

October 23, 2020

FOIA/PA Mail Referral Unit
Department of Justice
Room 115
LOC Building
Washington, DC 20530-0001

Dear FOIA Officer:

This is a request under the Freedom of Information Act, 5 U.S.C. § 552, regarding the expiration of three surveillance laws (collectively, the “expired provisions”), namely: (i) Section 215 of the USA Patriot Act of 2001 (50 U.S.C. § 1861 or FISA Section 501; the so-called “business records” provision); (ii) Section 206 of the USA Patriot Act of 2001 (50 U.S.C. § 1805(c)(2)(b) or FISA Section 105(c)(2)(B); the so-called “roving wiretaps” provision); and (iii) Section 6001 of the Intelligence Reform and Terrorism Prevention Act of 2004 (50 U.S.C. § 1801(b)(1)(C) or FISA Section 101(b)(1)(C); the so-called “lone wolf” amendment). The three provisions expired on March 15, 2020, and have not been revived through additional legislation. As Senators Patrick Leahy (D-Vermont) and Mike Lee (R-Utah) stressed in their July 21, 2020 letter (the “Leahy-Lee Letter”) to Attorney General Barr and Director of National Intelligence Ratcliffe, without the continued authorization of the expired authorities, “the executive branch is now limited to conducting relevant surveillance under pre-USA PATRIOT Act authorities.”¹ More broadly, this request also concerns the government’s surveillance and transparency practices regarding targeted IP addresses and networks, including the information requested in Senator Ron Wyden’s (D-Oregon) May 20, 2020 letter to then-Acting Director of National Intelligence Richard Grenell (the “Wyden Letter”).²

This request is filed on behalf of Demand Progress Education Fund, the Project for Privacy and Surveillance Accountability, Inc. (“PPSA”), former U.S. Senator Mark Udall (D-Colorado), and former U.S. Congressman Bob Goodlatte (R-Virginia) (collectively, the “Requesters”). This request is also directed specifically at the following units and/or divisions within the Department: The Office of the Attorney General; the Office of the Deputy Attorney General; the Office of Legislative Affairs; the National Security Division; the Federal Bureau of Investigation; the Drug Enforcement Agency; the Office of Legal Counsel; and the Office of Information Policy.

Specifically, this request asks for:

¹ Letter dated July 21, 2020 from Patrick Leahy and Mike Lee to William Barr and John Ratcliffe (Attachment A).

² Letter dated May 20, 2020 from Ron Wyden to Richard Grenell (Attachment B).

1. All documentation provided in response to Requests 1 and 1.a of the Leahy-Lee Letter.
2. To the extent not responsive to Item 1 above, or to any other request herein, any other agency records mentioning: (a) the expiration of any of the expired provisions; (b) the discontinuance or modification of any Department of Justice practice of submitting applications to the Foreign Intelligence Surveillance Court, as such discontinuance or modification may relate to the expiration of any of the expired provisions; and (c) the discontinuance or modification of any DOJ surveillance practice previously authorized under any of the expired provisions.
3. All documentation and explanations provided in response to Requests 2, 2.a, and 3 of the Leahy-Lee Letter.
4. To the extent not responsive to Item 3 above, or to any other request herein, any other agency records: (a) mentioning whether domestic records surveillance or surveillance involving records collection from domestic records holders, such as common carriers, may be conducted in the absence of express statutory authority, including pursuant to Executive Order 12333; (b) otherwise mentioning what types and what volume of information may be acquired pursuant to claimed inherent executive authority, including pursuant to Executive Order 12333; or (c) otherwise mentioning any authority supporting any claimed inherent surveillance powers.
5. All documentation provided in response to Request 4 of the Leahy-Lee Letter.
6. To the extent not responsive to Item 5 above, or to any other request herein, any other agency records mentioning authorities, statutory and otherwise, that may be relied upon to conduct surveillance in lieu of the expired provisions. This request encompasses any agency records mentioning the acquisition of identifiers domestically or from domestic records holders, including identifiers that indicate relevant records originate from within the United States and identifiers that other circumstances suggest may relate to a person in the United States or a United States person.
7. All documentation provided in response to Request 5 of the Leahy-Lee Letter.

