



U. S. Department of Justice

Civil Division

Assistant Attorney General

Washington, D.C. 20530

July 28, 2006

VIA FACSIMILE AND FEDERAL EXPRESS

Chairman James Volz
Board Member David C. Coen
Board Member John D. Burke
Vermont Public Service Board
112 State Street
Drawer 20
Montpelier, Vermont 05620

Re: Docket Nos. 7183, 7192, & 7193; July 12, 2006, Procedural Order

Dear Chairman Volz and Board Members Coen and Burke:

I write in response to the July 12, 2006, Procedural Order ("Procedural Order") issued by the Vermont Public Service Board ("VPSB") inviting the United States "to intervene in this proceeding in order to protect the interests of the United States." *See* Procedural Order at 5, enclosed hereto. I also understand that motions to dismiss these proceedings are pending before the VPSB. The United States appreciates the opportunity to provide its views to the VPSB. Please note, however, that our willingness to provide our views is not, and should not be deemed, either as a formal intervention in this matter or the submission of the United States to the jurisdiction of the State of Vermont.

It is my understanding that the Vermont Department of Public Services ("DPS") sent information requests to Verizon New England, Inc. ("Verizon") and AT&T Communications of New England, Inc. ("AT&T") (collectively the "carriers") in May after *USA Today* published an article alleging that the National Security Agency ("NSA") has been secretly collecting the phone call records of millions of Americans from various telecommunications carriers. *See* Letter of May 17 from Commissioner David O'Brien to Bruce P. Beausejour and Pamela Porell at requests 1-16, ("Document Requests") (a copy of this letter is enclosed hereto).

It is the position of the United States that compliance with the DPS Document Requests, and any similar discovery propounded in this VPSB proceeding, would place the carriers in a position of having to confirm or deny the existence of information that cannot be confirmed or

denied without harming national security, and that enforcing compliance with such requests for information would be inconsistent with, and preempted by, federal law.

I note that the Procedural Order recognizes the “incompatible state and federal obligations” on the carriers and expresses an interest in avoiding an imposition of such obligations. *See* Procedural Order at 3. Toward that end, this letter outlines the basic reasons why, in our view, the Document Requests that led to these proceedings, and any similar discovery propounded in this proceeding, are preempted by federal law and that compliance with such requests would violate federal law. In similar situations in both New Jersey and Missouri, the United States has acted to protect its sovereign interests by filing lawsuits to preclude the enforcement of subpoenas that seek disclosure of similar information. We sincerely hope that, in light of governing law and the national security concerns implicated by the requests for information, you will dismiss these petitions and close these proceedings, thereby avoiding litigation over the matter. The United States very much appreciates your consideration of its position.

1. There can be no question that the requests for information at issue here interfere with and seek the disclosure of information regarding the Nation’s foreign-intelligence gathering. But it has been clear since at least *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 4 L.Ed. 579 (1819), that state law may not regulate the Federal Government or obstruct federal operations. And foreign-intelligence gathering is an exclusively federal function; it concerns three overlapping areas that are peculiarly the province of the National Government: foreign relations and the conduct of the Nation’s foreign affairs, *see American Insurance Ass’n v. Garamendi*, 539 U.S. 396, 413 (2003); the conduct of military affairs, *see Sale v. Haitian Centers Council*, 509 U.S. 155, 188 (1993) (President has “unique responsibility” for the conduct of “foreign and military affairs”); and the national security function. As the Supreme Court of the United States has stressed, there is “paramount federal authority in safeguarding national security,” *Murphy v. Waterfront Comm’n of New York Harbor*, 378 U.S. 52, 76 n.16 (1964), as “[f]ew interests can be more compelling than a nation’s need to ensure its own security.” *Wayte v. United States*, 470 U.S. 598, 611 (1985).

