



U.S. Department of Justice

Office of Information Policy

Telephone: (202) 514-3642

Washington, D.C. 20530

MAR 19 2009

Ms. Marcia Hofmann
Electronic Frontier Foundation
454 Shotwell Street
San Francisco, CA 94110-1914

Re: AG/09-R0352
DAG/09-R0353
CLM:VRB:MMC

Dear Ms. Hofmann:

While processing your Freedom of Information Act (FOIA) request dated September 22, 2006, for specific records pertaining to the application of the pen register and trap and trace statute (18 U.S.C. §§ 3121-3127), the Criminal Division referred four documents, totaling fourteen pages, to this Office for processing and direct response to you. For your information, these documents were received by this Office on February 6, 2009. This response is made on behalf of the Offices of the Attorney General and Deputy Attorney General.

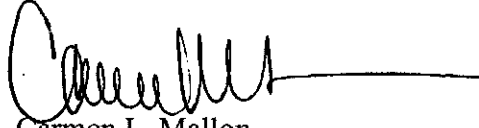
In your initial request letter you sought 1) applications made by United States Attorneys to federal courts to acquire post-cut-through dialed digits during telephone surveillance; 2) applications made by United States Attorneys to federal courts to acquire Uniform Resource Locators (URLs) during internet surveillance; 3) inquiries, and responses to those inquiries, made to the Department's Office of Enforcement Operations or Computer Crime and Intellectual Property Section regarding what constitutes "content" under the statute; 4) guidance issued by the Department to United States Attorneys as to what constitutes "content" for the purposes of the statute; and, 5) reports of apparent misconduct submitted to the Office of Professional Responsibility with regard to the collection of "content" under the statute.

Upon review of the documents referred by the Criminal Division, I have determined that three documents, totaling twelve pages, are not responsive to the enumerated items of your request. For your information, these documents concern proposals concerning internal consultation procedures and the delegation of authority with respect to the use of pen registers and trap and trace devices. These documents do not provide formal guidance or interpretations of the meaning of "content" under the statute. The final document, totaling two pages, is an undated and unsigned draft version of a document that appears in the electronic Reading Room of the Office of the Deputy Attorney General. In order to be of assistance I am providing you with a courtesy copy of this document, which is available at http://www.usdoj.gov/dag/readingroom/dag_foia1.htm.

If you are not satisfied my response concerning the documents referred to this Office by the Criminal Division, you may administratively appeal by writing to the Director, Office of

Information Policy, United States Department of Justice, Suite 11050, 1425 New York Avenue, NW, Washington, DC 20530-0001, within sixty days from the date of this letter. Both the letter and the envelope should be clearly marked "Freedom of Information Act Appeal."

Sincerely,

A handwritten signature in black ink, appearing to read "Carmen L. Mallon", followed by a long horizontal line extending to the right.

Carmen L. Mallon
Chief of Staff

Enclosure



Office of the Deputy Attorney General

Washington, D.C. 20530

February 6, 2003

MEMORANDUM FOR ALL HOLDERS OF THE UNITED STATES ATTORNEYS' MANUAL

FROM: THE DEPUTY ATTORNEY GENERAL 

United States Attorneys' Manual Staff
Executive Office for United States Attorneys

SUBJECT: Criminal Division Approval of Pen Registers and Trap and Trace Applications Involving the Collection of Uniform Resource Locators (URLs)

AFFECTS: All Titles with Criminal Prosecutions
(Titles 3, 4, 5, 6, 7, 8, 9)

The following creates a new section, 9-7.500 (Prior Consultation with the Computer Crime and Intellectual Property Section of the Criminal Division for Applications for Pen Register Orders Capable of Collecting Uniform Resource Locators (URLs)) to Title 9 (Criminal) of the United States Attorneys' Manual, with reference at 9-2.400 (Prior Approvals/Notification Table). The new policy similarly has an impact on other titles in regard to their criminal prosecutions and notification/notification tables. The new section sets forth policy regarding the requirement of prior consultation with the Computer Crime and Intellectual Property Section of the Criminal Division of certain applications for pen register orders.

9-7.500 Prior Consultation with the Computer Crime and Intellectual Property Section of the Criminal Division (CCIPS) for Applications for Pen Register and Trap and Trace Orders Capable of Collecting Uniform Resource Locators (URLs)

In 2001, the USA PATRIOT Act (P.L. 107-56) amended the Pen Register and Trap and Trace Statute (pen/trap statute), 18 U.S.C. § 3121 *et seq.*, to clarify that courts may issue pen/trap orders to collect the non-content information associated with Internet communications. One issue that has been raised in this regard is whether a pen register order may be used to collect (URLs), the terms that a person uses to request information on the World Wide Web (e.g., www.cybercrime.gov/PatrickLatham). Because of privacy and other concerns relating to the use of pen register orders in this fashion, use of pen registers to collect all or part of a URL is prohibited without prior consultation with CCIPS. Among the factors that should be considered in deciding whether to apply for a pen register are (1) the investigative need for the pen register order, (2) the litigation risk in the individual case, (3) how much of any given URL would be obtained, and (4) the impact of the order on the Department's policy goals.

Memorandum For All Holders Of The United States Attorney's Manual
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Consultation with CCIPS can help resolve these issues, as well as ensuring that the contemplated use of a pen register would be consistent with the Deputy Attorney General's May 24, 2002 Memorandum on "Avoiding Collection and Investigative Use of Content in the Operation of Pen Registers and Trap and Trace Devices."

This policy does not apply to applications for pen register orders that would merely authorize collection of Internet Protocol (IP) addresses, even if such IP addresses can be readily translated into URLs or portions of URLs. Similarly, this policy does not apply to the collection, at a web server, of tracing information indicating the source of requests to view a particular URL using a trap and trace order.

No employee of the Department will use the pen register authority to collect URLs without first consulting with the CCIPS of the Criminal Division. Absent emergency circumstances, such an employee will submit a memorandum to CCIPS that contains (a) the basic facts of the investigation, (b) the proposed application and order, (c) the investigative need for the collection of URLs, (d) an analysis of the litigation risk associated with obtaining the order in the context of the particular case, and (e) any other information relevant to evaluating the propriety of the application. In an emergency, such an employee may telephone CCIPS at (202) 514-1026 or, after hours at (202) 514-5000, and be prepared to describe the above information.