

**Congress of the United States**  
**Washington, DC 20515**

September 12, 2007

The Honorable Kevin J. Martin  
Chairman, Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554

Dear Mr. Chairman:

As you may recall, I wrote to you on May 15, 2006, regarding widespread reports of allegedly illegal disclosure of consumer telephone records by telecommunications carriers to national intelligence entities, including the National Security Agency (NSA). I urged you as head of the independent agency responsible for enforcement of our nation's communications laws to investigate these reports. You responded on May 22, 2006, that "the classified nature of the NSA's activities makes us unable to investigate the alleged violations," and further, that the "statutory privilege applicable to NSA activities also effectively prohibits any investigation by the Commission." My letter to you and your response are attached.

As you also know, at the first oversight hearing of the Federal Communications Commission (FCC) this year on March 14<sup>th</sup>, I again urged you to commence an inquiry into the alleged violations of communications privacy statutes and asked if you had reconsidered your previous position. In response to my question you disclosed that you had written a letter to Attorney General Alberto Gonzales, dated March 6, 2007, to obtain the viewpoint of the Department of Justice as to whether the FCC could begin an investigation. In your letter to Attorney General Gonzales you asked: "...in light of the state secrets assertions of the United States in civil litigation and the positions taken by the United States in state administrative proceedings, is it the view of the United States that the disclosure that would be entailed by an FCC investigation would pose an unnecessary risk of exceptionally grave damage to the national security of the United States?" This letter is also attached.

Attorney General Gonzales has not responded to your letter for six months and recently announced his resignation. During those six months much has transpired. For instance, the Inspector General of the Federal Bureau of Investigation found in a March report that carriers often turn over more information than requested by the government and that there were widespread violations of the process of seeking telecommunications records, known as "national security letters." Last week a Federal judge struck down portions of the Patriot Act that authorized use of such national security letters. In addition, Director of National Intelligence Mike McConnell acknowledged to the media

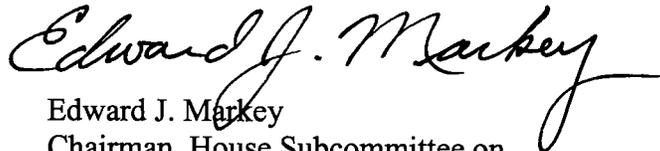
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just two weeks ago that telecommunications carriers assisted the government in its surveillance work and were being sued as a result. Finally, the *New York Times* reported last Sunday that the FBI's probes went beyond targeted suspects by gathering information about a target's "community of interest" as well.

As chairman of the independent regulatory agency that is responsible for enforcing many of our nation's telecommunications privacy laws on behalf of consumers, I believe you have a duty to investigate the widespread and serious allegations of rampant disregard for such privacy laws with regard to telecommunications companies. The Department of Justice and the NSA may possess authority to attempt to limit or terminate any investigation you commence but it is up to those agencies to invoke such authority. In my view, it is not for the Commission to assume that such agencies will act to thwart completely the exercise of Commission enforcement authority. And I hope you will agree that it also makes little sense to wait six more months for an answer to your correspondence.

I would appreciate a written response by September 21<sup>st</sup> detailing any action you intend to take in this area. Thank you for your attention to this matter.

Sincerely,

A handwritten signature in black ink that reads "Edward J. Markey". The signature is written in a cursive style with a long, sweeping tail on the letter "y".

Edward J. Markey  
Chairman, House Subcommittee on  
Telecommunications and the Internet

EDWARD J. MARKEY

7TH DISTRICT, MASSACHUSETTS

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THE INTERNET

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May 15, 2006

The Honorable Kevin Martin  
Chairman, Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554

Dear Mr. Chairman:

I am writing with respect to recent media reports about a massive program at the National Security Agency (NSA) designed to collect the telephone records of millions of Americans. According to these media reports, some of our nation's largest telecommunications carriers, namely AT&T, Verizon, and BellSouth, are working with that intelligence agency and disclosing to the NSA customer telephone calling information.

As you know, Section 222 of the Communications Act of 1934 (47 U.S.C. 222) contains prohibitions on the disclosure of such information by telecommunications carriers. Specifically, Section 222(a) states the following:

**"In General – Every telecommunications carrier has a duty to protect the confidentiality of proprietary information of, and relating to, other telecommunications carriers, equipment manufacturers, *and customers*, including telecommunications carriers reselling telecommunications services provided by a telecommunications carrier." (Emphasis added.)**

The revelation that several telecommunications carriers are complicit in the NSA's once-secret program, raises the question as to whether these carriers are in violation of Section 222 of the Communications Act and the Commission's regulations implementing that section. As you know, one of the principal purposes of Section 222 is to safeguard the privacy of telecommunications consumers. I am aware of no exception in that statute or in the Commission's regulations for "intelligence gathering purposes," or any other similar purpose, that would permit the wholesale disclosure of consumer records to any entity.

