

VIA E-MAIL

March 6, 2017

Arnetta Mallory
FOIA Initiatives Coordinator
Room 10702
600 E Street, NW
Washington, DC 20530-0001

Dear Ms. Mallory,

This letter constitutes a request under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, and is submitted on behalf of the Electronic Privacy Information Center (“EPIC”) to the Department of Justice National Security Division (“NSD”).

EPIC seeks records related to alleged electronic surveillance and related activities revealed to the public by the President of the United States (“EPIC FOIA Request”).

The NSD, which was created in 2006 to consolidate the Justice Department’s national security operations, is responsible for coordinating and facilitating national security investigations. In particular, the Office of Intelligence represents the government before the Foreign Intelligence Surveillance Court (“FISC”). As a result of the NSD’s role in making filings with the FISC, it follows that any FISA application seeking to conduct electronic surveillance or other FISA-authorized searches of Donald J. Trump, his associates, or facilities within Trump Tower would be held by NSD.

EPIC now seeks five categories of records related to alleged surveillance of the President and/or members of his campaign.

Documents Requested

1. Any and all applications made pursuant to 50 U.S.C. § 1804 where the target of electronic surveillance was “Donald J. Trump,” “Jefferson Beauregard Sessions III,” “Michael T. Flynn,” “Jared Corey Kushner,” “Jeffrey D. Gordon,” “Paul Manafort,” or “Carter Page”;
2. Any and all applications made pursuant to 50 U.S.C. § 1823 where the premises or property to be searched were located in Trump Tower, 725 5th Ave, New York, NY 10022;
3. Any and all applications made pursuant to 50 U.S.C. § 1842 where the “person to whom is leased or in whose name is listed the telephone line or other facility to which the pen

register or trap and trace device is to be attached or applied” was one of the aforementioned individuals in ¶ 1 above;

4. Any and all applications made pursuant to 50 U.S.C. § 1861 where the “tangible things sought” were located in Trump Tower, 725 5th Ave, New York, NY 10022; and
5. Any and all applications made pursuant to 50 U.S.C. § 1861 for call detail records of a specific selection term associated with one of the aforementioned individuals in ¶ 1 above;

Request for Expedited Processing

EPIC is entitled to expedited processing of this request. 5 U.S.C. § 552(a)(6)(E)(v)(II); 28 C.F.R. § 16.5(e)(1)(ii). There is there is an “urgency to inform the public about an actual or alleged federal government activity,” and the request is “made by a person who is primarily engaged in disseminating information.” § 16.5(e)(1)(ii).

First, there is an “urgency to inform the public about an actual or alleged federal government activity.” § 16.5(e)(1)(ii). There can be no question that there is an urgency to inform the public about the alleged government activity at issue in this request. The President of the United States himself has called for an investigation into the alleged surveillance of his campaign during the 2016 Election. This serious charge has been denied by intelligence officials from the current and former administration, and will likely be the subject of ongoing investigations in Congress.

On the morning of March 4, 2017, the President of the United States alleged in a series of tweets that former President Obama “had [his] ‘wires tapped’ in Trump Tower just before the victory.”¹ The President went on to allege “[h]ow low has President Obama gone to tapp [sic] my phones during the very sacred election process. This is Nixon/Watergate. Bad (or sick) guy!”² White House Press Secretary Sean Spicer issued a statement on Sunday March 5th that “President Donald J. Trump is requesting that as part of their investigation into Russian activity, the congressional intelligence committees exercise their oversight authority to determine whether executive branch investigative powers were abused in 2016.”³ In response to the President’s allegations, FBI Director James B. Comey has asked the Department of Justice to publicly reject the assertion, arguing that “the highly charged claim is false and must be corrected.”⁴ Former Director of National Intelligence James Clapper also categorically denied the President’s allegations, stating that “For the part of the national security apparatus that I oversaw as DNI, there

¹ @realDonaldTrump, Twitter (Mar. 4, 2017, 6:35 AM), <https://twitter.com/realDonaldTrump/status/837989835818287106>.

² @realDonaldTrump, Twitter (Mar. 4, 2017, 7:02 AM), <https://twitter.com/realDonaldTrump/status/837996746236182529>.

³ The White House, Statement from the Press Secretary (Mar. 5, 2017), <https://www.whitehouse.gov/the-press-office/2017/03/05/statement-press-secretary>.

