



U.S. Department of Justice

Executive Office for United States Attorneys
Freedom of Information/Privacy Act Staff
600 E Street, N.W., Room 7300
Washington, D.C. 20530
202-616-6757 Fax 202-616-6478

Requester: Marcia Hofmann

Request Number: 08-4268-R

Government Component that referred material: U. S. Department of Justice, Criminal Division

Dear Requester:

This is in reply to your Freedom of Information Act/Privacy Act request of September 22, 2006. Records were referred to us by the government component above for direct response to you.

The referred material has been considered under both the FOIA and the Privacy Act to provide you the greatest degree of access. Exemptions have been applied when deemed appropriate either for withholding records in full or for excising certain information. The exemptions cited are marked below. An enclosure to this letter explains the exemptions in more detail.

<u>Section 552</u>		<u>Section 552a</u>	
<input type="checkbox"/> (b)(1)	<input type="checkbox"/> (b)(4)	<input type="checkbox"/> (b)(7)(B)	<input checked="" type="checkbox"/> (j)(2)
<input type="checkbox"/> (b)(2)	<input type="checkbox"/> (b)(5)	<input checked="" type="checkbox"/> (b)(7)(C)	<input type="checkbox"/> (k)(2)
<input type="checkbox"/> (b)(3)	<input type="checkbox"/> (b)(6)	<input type="checkbox"/> (b)(7)(D)	<input type="checkbox"/> (k)(5)
_____	<input type="checkbox"/> (b)(7)(A)	<input type="checkbox"/> (b)(7)(E)	<input type="checkbox"/> _____
_____		<input type="checkbox"/> (b)(7)(F)	

We have reviewed approximately 78 page(s) of material:

3 page(s) are being released in full (RIF);
44 page(s) are being released in part (RIP);
 page(s) are withheld in full (WIF) and
31 pages were not originated within our agency and are being returned to Department of Justice, Criminal Division. The document should be referred to OIP.

This is the final action on this above-numbered request. You may appeal this decision on this request by writing within 60 days from the date of this letter to the **Office of Information and Privacy, United States Department of Justice, 1425 New York Avenue, Suite 11050, Washington, D.C. 20530-0001**. Both the letter and envelope should be marked "FOIA Appeal." If you are dissatisfied with the results of any such administrative appeal, judicial review may thereafter be available in U.S. District Court, 28 C.F.R. §16.9.

Sincerely,

William G. Stewart II
Assistant Director

Enclosure(s)

EXPLANATION OF EXEMPTIONS

FOIA: TITLE 5, UNITED STATES CODE, SECTION 552

- (b)(1) (A) specifically authorized under criteria established by and Executive order to be kept secret in the in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;
- (b)(2) related solely to the internal personnel rules and practices of an agency;
- (b)(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;
- (b)(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;
- (b)(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;
- (b)(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;
- (b)(7) records or information compiled for law enforcement purposes, but only the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, (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, or (F) could reasonably be expected to endanger the life or physical safety of any individual.
- (b)(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or
- (b)(9) geological and geophysical information and data, including maps, concerning wells.

PRIVACY ACT: TITLE 5, UNITED STATES CODE, SECTION 552a

- (d)(5) information compiled in reasonable anticipation of a civil action proceeding;
- (j)(2) material reporting investigative efforts pertaining to the enforcement of criminal law including efforts to prevent, control, or reduce crime or apprehend criminals;
- (k)(1) information which is currently and properly classified pursuant to Executive Order 12356 in the interest of the national defense or foreign policy, for example, information involving intelligence sources or methods;
- (k)(2) investigatory material compiled for law enforcement purposes, other than criminal, which did not result in loss of a right, benefit or privilege under Federal programs, or which would identify a source who furnished information pursuant to a promise that his/her identity would be held in confidence;
- (k)(3) material maintained in connection with providing protective services to the President of the United States or any other individual pursuant to the authority of Title 18, United States Code, Section 3056;
- (k)(4) required by statute to be maintained and used solely as statistical records;
- (k)(5) investigatory material compiled solely for the purpose of determining suitability eligibility, or qualification for Federal civilian employment or for access to classified information, the disclosure of which would reveal the identity of the person who furnished information pursuant to a promise that his identity would be held in confidence;
- (k)(6) testing or examination material used to determine individual qualifications for appointment or promotion in Federal Government service the release of which would compromise the testing or examination process;
- (k)(7) material used to determine potential for promotion in the armed services, the disclosure of which would reveal the identity of the person who furnished the material pursuant to a promise that his identity would be held in confidence.