8. To the extent not responsive to Item 7 above, or to any other request herein, any other agency records relying in whole or in part upon, or otherwise touching upon, any legal theory, as enunciated on March 11, 2004³ or otherwise, that: (a) executive authority displaces FISA when the two conflict; (b) the government may presumptively treat records as foreign unless or even though an identifier in such records is known to be a citizen of the United States; or (c) the government may otherwise treat records as not presumptively belonging to a United States person when those records are acquired domestically, are acquired from a domestic records holder, include identifiers that indicate relevant records originate from within the United States, or other circumstances suggest that the records may relate to a person in the United States or a United States person. This request encompasses any documentation, written communications, or other records regarding any surveillance program or practice relying, in whole or in part, upon any or all such legal theories.
9. To the extent not responsive to any other request herein, all agency records mentioning what standards the government must satisfy before acquiring or targeting for acquisition under any authorities other than those in the Foreign Intelligence Surveillance Act: (a) records of a United States person or a person located in the United States; (b) identifiers that indicate relevant records originate from within the United States; (c) records from a domestic records holder; or (d) records that other circumstances suggest may relate to a person in the United States or a United States person. This request encompasses any agency records that enumerate the various legal authorities pursuant to which such acquisition or targeting may occur and what processes for acquisition or targeting the government has concluded are so authorized.
10. To the extent not responsive to any other request herein, all agency records mentioning what standards the government must satisfy before an agency may query foreign intelligence information acquired under any authorities other than those in the Foreign Intelligence Surveillance Act for: (a) records of a United States person or a person located in the United States; (b) identifiers that indicate relevant records originate from within the United States; (c) records that originated from a domestic records holder; or (d) records that other

³ See Savage NYT FOIA Stellarwind IG Report Reprocessed September 2015 Version, at pp. 54-55 (available at <https://www.nytimes.com/interactive/2015/09/21/us/21foia-stellarwind-report.html>).

circumstances suggest may relate to a person in the United States or a United States person. This request encompasses any agency records mentioning any limit to any claimed authority to conduct relevant surveillance, including any guidance regarding when the government is not permitted to rely on claimed inherent executive authority to acquire or query the above-referenced records and any guidance regarding what domestic surveillance is “not precluded by applicable law,”⁴ including any agency records that enumerate the various legal authorities pursuant to which such querying may occur and what kinds of queries the government has concluded are so authorized.

11. To the extent not responsive to any other request herein, all agency records mentioning whether agencies’ subpoena power, including 21 U.S.C. § 876(a), may be lawfully used for the bulk collection of records.
12. To the extent not responsive to any other request herein, all agency records mentioning how the Department of Justice or any component thereof describes to the public and in judicial or administrative proceedings the provenance of information obtained in the absence of express statutory authority.
13. All documentation provided in response to Request 6 of the Leahy-Lee Letter.
14. To the extent not responsive to Item 13 above, or to any other request herein, any other agency records mentioning (a) whether, and under what circumstances, the government or any agency thereof may lawfully purchase, or is purchasing, information that would require a court order to compel production of under the Foreign Intelligence Surveillance Act; (b) how the government or any agency thereof describes to the public and in judicial or administrative proceedings the provenance of such purchased information; and (c) what information may not be so purchased, including whether the government or any agency thereof is prohibited from purchasing information from any particular entities or category of entities.
15. To the extent not responsive to any other request herein, all agency records mentioning whether the government or any agency thereof may target a website’s IP address under either or both of 50 U.S.C. §§ 1842 or

⁴ See, e.g., Exec. Order No. 12,333 § 2.6(d), 46 Fed. Reg. 59941 (Dec. 8, 1981).

1861 and all agency records mentioning whether the government or any agency thereof may purchase or otherwise obtain such records.