The requests for information demand that the carriers produce information regarding specified categories of communications between each carrier and the NSA since January 1, 2001, including *inter alia* “categories of information [] provided to the NSA, including the called and calling parties’ numbers; date of call; time of call; length of call’ name of called and calling parties” and the called and calling parties’ addresses;” whether the carrier “disclosed or delivered to any other state or federal agency the phone call records of any [] customer in Vermont since January 1, 2001;” “the format in which the information was provided;” “the reporting interval for the provision of such information;” “how many of [the carrier’s] Vermont customers have had their calling records disclosed or turned over to the NSA or any other governmental entity, on an agency-by-agency basis, since the inception of the disclosures;” “whether the disclosures of [the

carrier's] Vermont customer call information to the NSA and/or any state or federal agency is ongoing;" "the number of occasions that Verizon has made such disclosure;" whether the carrier is "disclosing records for any communications services other than telephone calling records;" whether "any such disclosures were made by [the carrier] [] voluntarily upon request of a governmental agency . . . [or] in response to an exercise of governmental authority . . . [and what] specific authority [the carrier] relied upon;" and whether the carrier "modified any of its equipment or other physical plant in Vermont to permit access to data and other information carried on its network by an agency of the federal government." See Document Requests, ¶¶ 1-16. In seeking to exert regulatory authority¹ with respect to the nation's foreign-intelligence gathering, the DPS has thus sought to use state regulatory authority to intrude upon a field that is reserved exclusively to the Federal Government and in a manner that interferes with federal prerogatives. That effort is fundamentally inconsistent with the Supremacy Clause. *McCulloch*, 17 U.S. at 326-27 ("[T]he states have no power . . . to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the power vested in the general government."); see also *Leslie Miller, Inc. v. Arkansas*, 352 U.S. 187 (1956).

The Supreme Court's decision in *American Insurance Ass'n v. Garamendi*, 539 U.S. 396 (2003), is the most recent precedent that demonstrates that these state-law information requests are preempted by federal law. In *Garamendi*, the Supreme Court held invalid subpoenas issued by the State of California to insurance carriers pursuant to a California statute that required those carriers to disclose all policies sold in Europe between 1920 and 1945, concluding that California's effort to impose such disclosure obligations interfered with the President's conduct of foreign affairs. Here, the requests for information seek the disclosure of information that infringes on the Federal Government's intelligence gathering authority and on the Federal Government's role in protecting the national security at a time when we face terrorist threats to the United States homeland; those requests for information, just like the subpoenas at issue in *Garmendi*, are preempted. Under the Supremacy Clause, "a state may not interfere with federal action taken pursuant to the exclusive power granted under the United States Constitution or under congressional legislation occupying the field." *Abraham v. Hodges*, 255 F. Supp. 2d 539, 549 (D.S.C. 2002) (enjoining the state of South Carolina from interfering with the shipment of nuclear waste, a matter involving the national security, because "when the federal government acts within its own sphere or pursuant to the authority of Congress in a given field, a state may not interfere by means of conflicting attempt to promote its own local interests").

¹ The information request makes clear that the DPS issued the request "[p]ursuant to its statutory authority under 30 V.S.A. § 206." Likewise, any independent request for information or discovery by the VPSB would be pursuant to similar state law. See 30 V.S.A. § 18. *Accord* Rules and General Orders of the VPSB § 2.214.

2. Responding to the requests for information, including merely disclosing whether or to what extent any responsive materials exist, would also violate various federal statutes and Executive Orders. Section 6 of the National Security Agency Act of 1959, Pub. L. No. 86-36, § 6, 73 Stat. 63, 64, codified at 50 U.S.C. § 402 note, provides: “[N]othing in this Act *or any other law* . . . shall be construed to require the disclosure of the organization or any function of the National Security Agency, of any information with respect to the activities thereof, or of the names, titles, salaries, or number of persons employed by such agency.”² *Ibid.* (emphasis added). Similarly, section 102A(i)(1) of the Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638 (Dec. 17, 2004), codified at 50 U.S.C. § 403-1(i)(1), confers upon the Director of National Intelligence (“DNI”) the authority and responsibility to “protect intelligence sources and methods from unauthorized disclosure.” *Ibid.*³ (As set forth below, the DNI has determined that disclosure of the types of information sought by the information requests would harm national security.)