REQUESTER: Marcia Hoffman

FOIA FILE#: 08-4268-R

DOCUMENTS Released in Full "RIF"

1 pages



U.S. Department of Justice

Executive Office for United States Attorneys

Office of the Director

Room 2244A, Main Justice Building
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

(202) 514-2121

MEMORANDUM - Sent via Electronic Mail

DATE: JUN 3 2002

TO: All United States Attorneys
All First Assistant United States Attorneys
All Criminal Chiefs

FROM:  Kenneth L. Wainstein
Director

SUBJECT: Policy Concerning Operation of Pen Registers and Trap and Trace Devices

ACTION REQUIRED: None. Information only.

CONTACT PERSON: Chris Chaney
Counsel to the Director Staff
(202) 514-1023
E-mail: chaney, chris

The attached memorandum from Deputy Attorney General Larry D. Thompson sets forth the Department's policy concerning the avoidance of "overcollection" in the use of pen registers and trap and trace devices. Please distribute this memorandum to all criminal Assistant United States Attorneys and other appropriate personnel. If you have questions or comments, please contact Chris Chaney. Thank you.

Attachment

cc: United States Attorneys' Secretaries

RTF

REQUESTER: marcia Hoffmann

FOIA FILE#: 08-4268-R

MIXED DOCUMENTS

Pages RIF 2

Pages RIP 44

Pages WIF _____

DUP Pages _____

Image Not Available

U.S. Department of Justice

Michael J. Sullivan
United States Attorney
District of Massachusetts

Main Reception: (617) 748-3100

John Joseph Moakley United States Courthouse
1 Courthouse Way
Suite 9200
Boston, Massachusetts 02210

November 15, 2005

Charles B. Swartwood, III
Chief, United States Magistrate Judge
United States District Court
District of Massachusetts
1 Courthouse Way
Boston, MA 02210

Re: Pen Register/Trap & Trace Orders

Dear Judge Swartwood:

Thank you for the opportunity to address the issues raised by the Memorandum and Order entered by United States Magistrate,

We very much share (7C) concern to minimize the interception of content during the execution of pen register and/or trap & trace orders. However, for the reasons articulated below, we believe that (7C) supplemental language is contrary to the statutory balance determined by Congress as set forth in 18 U.S.C. §3121(c). In addition, the definition of "contents" proposed by (7C) will be overly broad when it is applied in certain network contexts. Accordingly, we believe the Court should not adopt this supplemental language as a model.

(7C) added the following supplemental language to the trap and trace orders presented to him in Docket No.

It is ORDERED that the pen register and trap and trace device installed in accordance with the within Order be configured to exclude all information constituting or disclosing the "contents" of any communications or accompanying electronic files.

RIP
7C

Judge Swartwood
November 15, 2005
Page 2

"Contents" is defined by statute as any "...information concerning the substance, purport or meaning of that communication."

The disclosure of the "contents" of communications is prohibited pursuant to this Order even if what is disclosed is also "dialing, routing, addressing and signaling information."

Therefore, the term "contents" of communications includes subject lines, application commands, search queries, requested file names, and file paths. Disclosure of such information is prohibited by the within Order.

Violation of the within Order may subject an internet service provider to contempt of court sanctions.