16. All documentation provided in response to the Wyden Letter.
17. To the extent not responsive to Item 16 above, or to any other request herein, any other agency records mentioning how the government or any agency thereof implements its transparency and public reporting requirements for 50 U.S.C. § 1861 with regard to (a) targeted IP addresses, including both the reporting treatment of targeted IP addresses that reveal other IP addresses as well as how those other IP addresses are reported; (b) networks, including the reporting of multiple users of a single network; (c) website visitors, including the reporting treatment of acquired identifiers and records of those visits with respect to the requirement to report “unique identifiers used to communicate information”; (d) the reporting treatment of the collection of single versus multiple internet searches or visits, including any differing treatment in relation to a certain span of time; and (e) applications that do not, as described in 50 U.S.C. § 1862(c)(1)(C), “specifically identify an individual, account, or personal device,” including whether the targeting of a network or an IP address would be categorized this way and where else collection based on these applications would be reflected in public transparency reporting.
18. All documentation provided in response to Senators Richard Durbin, Russell Feingold, and Ron Wyden’s January 22, 2010, letter to then-Attorney General Eric Holder.⁵
19. To the extent not responsive to Item 18, or to any other request herein, the January 8, 2010, Office of Legal Counsel opinion referenced on page 264 of the Department of Justice Office of the Inspector General’s 2010 report entitled “A Review of the Federal Bureau of Investigation’s Use of Exigent Letters and Other Informal Requests for Telephone Records,” as well as any agency records mentioning that opinion and any agency records mentioning any opinions that have superseded that opinion.

Scope of Request:

For all purposes of this request: (I) the terms “agency” and “records” shall be construed in relation to the definitions codified in 5 U.S.C. § 552(f); (II) the date range for

⁵ Letter dated January 22, 2010 from Richard Durbin, Russell Feingold, and Ron Wyden to Eric Holder (Attachment C).

responsive materials encompasses those either created, altered, sent, or received between May 1, 2000 and October 23, 2020, provided, however, that the date range for responsive materials from the Office of Legal Counsel and the Drug Enforcement Agency encompasses those either created, altered, sent, or received between January 1, 1991 and October 23, 2020.

Fees:

The Requesters request a complete fee waiver because we are members of the “news media,” because disclosure of the requested information is likely to contribute significantly to public understanding of the operations and activities of the government, and because the Requesters have no commercial interest in the requested documents. See 5 U.S.C. § 552(a)(4)(A)(ii)(II).

News Media Status:

The Court of Appeals for the District of Columbia Circuit has elaborated upon the definition of “news media,” holding that “a representative of the news media is, in essence, a person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.” D.C. district courts have found that online publications count for FOIA fee purposes.

Demand Progress Education Fund is a nonprofit 501(c)(3) entity fiscally sponsored by the New Venture Fund, which regularly publishes information of public interest (see <https://demandprogresseducationfund.org/> and www.section215.org), especially with regards to surveillance, transparency, government accountability, and corruption. Demand Progress employees investigate government corruption and secrecy and work to empower the public and other news media organizations with information.

Likewise, PPSA is an incorporated organization that regularly publishes information of public interest (see <https://www.protectprivacynow.org/news--updates/>), especially with regards to surveillance, privacy, and civil liberties.

The requested documents, which the Requesters will editorialize and publish, will contribute to the public’s understanding of the government’s lawful surveillance powers and possibly unlawful domestic surveillance.

Public Interest Fee Waiver:

In addition to the news media status determination, we request a full fee waiver because “disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the

government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii). The subjects of the records requested here concern government operations and activities, in particular warrantless, domestic surveillance. The records would contribute to public understanding of these activities by revealing what legal grounds the federal government relies on to conduct warrantless, domestic surveillance. Such information is not currently public.

The Requesters, meanwhile, have no commercial interest in the documents, and therefore the public interest in disclosure of these records is far greater than the Requesters’ commercial interest in them.