⁴ Michael S. Schmidt & Michael D. Shear, *Comey Asks Justice Dept. to Reject Trump’s Wiretapping Claim*, N.Y. Times (Mar. 5, 2017), <https://www.nytimes.com/2017/03/05/us/politics/trump-seeks-inquiry-into-allegations-that-obama-tapped-his-phones.html>.

was no such wiretap activity mounted against the President-elect at the time, or as a candidate, or against his campaign.”⁵ Clearly there is public interest in the resolution of these allegations made by President Trump of potentially unlawful wiretapping of his election campaign.

In submitting this request for expedited processing, I certify that this explanation is true and correct to the best of my knowledge and belief. § 16.5(e)(3); § 552(a)(6)(E)(vi).

Request for “News Media” Fee Status and Fee Waiver

EPIC is a “representative of the news media” for fee classification purposes. *EPIC v. Dep’t of Def.*, 241 F. Supp. 2d 5 (D.D.C. 2003). Based on EPIC’s status as a “news media” requester, EPIC is entitled to receive the requested record with only duplication fees assessed. 5 U.S.C. § 552(a)(4)(A)(ii)(II). *See also* 28 C.F.R. § 16.10(c).

Further, any duplication fees should also be waived because “disclosure of the requested information is in the public interest because it is likely to contribute to the public understanding of the operations or activities of the government” and “is not primarily in the commercial interest” of EPIC, the requester. 28 C.F.R. § 16.10(k)(2); § 552(a)(4)(A)(iii). EPIC’s request satisfies this standard based on DOJ’s considerations for granting a fee waiver.

The Department of Justice evaluates the three considerations to determine whether this requirement is met: (i) the “subject of the request must concern identifiable operations or activities of the Federal Government with a connection that is direct and clear, not remote or attenuated”; (ii) disclosure must be “likely to contribute significantly to public understanding of those operations or activities”; and (iii) “disclosure must not be primarily in the commercial interest of the requester.” §§ 16.10(k)(2)(i)–(iii).

As to the first consideration, the subject of the request concerns “identifiable operations or activities of the federal government” because the requested documents involves alleged surveillance activities of the federal government, facilitated by NSD. § 16.10(k)(2)(i). The alleged NSD records clearly concern the agency’s surveillance operations and activities, which self-evidently constitute activities of the federal government.

As to the second consideration, disclosure would also be “likely to contribute significantly to public understanding of those operations or activities.” § 16.10(k)(2)(ii). The President has made an explosive allegation concerning unlawful wiretapping by former President Obama, and any information concerning the existence (or not) of the records at issue in this request would contribute “meaningfully” to the public’s understanding of the government’s operations and these serious allegations. § 16.10(k)(2)(ii)(A). Disclosure will “contribute to the understanding of a reasonably broad audience of persons interested in the subject” because, as provided in the relevant FOIA regulations, NSD will “presum[e] that a representative of the news media will satisfy this consideration.” § 16.10(k)(2)(ii)(B).

⁵ Jeremy Diamond, *Clapper: ‘No Such Wiretap Activity Mounted’ on Trump*, CNN (Mar. 5, 2017), <http://www.cnn.com/2017/03/05/politics/clapper-trump-wiretap/>.

As to the third consideration, “[d]isclosure of the information is not primarily in the commercial interest” of EPIC. § 16.10(k)(2)(iii). EPIC has no commercial interest in the requested records. EPIC is a registered non-profit organization committed to privacy, open government, and civil liberties.⁶ The DOJ regulations state that “[c]omponents ordinarily will presume that when a news media requester has satisfied the [public interest standard], the request is not primarily in the commercial interest of the requester.” § 16.10(k)(2)(iii)(B). As established in the sections above, EPIC is a news media requester and therefore there is no commercial interest behind this request.

For these reasons, a fee waiver should be granted.

Conclusion

Thank you for your consideration of this request. I anticipate your determination within ten calendar days. 5 U.S.C. § 552(a)(6)(E)(ii)(I); 28 C.F.R. § 16.5(e)(4)

For questions regarding this request I can be contacted at 202-483-1140 x111 or FOIA@epic.org.

Respectfully submitted,

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⁶ *About EPIC*, EPIC.org, <http://epic.org/epic/about.html>.

