

May 9, 2017

The Honorable Lindsey Graham, Chairman
The Honorable Sheldon Whitehouse, Ranking Member
U.S. Senate Committee on the Judiciary
Subcommittee on Crime and Terrorism
224 Dirksen Senate Office
Washington, DC 20510

**RE: Hearing on “Law Enforcement Access to Data Stored Across Borders:
Facilitating Cooperation and Protecting Rights”**

Dear Chairman Graham and Ranking Member Whitehouse:

We write to you regarding the “Law Enforcement Access to Data Stored Across Borders: Facilitating Cooperation and Protecting Rights” hearing.¹ Governments are increasingly seeking access to personal data stored beyond their national borders. These requests present difficult questions of national law, territoriality, and compliance with international data protection standards. EPIC has an active interest in this issue. We welcome your leadership on this issue and look forward to opportunities to work with you and your staff.

EPIC is a public interest research center established in 1994 to focus public attention on emerging privacy and civil liberties issues.² EPIC has long advocated for transparency concerning international agreements.³ EPIC is currently pursuing a Freedom of Information Act (FOIA) request for the US-UK Surveillance Agreement.⁴ EPIC has also filed a FOIA request for records of a March 29, 2017 meeting between Attorney General Jeff Sessions and EU Commissioner Věra Jourová, where the officials reportedly discussed “a proposal [on] how to ‘solve this problem’” of encryption.⁵

According to news reports, officials from the United States and the United Kingdom are in secret negotiations to establish a data transfer agreement (“US-UK Surveillance Agreement”)

¹ Law Enforcement Access to Data Stored Across Borders: Facilitating Cooperation and Protecting Rights, 115th Cong. (2017), S. Comm. on the Judiciary, Subcomm. On Crime and Terrorism, <https://www.judiciary.senate.gov/meetings/law-enforcement-access-to-data-stored-across-borders-facilitating-cooperation-and-protecting-rights> (May 10, 2017).

² See EPIC, *About EPIC*, <https://epic.org/epic/about.html>.

³ See, e.g., EPIC v. DOJ: EPIC Prevails, DOJ Releases Secret EU-US Umbrella Agreement (Jan. 25, 2016), <https://epic.org/2016/01/epic-v-doj-epic-prevails-doj-r.html>.

⁴ EPIC, *US-UK Intercept Treaty*, <https://epic.org/foia/doj/us-uk-surveillance-treaty/>.

⁵ EPIC, *EPIC Seeks Information on Sessions-Jourová Encryption Discussion* (Apr. 3, 2017), <https://epic.org/2017/04/epic-seeks-information-on-sess.html>.

for mutual direct access to communications data in each country.⁶ Though a draft negotiating document was reached by the countries, it has not been released to the public. The U.S. Justice and State Departments are purportedly responsible for negotiating the Surveillance Agreement with the British government. On November 18, 2016, EPIC filed a FOIA request with the Department of Justice (DOJ) to obtain public release of the Surveillance Agreement's text and any supporting documents.⁷ On Nov. 29, 2016, the DOJ acknowledged receipt of EPIC's FOIA request and stated that "unusual circumstances" would require additional time to process the request.⁸ Last week, the DOJ alerted EPIC that responsive documents had been located and, because the records originated with the Department of State, they had been referred to the State Department for processing and direct response to EPIC.⁹

The Washington Post reviewed a draft of the US-UK Surveillance Agreement and reported it would "enable the British government to serve wiretap orders directly on U.S. communication firms for live intercepts in criminal and national security investigations involving its own citizens."¹⁰ The Surveillance Agreement would also permit the British government "to serve orders [on US firms] to obtain stored data, such as emails."¹¹

The Post's report concluded that the US-UK Surveillance Agreement would ensure that the "British government would not be able to directly obtain the records of Americans if a U.S. citizen or resident surfaced in an investigation."¹² However, the document was still "silent on the legal standard the British government must meet to obtain a wiretap order or a search warrant for stored data."¹³ As a result, the Surveillance Agreement risks circumventing or weakening the protections afforded by both the U.S. Constitution and statute.¹⁴

Public disclosure of the US-UK Surveillance Agreement is critical to the understanding of how foreign governments access user data from US firms. Absent full disclosure of the Surveillance Agreement, the public also cannot be assured that US person data will not be collected by the British government, and that vital US legal protections will not be circumvented.

⁶ Ellen Nakashima and Andrea Peterson, *The British want to come to America — with wiretap orders and search warrants*, Wash. Post (Feb. 4, 2016), https://www.washingtonpost.com/world/national-security/the-british-want-to-come-to-america--with-wiretap-orders-and-search-warrants/2016/02/04/b351ce9e-ca86-11e5-a7b2-5a2f824b02c9_story.html.

⁷ FOIA Request from EPIC to DOJ (Nov. 18, 2016), <https://epic.org/foia/EPIC-16-11-18-DOJ-FOIA-20161118-Request.pdf>.

⁸ E-mail from Amanda Marchand Jones, Chief, FOIA/PA Unit, DOJ, to John Tran, EPIC (Nov. 29, 2016), available at <https://epic.org/FOIA/us-uk-surveillance-treaty/EPIC-16-11-18-DOJ-FOIA-20161129-Acknowledgment.pdf>.

⁹ E-mail from Amanda Marchand Jones, Chief, FOIA/PA Unit, DOJ, to John Tran, EPIC (May 3, 2017), available at <https://epic.org/FOIA/us-uk-surveillance-treaty/EPIC-16-11-18-DOJ-FOIA-20170503-transferred-for-processig.pdf>.

¹⁰ Nakashima, *supra* note 6.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ See e.g. 18 U.S.C. 119.

And disclosure is urgent – a proposal on encryption policy may be taken up at a June 2017 meeting between the United States and the European Union.¹⁵

We ask that this Statement from EPIC be entered in the hearing record. EPIC will keep the Subcommittee apprised of the documents we receive in our FOIA cases. We look forward to working with you on these issues of vital importance to the American public.

Sincerely,

/s/ Marc Rotenberg

Marc Rotenberg
EPIC President

/s/ Caitriona Fitzgerald

Caitriona Fitzgerald
EPIC Policy Director

/s/ Alan Butler

Alan Butler
EPIC Senior Counsel

¹⁵ Kieren McCarthy, *Europe to push new laws to access encrypted apps data*, The Register (Mar. 30, 2017), https://www.theregister.co.uk/2017/03/30/ec_push_encryption_backdoors/.