As an example of the Requesters’ past efforts and current intentions with regard to the requested documents, DPEF has published copious research and analysis at www.section215.org, including a 25-page chronicling of misuse of the government’s authority to acquire records. These materials have been relied upon by members of Congress, their staffs, and the media in synthesizing the extraordinary complexity and secrecy around domestic surveillance. The website’s analytics indicate that between January 1, 2020, and July 23, 2020, 4,657 unique visitors accumulated 6,877 pageviews. The top three results are from Maryland, Virginia, and the District of Columbia, where most Congressional staff reside. Relatedly, current members of Congress have asked several of these questions in letters to the Department of Justice and the Office of the Director of National Intelligence and in Questions for the Record — the letters have not been answered, and no substantive answers have been provided in response to the Questions for the Record.

The Requesters’ past and future authorship is and will be in the public interest as it informs the public debate around surveillance, especially surveillance of people in the United States, and such articles will continue to be free to the public. The requested records will be used to author such articles for news outlets and this request is not made for commercial purposes.

Conclusion:

Based on the above, the Requesters are representatives of the news media and this request merits a full waiver of searching and duplication fees because it is made "in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government." 5 U.S.C. § 552(a)(4)(A)(iii).

Format:

Rather than physical production of any responsive records, we ask that you please provide each record in electronic form. If a portion of responsive records may be produced

more readily than the remainder, we request that those records be produced first and that the remaining records be produced on a rolling basis. Further, we recognize the possibility that some responsive records may be exempt. **To the extent possible, if redaction under 5 U.S.C. § 552(b) can render a responsive but exempt record nonexempt, please produce any such record in redacted form.** We believe that any redaction should foreclose the need to issue a Glomar response, as anonymized and redacted production would neither (1) reveal intelligence sources or methods nor (2) disclose the agency's interest (or lack thereof) in any particular individual.

Contact:

We welcome communication about this request if further discussion would assist in the search and release of the requested records. Please feel free to contact counsel for the Requesters by email at gschaerr@schaerr-jaffe.com or by phone at (202) 787-1060. You may also contact Demand Progress Education Fund by email at sean@demandprogress.org, or by phone at (570) 798-7678.

Thank you for your speedy attention and assistance.

Sincerely,

Gene C. Schaerr
Sean Vitka

ATTACHMENT A

United States Senate

WASHINGTON, DC 20510

July 21, 2020

The Honorable William P. Barr
Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

The Honorable John Ratcliffe
Director of National Intelligence
Office of the Director of National Intelligence
Washington, DC 20511

Dear Attorney General Barr and Director Ratcliffe:

We write to confirm that federal agencies have terminated surveillance operations authorized by now-expired Foreign Intelligence Surveillance Act (FISA) provisions under the USA FREEDOM Act.¹ With the expiration of these statutory authorities—commonly referred to as lone wolf, roving wiretap, and Section 215 authorities—the executive branch is now limited to conducting relevant surveillance under pre-USA PATRIOT Act authorities.

At times the executive branch has tenuously relied on Executive Order 12333, issued in 1981, to conduct surveillance operations wholly independent of any statutory authorization. This poses an extremely concerning and constitutionally suspect scenario where, as is the case now, Congress' duly-passed statutory surveillance authorities have expired, but the executive branch may be secretly relying on its alleged inherent power to continue its intelligence collection efforts without congressional authorization and outside of the statutory framework. This would constitute a system of surveillance with no congressional oversight potentially resulting in programmatic Fourth Amendment violations at tremendous scale. This is especially concerning on the heels of IG Horowitz's report highlighting consistent errors in approved FISA warrants.

We strongly believe that such reliance on Executive Order 12333 would be plainly illegal.

Government agencies have further relied on faulty interpretations of federal statutes to authorize or continue surveillance. For example, the Drug Enforcement Administration used its general subpoena power² to collect bulk telephone call records from the early 1990s to 2013—without an appropriate legal review. As explained by a 2019 Department of Justice Inspector General report into the activity, “[s]everal published court decisions have clearly suggested potential challenges

¹ Expired authorities include those authorized in Section 102(b)(1) of the USA PATRIOT Improvement and Reauthorization Act of 2005 and Section 6001(b)(1) of the Intelligence Reform and Terrorism Prevention Act of 2004.