Several Executive Orders promulgated pursuant to the foregoing constitutional and statutory authority govern access to and handling of national security information. Of particular importance here, Executive Order No. 12958, 60 Fed. Reg. 19825 (April 17, 1995), as amended by Executive Order No. 13292, 68 Fed. Reg. 15315 (March 25, 2003), prescribes a comprehensive system for classifying, safeguarding, and declassifying national security information. It provides that a person may have access to classified information only where “a favorable determination of eligibility for access has been made by an agency head or the agency

² Section 6 reflects a “congressional judgment that in order to preserve national security, information elucidating the subjects specified ought to be safe from forced exposure.” *The Founding Church of Scientology of Washington, D.C., Inc. v. Nat’l Security Agency*, 610 F.2d 824, 828 (D.C. Cir. 1979); *accord Hayden v. Nat’l Security Agency*, 608 F.2d 1381, 1389 (D.C. Cir. 1979). Thus, in enacting Section 6, Congress was “fully aware of the ‘unique and sensitive’ activities of the [NSA] which require ‘extreme security measures,’” *Hayden*, 608 F.2d at 1390 (citing legislative history), and “[t]he protection afforded by section 6 is, by its very terms, absolute. If a document is covered by section 6, NSA is entitled to withhold it. . . .” *Linder v. Nat’l Security Agency*, 94 F.3d 693, 698 (D.C. Cir. 1996).

³ The authority to protect intelligence sources and methods from disclosure is rooted in the “practical necessities of modern intelligence gathering,” *Fitzgibbon v. CIA*, 911 F.2d 755, 761 (D.C. Cir. 1990), and has been described by the Supreme Court as both “sweeping,” *CIA v. Sims*, 471 U.S. 159, 169 (1985), and “wideranging.” *Snepp v. United States*, 444 U.S. 507, 509 (1980). Sources and methods constitute “the heart of all intelligence operations,” *Sims*, 471 U.S. at 167, and “[i]t is the responsibility of the [intelligence community] to weigh the variety of complex and subtle factors in determining whether disclosure of information may lead to an unacceptable risk of compromising the . . . intelligence-gathering process.” *Id.* at 180.

head's designee"; "the person has signed an approved nondisclosure agreement"; and "the person has a need-to-know the information." That Executive Order further states that "Classified information shall remain under the control of the originating agency or its successor in function." Exec. Order No. 13292, Sec. 4.1(c). Exec. Order No. 13292, Sec. 4.1(a).

Finally, it is a federal crime to divulge to an unauthorized person specified categories of classified information, including information "concerning the communication intelligence activities of the United States." 18 U.S.C. § 798(a). The term "classified information" means "information which, at the time of a violation of this section, is, for reasons of national security, specifically designated by a United States Government Agency for limited or restricted dissemination or distribution," while an "unauthorized person" is "any person who, or agency which, is not authorized to receive information of the categories set forth in subsection (a) of this section, by the President, or by the head of a department or agency of the United States Government which is expressly designated by the President to engage in communication intelligence activities for the United States." 18 U.S.C. § 798(b).

Vermont state officials have not been authorized to receive classified information concerning the foreign-intelligence activities of the United States in accordance with the terms of the foregoing statutes or Executive Orders (or any other lawful authority). To the extent any Vermont agency's requests for information seek to compel disclosure of such information to state officials, responding to those requests would obviously violate federal law.

3. The recent successful assertion of the state secrets privilege by the DNI in *Terkel v. AT&T*, 06-cv-2837 (N.D. Ill.), regarding the very same topics and types of information sought by these requests for information, underscores that compliance with the requests for information would be improper. It is well-established that intelligence information relating to the national security of the United States is subject to the Federal Government's state secrets privilege. *See United States v. Reynolds*, 345 U.S. 1 (1953). The privilege encompasses a range of matters, including information the disclosure of which would result in an "impairment of the nation's defense capabilities, disclosure of intelligence-gathering methods or capabilities, and disruption of diplomatic relations with foreign Governments." *Ellsberg v. Mitchell*, 709 F.2d 51, 57 (D.C. Cir. 1983), *cert. denied sub nom. Russo v. Mitchell*, 465 U.S. 1038 (1984) (footnotes omitted); *see also Halkin v. Helms*, 690 F.2d 977, 990 (D.C. Cir. 1982) (state secrets privilege protects intelligence sources and methods involved in NSA surveillance).