In implementing the within Order, should any questions arise as to whether the pen register and/or trap and trace device should be configured to provide or not to provide any particular category of information over and above those stated, the Trial Attorney and/or the internet service provider are invited to apply to this court for clarification and/or guidance. [emphasis added]

Three aspects of this supplemental language are of concern: (1) it imposes an absolute bar on even incidental acquisition of content, overriding Congress' explicit acknowledgment that technical complications may make such incidental collection unavoidable; (2) it shifts the statutory burden of minimizing the interception of the contents of communications from the applicant government agency to the internet service provider ("ISP"); and (3) it establishes an overly broad itemization of "contents" which includes non-content material. These aspects are addressed below after a description of the central statutory provision, 18 U.S.C. §3121(c).

RIF

As (7C) identified, the nettlesome line between content and non-content surfaced first in the area of telecommunications the better part of a decade ago. At that time, individuals had begun with increasing frequency to use their telephones to access banking and credit card information, keying in their account numbers for this purpose. In its second session, the 103th Congress amended the pen register statute in 1994 to limit, but not prohibit, the interception of content during the execution of a pen register. The limitation established by Congress, and the burden of compliance with that limitation, was codified in §3121(c) as follows:

(c) **Limitation** - A Government agency authorized to install and use a pen register under this chapter or under State law shall use technology reasonably available to it that restricts the recording or decoding of electronic or other impulses to the dialing and signaling information utilized in call processing.

After seven years' experience with this formulation, Congress amended the statute again in 2001 in the Patriot Act, keeping the same core approach, but expanding §3121(c) to explicitly include trap and trace devices, and the placement of both pen registers and trap and trace devices on electronic networks:

(c) **Limitation** - A government agency authorized to install and use a pen register or trap and trace device under this chapter or under State law shall use technology reasonably available to it that restricts the recording or decoding of electronic or other impulses to the dialing, routing, addressing, and signaling information utilized in the processing and transmitting of wire or electronic communications so as not to include the contents of any wire or electronic communications. [emphasis added]

This is the specific statutory provision which the Court is seeking to implement.

RIP
7C

Judge Swartwood
November 15, 2005
Page 4

(7 C) supplemental language directly conflicts with 18 U.S.C. 3121(c) in two respects. First, (7 C) Order converts the statutory requirement to use "technology reasonably available" to avoid content into an absolute ban on the interception of content. Congress recognized - in its revisions to the pen register statute in both 1994 and 2001 - that the complexity of telecommunications and network communications presently create impossible challenges to separating all content from non-content dialing, routing, addressing and signaling information in real time. Accordingly, rather than subjecting government agencies (or, in the case (7 C) order, internet service providers) to the risk of contempt of court when content was inevitably intercepted as part of the execution of a pen register or trap and trace order, Congress established the more elastic requirement in §3121(c) that the government use "technology reasonably available to it" to accomplish this end. Thus, we believe, the language in (7 C) Order exceeds the authority conferred by the statute.

As we indicated in the beginning of this letter, the Department of Justice shares the Court's deep concern that the collection of content in the operation of pen registers and trap and trace devices be avoided and minimized to the extent technologically possible. Accordingly, in May, 2002, then Deputy Attorney General Larry D. Thompson issued a memorandum setting forth the Department's policy regarding the avoidance of "over-collection" in the use of pen registers and trap and trace devices that are deployed under the authority of 18 U.S.C. §3121 et seq. In sum, the memorandum establishes the following basic principles: that reasonably available technology shall be used to avoid over-collection; and, when over-collection does occur despite use of reasonably available technology, no affirmative investigative use shall be made of that information except to prevent immediate danger of death, serious physical injury, or harm to the national security. I have attached to this letter a copy of the 2002 policy memorandum for the Court's consideration.

Our second concern is that by its express terms, §3121(c) places the burden on the government agency to ensure that the amount of content inadvertently intercepted pursuant to a pen register or trap and trace order is minimized. By contrast,

RIP
7C