² Under 21 U.S.C. § 876(a).

to the validity of the DEA's use of its statutory subpoena power in this expansive, non-targeted manner."³ The government's similar reliance on secret legal interpretations of Section 215 reflects a pattern of obscuring the true contours of the executive's surveillance activities.

Congress and the American people have a right to know if this or any other administration is spying on people in the United States outside of express congressional approval, with no or diminished guardrails. We ask that you respond to the following by August 7, 2020:

1. Provide documentation of the guidance issued to relevant federal agencies and procedures enacted to ensure that surveillance activities under the expired USA FREEDOM authorities have halted.
 - a. Please detail whether and how such guidance distinguishes among investigations that were ongoing when authorities lapsed on March 15, 2020; investigations into conduct that occurred before the lapse in authorities, including whether such agencies may add targets or additional identifiers in enterprise investigations that predate the lapse; and enterprise investigations into conduct that occurred before the lapse.
2. Provide a detailed explanation of this administration's interpretation of Executive Order 12333 in terms of any claimed inherent surveillance powers.
 - a. Please explain whether the Department of Justice considers domestic records surveillance and surveillance involving records collection from domestic records holders lawful when conducted in the absence of statutory authority.
3. Provide a detailed explanation of any other authority that this administration believes grants it inherent surveillance powers.
4. Confirm whether any federal agencies or investigations are relying on Executive Order 12333 or other claimed inherent surveillance powers to conduct surveillance in lieu of expired authorities under the USA FREEDOM Act.
5. On March 11, 2004, the executive branch secretly claimed the power to surveil records in bulk—in particular telephone and Internet metadata. The executive branch claimed that executive authority "displace[s]" FISA when the two conflict; and that the government may presumptively treat records as foreign unless a "party to such communication is known to be a citizen of the United States." Explain which, if any, of these legal theories are relied upon as the basis, in whole or in part, for any ongoing surveillance programs.
6. Provide a detailed explanation of the extent to which the government is purchasing or may purchase information that would require a court order to acquire under Section 215 or any other expired USA FREEDOM authority.

To be clear, we support reauthorizing the expired USA FREEDOM authorities. After our amendment to strengthen the amici process and improve the disclosure of exculpatory evidence was approved in the Senate, we both voted for H.R. 6172, the USA FREEDOM Reauthorization Act of 2020. That legislation, with our amendment included, passed the Senate by an overwhelming vote of 80-16.

³ Office of the Inspector General, A Review of the Drug Enforcement Administration's Use of Administrative Subpoenas to Collect or Exploit Bulk Data, Department of Justice (March 2019), <https://oig.justice.gov/reports/2019/o1901.pdf>.

But the rights of all Americans depend on their government exercising its power responsibly, adhering to the rule of law, and upholding its duty to act transparently. And any surveillance conducted in the absence of statutory authorities and congressional oversight would be extraordinarily concerning and illegal.

Thank you for your attention to this matter. If you have any questions, or if any of the above responses involve classified information that must be transmitted in a secure manner, please contact [REDACTED] with Senator Leahy's staff at [REDACTED] or [REDACTED] with Senator Lee's staff at [REDACTED].

Sincerely,



Patrick Leahy
United States Senator



Mike Lee
United States Senator

ATTACHMENT B

United States Senate
WASHINGTON, DC 20510-3703

COMMITTEES:

COMMITTEE ON FINANCE
COMMITTEE ON BUDGET
COMMITTEE ON ENERGY & NATURAL RESOURCES
SELECT COMMITTEE ON INTELLIGENCE
JOINT COMMITTEE ON TAXATION

May 20, 2020

The Honorable Richard Grenell
Acting Director
Office of the Director of National Intelligence
Washington, D.C. 20511

Dear Director Grenell,

I am writing to inquire whether public reporting on the use of Section 215 of the PATRIOT Act would capture the government's collection of web browsing and internet searches. As you know, on May 13, 2020, 59 U.S. Senators voted to prohibit this form of warrantless surveillance, reflecting the broad, bipartisan view that it represents a dangerous invasion of Americans' privacy.