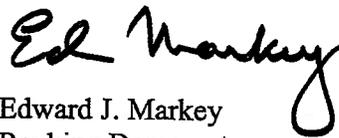
Also, at least one telecommunications carrier, Qwest, objected to participating in the NSA program. According to reports, it refused because it allegedly believed the program was illegal and violated the Communications Act.

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I would like to know what the Commission intends to do with respect to probing these apparent breaches of the customer privacy provisions of the Communications Act. Please provide me with a response which outlines the Commission's plan, in detail, for investigating and resolving these alleged violations of consumer privacy. In the alternative, please provide detailed legal reasoning as to why the Commission believes the NSA program, as described, is not violative of the law or the Commission's regulations and why the Commission is therefore not taking any enforcement action. I respectfully request a response to this inquiry by close of business on Monday, May 22, 2006.

Thank you in advance for your attention to this matter.

Sincerely,

A handwritten signature in black ink that reads "Ed Markey". The signature is written in a cursive, flowing style with a large loop at the end of the last name.

Edward J. Markey  
Ranking Democrat  
House Subcommittee on  
Telecommunications and the Internet



OFFICE OF  
THE CHAIRMAN

FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON

May 22, 2006

The Honorable Edward J. Markey  
Ranking Member  
Subcommittee on Telecommunications and the Internet  
Energy and Commerce Committee  
U.S. House of Representatives  
2108 Rayburn House Office Building  
Washington, D.C. 20515

Dear Congressman Markey:

Thank you for your letter regarding recent media reports concerning the collection of telephone records by the National Security Agency. In your letter, you note that section 222 of the Communications Act provides that “[e]very telecommunications carrier has a duty to protect the confidentiality of proprietary information of, and relating to . . . customers.” 47 U.S.C. § 222(a). You have asked me to explain the Commission’s plan “for investigating and resolving these alleged violations of consumer privacy.”

I know that all of the members of this Commission take very seriously our charge to faithfully implement the nation’s laws, including our authority to investigate potential violations of the Communications Act. In this case, however, the classified nature of the NSA’s activities makes us unable to investigate the alleged violations discussed in your letter at this time.

The activities mentioned in your letter are currently the subject of an action filed in the United States District Court for the Northern District of California. The plaintiffs in that case allege that the NSA has “arrang[ed] with some of the nation’s largest telecommunications companies . . . to gain direct access to . . . those companies’ records pertaining to the communications they transmit.” *Hepting v. AT&T Corp.*, No. C-06-0672-VRW (N.D. Cal.), Amended Complaint ¶ 41 (Feb. 22, 2006). According to the complaint, for example, AT&T Corp. has provided the government “with direct access to the contents” of databases containing “personally identifiable customary proprietary network information (CPNI),” including “records of nearly every telephone communication carried over its domestic network since approximately 2001, records that include the originating and terminating telephone numbers and the time and length for each call.” *Id.* ¶¶ 55, 56, 61; *see also, e.g.*, Leslie Cauley, “NSA Has Massive Database of Americans’ Phone Calls,” *USA Today* A1 (May 11, 2006) (alleging that the NSA “has been secretly collecting the phone call records of tens of millions of Americans, using data provided” by major telecommunications carriers).

The government has moved to dismiss the action on the basis of the military and state secrets privilege. See *Hepting*, Motion to Dismiss or, in the Alternative, for Summary Judgment by the United States of America (May 12, 2006). Its motion is accompanied by declarations from John D. Negroponete, Director of National Intelligence, and Lieutenant General Keith B. Alexander, Director, National Security Agency, who have maintained that disclosure of information “implicated by Plaintiffs’ claims . . . could reasonably be expected to cause exceptionally grave damage to the national security of the United States.” Negroponete Decl. ¶ 9. They specifically address “the NSA’s purported involvement” with specific telephone companies, noting that “the United States can neither confirm nor deny alleged NSA activities, relationships, or targets,” because “[t]o do otherwise when challenged in litigation would result in the exposure of intelligence information, sources, and methods and would severely undermine surveillance activities in general.” Alexander Decl. ¶ 8.

The representations of Director Negroponete and General Alexander make clear that it would not be possible for us to investigate the activities addressed in your letter without examining highly sensitive classified information. The Commission has no power to order the production of classified information. Rather, the Supreme Court has held that “the protection of classified information must be committed to the broad discretion of the agency responsible, and this must include broad discretion to determine who may have access to it. Certainly, it is not reasonably possible for an outside nonexpert body to review the substance of such a judgment.” *Department of the Navy v. Egan*, 484 U.S. 518, 529 (1988).

