

August 4, 2015

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, SW,
Washington, DC 20554

RE: Petition to Repeal 47 C.F.R. § 42.6 (“Retention of Telephone Toll Records”)

Dear Secretary Dortch,

We, the undersigned consumer rights, human rights, and civil liberties organizations, along with members of the EPIC Advisory Board, petition the Federal Communications Commission (“FCC”) t

In 1985, when data was retained for only six months, the FCC initiated a rulemaking to remove this burdensome record-keeping requirement.⁴ In response to the FCC’s proposal, the Department of Justice (“DOJ”) petitioned the Commission to extend the retention period from 6 to 18 months,⁵ claiming “telephone toll records are often essential to the successful investigation and prosecution of today’s sophisticated criminal conspiracies”⁶ Telecommunications providers objected to the DOJ’s proposal, noting that the elimination of the retention period would permit telephone companies to “develop cost efficient recordkeeping systems.”⁷ The companies also stated that “a six month retention period would seem adequate for most records.”⁸

regulation is based on an outdated model since carriers have “moved away from classic billing models, in which charges are itemized,” and instead use “non-measured, bundled, and flat-rate service plans,” such that “some carriers have claimed that call records under such new plans are not covered by Section 42.6 because they are not ‘toll records.’”¹¹

Not only is the rule ineffectual in assisting law enforcement, it also stifles innovation and market competition. As explained above, carriers opposed the proposal to retain toll records for 18 months because moving away from toll recordkeeping would allow them to develop more cost efficient recordkeeping systems.¹² Furthermore, the toll recordkeeping is out of sync with the market demands of “bundled” packages that provide consumers with more comprehensive billing structures.¹³ And the requirement prevents companies from competing on privacy, which many believe is the market-based solution to the enormous privacy challenge confronting the nation today.¹⁴ These inefficiencies reveal that this program is no longer necessary or reliable in meeting the original goal of “forming basis of charges to subscribers and others”¹⁵ or “supporting successful investigations.”¹⁶

¹¹ *Id.* at 11-12; See also *formih8 0024 052 288 cm BT 000 ed. Ofreau of III f (succes Mede es um Oromm Ttainl*

Mass Retention of Telecommunications Data Implicates Substantial Privacy and Associational Freedom Interests

Section 42.6 requires telecommunication carriers to retain sensitive information on all of their customers, including the name, address, and telephone number of the caller, telephone number called, date, time and length of the call.¹⁷ These telephone records not only show who consumers call and when, but can also reveal intimate details about consumers' daily lives.¹⁸ These records reveal close contacts and associates, and confidential relationships between individuals and their attorneys, doctors, or elected representatives.¹⁹

Justice Stewart recognized the significant privacy interests implicated through phone surveillance in his dissent in *Smith v. Maryland*. He wrote,

[t]he role played by a private telephone is . . . vital, and since *Katz* it has been abundantly clear that telephone conversations carried on by people in their homes or offices are fully protected by the Fourth and Fourteenth Amendments. As the Court said in *United States v. United States District Court*, “the broad and unsuspected governmental incursions into conversational privacy which electronic surveillance entails necessitate the application of Fourth Amendment safeguards.”²⁰

an individual can be presumed to accept when imparting information to third parties, but on the risks he should be forced to assume in a free and open society.”²¹

Following the decision in *Smith v. Maryland*, the United States Congress took steps to safeguard telephone record information and overturned the Court’s decision.²² The House Committee report that accompanied the Electronic Communications Privacy Act of 1986 explained:

As a general matter telephone companies maintain a record of calls placed from a telephone for billing purposes. These business records are primarily used by the telephone company for its own purposes. At the federal level the government can legally obtain access to such records based on a grand jury or trial subpoena or through the use of an administrative summons authorizing a specific federal agency to obtain records. Such government access is usually in connection with an ongoing criminal or civil investigation.²³

The call toll records currently retained under the FCC Section 42.6 are not specifically tailored or limited to a particular investigation; carriers are required to retain data for 18 months for all subscribers. Since 90% of American adults have a cell phone, this equates to sensitive data being retained for nearly every American adult, even when they are under no suspicion of wrongdoing.²⁴ Such mass retention of sensitive data of the American people, and subsequent access by the government has a chilling effect.