There have also been long-standing concerns about the inadequacy of public reporting on the use of Section 215, including whether the data released annually by the Director of National Intelligence adequately captures the extent of the government's collection activities and its impact on Americans. These concerns are magnified by the lack of clarity as to how the public reporting requirements would apply to web browsing and internet searches.

Current law requires the DNI to report publicly on the number of targets of Section 215 collection and the number of "unique identifiers used to communicate information" the government collects. In its annual Statistical Transparency Report, the Office of the Director of National Intelligence has used email addresses as an example of a "unique identifier." While this may help put into context the scale of the government's collection of email communications, I am concerned it does not necessarily apply to web browsing and internet searches. This ambiguity creates the likelihood that Congress and the American people may not be given the information to realize the scale of warrantless government surveillance of their use of the internet. I therefore request that you respond to the following questions:

How would the government apply the public reporting requirements for Section 215 to web browsing and internet searches? In this context, would the target or "unique identifier" be an IP address?

If the target or "unique identifier" is an IP address, would the government differentiate among multiple individuals using the same IP address, such as family members and roommates using the same Wi-Fi network, or could numerous users appear as a single target or "unique identifier"?

If the government were to collect web browsing information about everyone who visited a particular website, would those visitors be considered targets or "unique identifiers" for

purposes of the public reporting? Would the public reporting data capture every internet user whose access to that website was collected by the government?

If the government were to collect web browsing and internet searches associated with a single user, would the public reporting requirement capture the scope of the collection? In other words, how would the public reporting requirement distinguish between the government collecting information about a single visit to a website or a single search by one person and a month or a year of a person's internet use?

Thank you for your attention to this important matter.

Sincerely,

A handwritten signature in blue ink, appearing to read "Ron Wyden", with a stylized flourish at the end.

Ron Wyden
United States Senator

ATTACHMENT C

United States Senate

WASHINGTON, DC 20510

January 22, 2010

The Honorable Eric H. Holder, Jr.
Attorney General
United States Department of Justice
Washington, DC 20530

Dear Mr. Attorney General:

We are greatly concerned by the Department of Justice Office of Inspector General (OIG) report entitled "A Review of the Federal Bureau of Investigation's Use of Exigent Letters and Other Informal Requests for Telephone Records," which was issued yesterday. The report documents what appears to be several years of rampant illegality in the FBI's methods of obtaining telephone records. As you know, we have been urging changes to the Patriot Act that would protect national security as well as the rights of Americans, and we believe this report further highlights the need for legislative changes.

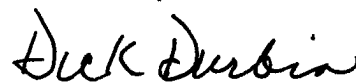
We write specifically because we believe the Department should immediately provide to Congress a copy of the January 8, 2010, Office of Legal Counsel (OLC) opinion that is referenced in the OIG report and that apparently interprets the FBI's authority to obtain phone records. Although much of the information about the OLC opinion is redacted in the public version of the OIG report, the opinion appears to have important implications for the rights of Americans. The report states that "the OLC agreed with the FBI that under certain circumstances [REDACTED] allows the FBI to ask for and obtain these [phone] records on a voluntary basis from the providers, without legal process or a qualifying emergency." (p. 264) It further states that "we believe the FBI's potential use of [REDACTED] to obtain records has significant policy implications that need to be considered by the FBI, the Department, and the Congress." (p. 265) And finally, it states that the OIG recommends "that the Department notify Congress of this issue and of the OLC opinion interpreting the scope of the FBI's authority under it, so that Congress can consider [REDACTED] and the implications of its potential use." (p. 268)

In light of the OIG's recommendation, please provide Congress with the January 8 OLC opinion immediately. We appreciate your attention to this important issue.

Sincerely,



Russell D. Feingold
United States Senator



Richard J. Durbin
United States Senator



Ron Wyden
United States Senator