The statutory privilege applicable to NSA activities also effectively prohibits any investigation by the Commission. The National Security Act of 1959 provides that “nothing 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 [or] of any information with respect to the activities thereof.” Pub. L. No. 86-36, § 6(a), 73 Stat. 63, 64, codified at 50 U.S.C. § 402 note. As the United States Court of Appeals for the District of Columbia Circuit has explained, the statute’s “explicit reference to ‘any other law’ . . . must be construed to prohibit the disclosure of information relating to NSA’s functions and activities as well as its personnel.” *Linder v. NSA*, 94 F.3d 693, 696 (D.C. Cir. 1996); see also *Hayden v. NSA/Central Sec. Serv.*, 608 F.2d 1381, 1390 (D.C. Cir. 1979) (“Congress has already, in enacting the statute, decided that disclosure of NSA activities is potentially harmful.”). This statute displaces any authority that the Commission might otherwise have to compel, at this time, the production of information relating to the activities discussed in your letter.

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I appreciate your interest in this important matter. Please do not hesitate to contact me if you have further questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Kevin J. Martin". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Kevin J. Martin  
Chairman



OFFICE OF  
THE CHAIRMAN

FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON

March 6, 2007

The Honorable Alberto Gonzales  
Attorney General of the United States  
United States Department of Justice  
950 Pennsylvania Avenue, NW  
Washington, D.C. 20530

Dear Attorney General Gonzales:

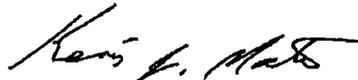
The Federal Communications Commission has been asked by members of Congress to investigate allegations that telephone carriers have provided the National Security Agency (NSA) with access to customers' telephone records in violation of Section 222 of the Communications Act. The FCC has never before investigated intelligence activities carried out by the United States. It is also my understanding that the House Permanent Select Committee on Intelligence and the Senate Select Committee on Intelligence have been briefed with respect to any relevant intelligence activities. In addition, as you know, the allegations here have been the focus of several judicial and state administrative proceedings. To date, the United States, in each of these judicial and administrative proceedings, has consistently refused to permit disclosure of any information related to carriers' alleged provision of customer records to the NSA. The United States has taken the position that disclosure of such classified information "could reasonably be expected to cause exceptionally grave damage to the national security of the United States." *Hepting v. AT&T Corp.*, Motion to Dismiss or, in the Alternative, for Summary Judgment by the United States of America, Declaration of John D. Negroponte, Director of National Intelligence, ¶ 9 (May 12, 2006). The United States has further stated that "[it] can neither confirm nor deny alleged NSA activities, relationships or targets," because "[t]o say otherwise when challenged in litigation would result in routine exposure of intelligence information, sources, and methods and would severely undermine surveillance activities in general." Negroponte Declaration at ¶ 12. Moreover, the United States has maintained that, pursuant to section 6 of the National Security Agency Act of 1959, courts and administrative agencies lack any authority to compel the disclosure of any information relating to the carriers' alleged provision of records to the NSA. *See, e.g., Hepting v. AT&T Corp.*, Motion to Dismiss or, in the Alternative, for Summary Judgment by the United States of America, at 13-14 (May 12, 2006).

In addition, telephone carriers have stated that they "would not be able to mount a factual defense" to allegations that they have violated Section 222 of the

Communications Act “without violating legal prohibitions on disclosure of classified information pertaining to surveillance.” *Hepting v. AT&T Corp.*, Motion of Defendant AT&T Corp. to Dismiss Plaintiffs’ Amended Complaint; Supporting Memorandum (June 8, 2006), at 17. And the United States has confirmed that carriers “merely disclosing whether or to what extent any responsive materials exist, would also violate various statutes and Executive Orders,” including the Intelligence Reform and Terrorism Prevention Act of 2004, Executive Order 12958, as amended by Executive Order 13292, and 18 U.S.C. § 798(b). See Letter from Assistant Attorney General Peter D. Keisler to Chairman Kurt Adams and Commissioner Sharon M. Reishus, Maine Public Service Commission, at 4 (July 28, 2006).

Based on these representations and the fact that the FCC has never before investigated government intelligence activities, the FCC has not initiated an investigation of the allegations that carriers provided phone records to the NSA. As indicated above, such an investigation would require the disclosure of classified information, and the United States has consistently opposed such disclosure in both litigation and administrative proceedings. However, out of an abundance of caution and in light of renewed requests from members of Congress that the FCC commence an investigation of these allegations, I ask you to confirm the United States’s view of the propriety of the FCC investigating these allegations. Specifically, in light of the state secrets assertions of the United States in civil litigation and the positions taken by the United States in state administrative proceedings, is it the view of the United States that the disclosure that would be entailed by an FCC investigation would pose an unnecessary risk of exceptionally grave damage to the national security of the United States? I appreciate your prompt attention to this matter.

Sincerely,



Kevin J. Martin  
Chairman