum, Michael Chertoff (Assistant Attorney General) to Deputy Attorney General; 7 pages. Withheld pursuant to 5 U.S.C. 552(b)(5).
39. Draft Memorandums, 9/02; 33 pages. Withheld pursuant to 5 U.S.C. 552(b)(5).
40. Memorandum with attachments, Martha Stansell-Gamm (Criminal Division) to Michael Chertoff (Assistant Attorney General); 10 pages. Withheld pursuant to 5 U.S.C. 552(b)(5).
41. Emails; 73 pages. Withheld pursuant to 5 U.S.C. 552(b)(5).
42. Handwritten Note, 4 pages. Withheld pursuant to 5 U.S.C. 552(b)(5).

United States Court of Appeals,
District of Columbia Circuit.

UNITED STATES TELECOM ASSOCIATION, et
al., Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
and United States of America, Respondents.

AirTouch Communications, Inc., et al., Intervenor

Nos. 99-1442, 99-1466, 99-1475 & 99-1523.

Argued May 17, 2000.

Decided Aug. 15, 2000.

Telecommunications carriers and privacy rights organizations filed petitions for review challenging portions of Federal Communications Commission (FCC) order, 14 F.C.C.R. 16794, requiring carriers to implement technology enabling interception of information relating to wireless telephone calls under Communications Assistance for Law Enforcement Act (CALEA). Petitions were consolidated, and the Court of Appeals, Tatel, Circuit Judge, held that: (1) FCC failed to engage in reasoned decision-making in requiring dialed digit extraction, party hold/join/drop information, subject-initiated dialing and signaling information, and in-band and out-of-band signaling information; (2) technology that would make available locations of antenna towers used to connect at beginning and end of wireless telephone calls could be required as "call-identifying information;" and (3) FCC could require technology enabling interception of digital packet mode data.

Petitions granted in part and denied in part.

West Headnotes

[1] Statutes ☞219(2)
361k219(2)

[1] Statutes ☞219(4)
361k219(4)

To resolve a challenge to an agency's interpretation of a statute it is charged with administering, the court first determines whether Congress has directly spoken to the precise question at issue, and, if it has, that is the end of the matter, since the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress; however, if the court finds the statute

silent or ambiguous with respect to the precise question at issue, the court determines whether the agency's answer is based on a permissible construction of the statute, affording substantial deference to the agency's interpretation of statutory language.

[2] Telecommunications ☞461.15
372k461.15

For purposes of *Chevron* analysis of Federal Communications Commission's (FCC) interpretation, Communications Assistance for Law Enforcement Act's (CALEA) definition of "call-identifying information," which included dialing or signaling information that identified origin, direction, destination, or termination of communication, was ambiguous as to whether it was limited to telephone numbers alone. Communications Assistance for Law Enforcement Act, § 102(2), 47 U.S.C.A. § 1001(2).

[3] Statutes ☞195
361k195

Where Congress includes particular language in one section of a statute, but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.

[4] Administrative Law and Procedure ☞507
15Ak507

[4] Administrative Law and Procedure ☞763
15Ak763

An agency must cogently explain why it has exercised its discretion in a given manner, and that explanation must be sufficient to enable the Court of Appeals to conclude that the agency's action was the product of reasoned decisionmaking.

[5] Telecommunications ☞461.5
372k461.5

Federal Communications Commission (FCC) failed to engage in reasoned decisionmaking in requiring, under Communications Assistance for Law Enforcement Act (CALEA), telecommunications carriers to implement technology enabling post-cut-through dialed digit extraction, interception of party hold/join/drop information, interception of subject-initiated dialing and signaling information, including signals generated

(Cite as: 227 F.3d 450, 343 U.S.App.D.C. 278)

by activating features such as call forwarding and call waiting, and interception of in-band and out-of-band signaling information; FCC simply concluded that required information was covered by CALEA's definition of "call-identifying information" without explaining how required information related to origin, direction, destination, or termination of calls, and FCC modified standards, which had been set by telecommunications industry association pursuant to CALEA, without identifying their deficiencies. Communications Assistance for Law Enforcement Act, §§ 102(2), 103(a)(2), 107(b), 47 U.S.C.A. §§ 1001(2), 1002(a)(2), 1006(b).

[6] Telecommunications ☞461.5
372k461.5

Federal Communications Commission (FCC) acted arbitrarily and capriciously in requiring, under Communications Assistance for Law Enforcement Act (CALEA), that telecommunications carriers implement call-identification technologies in addition to those established by telecommunications industry association (TIA) under CALEA, since FCC failed to ensure that CALEA's requirements were met by cost-effective methods and failed to ensure that cost of compliance on residential ratepayers was minimized; FCC adopted estimate predicting that TIA standards would cost \$916 million and additional requirements would add \$414 million, and then concluded without explanation that additional cost was not so exorbitant as to require exclusion, FCC made no attempt to determine cost of obtaining additional information through alternative methods, and FCC never explained impact on residential rates. Communications Assistance for Law Enforcement Act, §§ 103, 107(b)(1, 3), 47 U.S.C.A. §§ 1002, 1006(b)(1, 3).

[7] Administrative Law and Procedure ☞763
15Ak763

Agency action must be based on a consideration of the relevant factors and must rest on reasoned decisionmaking in which the agency must examine the relevant data and articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choice made.

[8] Telecommunications ☞461.5
372k461.5

Federal Communications Commission (FCC) failed to adequately consider privacy and security of communications not authorized to be intercepted when

it required, under Communications Assistance for Law Enforcement Act (CALEA), telecommunications carriers to implement post-cut-through dialed digit extraction technology capable of monitoring all digits dialed after calls were connected; although some post-cut-through digits were telephone numbers, others would convey call content, such as financial account numbers, passwords, and pager messages, and FCC rejected methods of allowing law enforcement agencies (LEAs) with only pen register orders to obtain phone numbers, but not call content, on ground that those methods would be costly and time consuming to LEAs. Communications Assistance for Law Enforcement Act, § 107(b)(1, 2), 47 U.S.C.A. § 1006(b)(1, 2).

[9] Telecommunications ☞461.5
372k461.5

Federal Communications Commission (FCC) could require, pursuant to Communications Assistance for Law Enforcement Act's (CALEA's) definition of call-identifying information, telecommunications carriers to implement technology that would make available to law enforcement agencies (LEAs) locations of antenna towers that mobile phones used to connect at beginning and end of calls; call-identifying information included "signalling" information, mobile phones would send signal to nearest cell site at start and end of each call, location information LEAs would routinely obtain from telephone numbers in wireline environment was comparable to antenna tower location information in wireless environment, and LEAs would require something more than pen register order to obtain antenna location information. Communications Assistance for Law Enforcement Act, §§ 102(2), 103(a)(2), 47 U.S.C.A. §§ 1001(2), 1002(a)(2).

[10] Telecommunications ☞461.5
372k461.5

Requirement under Communications Assistance for Law Enforcement Act (CALEA) that telecommunications carriers implement technologies that would enable law enforcement agencies (LEAs) to intercept digital packet mode data was proper, even though packet mode data would contain call content in addition to call-identifying packet header; since requirement was included in standards developed by telecommunications industry association (TIA), it was unaffected by any deficiencies in Federal Communications Commission's (FCC's) cost accounting, FCC recognized privacy concerns arising from requirement and asked TIA to study ways of separating header information from call content, and