As Justice Sotomayor recently stated in *United States v. Jones*, “[a]wareness that the Government may be watching chills associational and expressive freedoms.”²⁵ And although telephone records may be a useful resource in the investigations of crimes,²⁶ law enforcement

²¹ *Id.* at 749.

²² Electronic Communications Privacy Act, Pub.L. 99-508, codified at 18 U.S.C. 3121 *et seq.* (“General prohibition on pen register and trap and trace device use; exception”).

²³ H. REP. NO. 99-647, at 26 (1986) (internal citations omitted).

²⁴ *Mobile Technology Fact Sheet*, *supra* note 19.

²⁵ *United States v. Jones*, 132 S. Ct. 945, 956 (2012) (Sotomayor, J., concurring).

²⁶ DOJ CPNI Petition, *supra* note 10, at 5-6.

agencies could request that records be maintained “for individuals under investigation *without requiring that all toll records be retained,*” as carriers have previously suggested.²⁷

permanent or temporary places of residence, daily or other movements, activities carried out, social relationships and the social environments frequented.³¹

With the decision, the CJEU “made clear that the unbounded retention of telephone records for national security purposes is not necessary, appropriate or proportionate in a democratic society.”³²

The CJEU decision bears on the FCC’s continuing the mandate of Section 42.6. The routine compelled retention of telephone records is not necessary or proportionate for a democratic society.

Recent Data Breaches Reveal the Inherent Risks of Maintaining Unnecessary Records

In recent months, there have been a large number of high profile data breaches that illustrate the severity of the risks associated with data retention. For example, in April 2015, the Office of Personnel Management (“OPM”) discovered that the personal data of 4.2 million current and former Federal government employees had been stolen. Subsequently in June 2015, OPM discovered that additional information had been compromised: including the background investigation records of current, former, and prospective Federal employees and contractors, totaling 21.5 million individuals.³³

The FCC itself has brought data breach actions against companies that fail to safeguard the personal information of their customers. The agency recently proposed “a \$10 million fine

³¹ Press Release No 54/14, Court of Justice of the European Union, The Court of Justice Declares the Data Retention Directive to be Invalid (Apr. 8, 2014), <http://curia.europa.eu/jcms/upload/docs/application/pdf/2014-04/cp140054en.pdf>. Similar views were expressed by Justice Potter Stewart in dissent in *Smith v. Maryland*, 742 U.S. at 746.

³² See Letter Concerning European Court of Justice Opinion on Data Retention and Privacy from Privacy Advocates, to John Podesta, Counsel to the President, and Nicole Wong, Deputy Chief Tech. Officer, Office of Science & Tech. Pol’y (Apr. 16, 2014), <http://privacycoalition.org/Priv-Coal-to-WH-on-ECJ-Opinion.pdf>.

³³ *Information About OPM Cybersecurity Incidents*, OPM.GOV, <https://www.opm.gov/cybersecurity/> (last visited July 16, 2015).

against two telecommunications carriers for failing to protect the personal information of up to 305,000 consumers.”³⁴ According to the FCC:

The Commission alleges that the carriers’ failure to reasonably secure their customers’ personal information violates the companies’ statutory duty under the Communications Act to protect that information, and also constitutes an unjust and unreasonable practice in violation of the Act, given that their data security

undersigned organizations and privacy experts petition the FCC to repeal 47 C.F.R. § 42.6 in its entirety.

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Respectfully submitted,

Organizations

Access
American-Arab Discrimination Committee (ADC)
American Consumer Institute for Citizen Research
American Library Association
Benton Foundation
Bill of Rights Defense Committee
Campaign for Liberty
Center for Digital Democracy
Center for Financial Privacy and Human Rights
Citizen Outreach
Constitutional Alliance
Consumer Action
Consumer Watchdog
Council on American-Islamic Relations
Cyber Privacy Project
Defending Dissent Foundation
DownsizeDC.org, Inc.
Electronic Frontier Foundation
Electronic Privacy Information Center (EPIC)
Fight for the Future
Freedom of the Press Foundation
Government Accountability Project
Liberty Coalition
Niskanen Center
PEN American Center
Privacy Rights Clearinghouse
Restore the Fourth
TechFreedom

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