In the *Terkel* case, the DNI has formally, and successfully, asserted the state secrets privilege regarding the very same topics and types of information sought by these requests for information. In particular in *Terkel*, Director Negro Ponte concluded that "the United States can neither confirm nor deny allegations concerning intelligence activities, sources, methods, relationships, or targets" and that "[t]he harm of revealing such information should be obvious" because "[i]f the United States confirms that it is conducting a particular intelligence activity,

that it is gathering information from a particular source, or that it has gathered information on a particular person, such intelligence-gathering activities would be compromised and foreign adversaries such as al Qaeda and affiliated terrorist organizations could use such information to avoid detection.” See Unclassified Declaration of John D. Negroponte in *Terkel* (“Negroponte Decl.”) ¶ 12, enclosed hereto. Furthermore, “[e]ven confirming that a certain intelligence activity or relationship does *not* exist, either in general or with respect to specific targets or channels, would cause harm to the national security because alerting our adversaries to channels or individuals that are not under surveillance could likewise help them avoid detection.” *Id.*

In light of the exceptionally grave damage to national security that could result from any such information, Director Negroponte explained that “[a]ny further elaboration on the public record concerning these matters would reveal information that would cause the very harms that my assertion of privilege is intended to prevent.” *Id.* The assertion of the state secrets privilege in *Terkel* therefore covered “any information tending to confirm or deny: (a) alleged intelligence activities, such as the alleged collection by the NSA of records pertaining to a large number of telephone calls, (b) an alleged relationship between the NSA and AT&T (either in general or with respect to specific alleged intelligence activities), and (c) whether particular individuals or organizations have had records of their telephone calls disclosed to the NSA.” Negroponte Decl. ¶ 11. In other words, the state secrets privilege covers the precise subject matter sought from the carriers by Vermont officials.

In the *Terkel* decision, Judge Kennelly granted the government's motion to dismiss the action, thereby upholding the DNI's assertion of the state secrets privilege. Having been "persuaded that requiring AT&T to confirm or deny whether it has disclosed large quantities of telephone records to the Federal Government could give adversaries of this country valuable insight into the government's intelligence activities," the Court held that "such disclosures are barred by the state secrets privilege." *Terkel*, Slip. Op. at 32, enclosed hereto. In seeking to have telecommunication carriers confirm or deny similar information, the requests at issue here thus seek the very type of disclosures deemed inimical to the national security in *Terkel* by both the DNI and Judge Kennelly.⁴

* * *

⁴ In another pending case raising similar issues, *Hepting v. AT&T Corp.*, No. 06-0672-VRW (N.D. Cal.), although the Court did not grant the government's motion to dismiss at this stage, it declined to permit discovery on communications records allegations. The United States respectfully disagrees with his decision not to dismiss the case on state secrets ground; Judge Walker himself certified his order for immediate appeal, and the United States will appeal. In any event, however, a *federal court's* authority regarding the assertion of state secrets in no way whatsoever provides authority for a state administrative body, otherwise without authority under the Constitution in this area, to order the release of classified information or otherwise interfere with alleged federal government operations.

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Accordingly, for the reasons outlined above, it is the United States' position that the requests for information and the application of state law they embody are inconsistent with and preempted under the Supremacy Clause, and that compliance with these requests, or any similar discovery propounded by the VPSB, would place the carriers in a position of having to confirm or deny the existence of information that cannot be confirmed or denied without causing harm to the national security. For these reasons, we urge you to grant the pending motions to dismiss or otherwise close these proceedings so that litigation over this matter may be avoided.

Please do not hesitate to contact me if you have any questions. As noted, your consideration of this matter is very much appreciated.

Sincerely,

A handwritten signature in black ink, appearing to read 'P. Keisler', written in a cursive style.

Peter D. Keisler
Assistant Attorney General

Enclosures