

United States Senate

WASHINGTON, DC 20510

December 5, 2019

The Honorable William Barr
Attorney General
United States Department of Justice
Washington, DC 20530

Dear Attorney General Barr:

We write to inquire about the findings contained in the March 2019 Department of Justice Office of the Inspector General (OIG) report, *A Review of the Drug Enforcement Administration's Use of Administrative Subpoenas to Collect or Exploit Mass Data*.¹

The OIG examined three surveillance programs in which the DEA abused its administrative subpoena authority under 21 U.S.C. § 876(a) to collect and exploit Americans' data in bulk. Two of these programs involved the collection and exploitation of non-content bulk telephone records and the third involved the collection of bulk purchase transaction data. The DEA kept these programs hidden from federal courts and most members of Congress until recently.

The OIG found a number of very troubling problems with these three DEA programs.

First, the OIG found that the DEA and the DOJ failed to conduct a comprehensive legal analysis regarding the DEA's abuse of its subpoena authority to collect and exploit bulk data on millions of Americans. The OIG found this especially problematic for two of the programs, as they involved a "uniquely expansive use of Section 876(a) authority to collect data in bulk without making a prior finding that the records were . . . 'relevant or material' to any specific defined investigation." The third program also "failed to formalize a complete and adequate legal assessment."²

Second, the OIG found that the procedural safeguards and audits for two of the programs failed to ensure the DEA's surveillance programs met the 21 U.S.C. § 876(a) statutory requirements that the subpoenaed information be relevant or material to an ongoing drug investigation.³ The IG also confirmed that bulk data collected by the DEA in these two programs was used by the government in cases with no known drug nexus.⁴

Third, the OIG raised important questions about the DEA's adherence to criminal case discovery and disclosure obligations in two of the programs, finding troubling statements in the DEA

¹A Review of the Drug Enforcement Administration's Use of Administrative Subpoenas to Collect or Exploit Mass Data. <https://oig.justice.gov/reports/2019/o1901.pdf>

² *Id.*, at iii.

³ *Id.*

⁴ *Id.*, at ii.

training materials and other documents that appear to violate federal rules, including that the products developed in one program could not be shared with prosecutors.⁵

One of the programs – identified in the redacted OIG report as Program A – began in 1992, during your previous service as Attorney General. Under this program, which you authorized, the DEA bought telephone records from several willing phone companies, revealing every phone call made from the United States to countries that the DEA determined had a “nexus to drugs.” This illegal surveillance program, which was hidden from the courts, resulted in millions or billions of call records being analyzed, inevitably including calls to and from Americans who were not suspected of committing any crimes. According to the OIG, Program A operated from 1992 until 2013, until it was scaled back by senior officials at the DOJ after a similarly illegal program, operated by the National Security Agency, was revealed by the press in 2013.

After 2013, the DEA shifted from collecting bulk records about all calls to a large number of countries, to requesting records about specific telephone numbers tied to federal investigations. These subpoena authorities require that DEA officials provide evidence that the requested information is “relevant or material” to a drug investigation. However, the OIG found that the DEA’s procedural safeguards are “not sufficiently clear or strong enough to ensure compliance with the requirement under Section 876(a).”⁶

Because of the significant privacy and civil rights concerns inherent in these metadata collection programs, we would appreciate your prompt attention to the questions below. We expect full, candid and public responses to these questions, so that the American public can be reassured that the problems identified by the OIG have been appropriately addressed.

1. During the two decades in which the DEA operated Program A, did any telecommunications companies ever raise questions about its legality, refuse to comply with a DEA subpoena for bulk data, or seek judicial review?
2. According to the OIG report, the DEA transitioned in 2013 from collecting bulk records under Program A to requesting records about specific targets. What legal analysis, if any, did DOJ and DEA engage in before beginning this reconfigured surveillance program? If no legal analysis was conducted, why not?
3. Under target-specific data collection operations, DEA officials must now provide “reasonable articulable suspicion” that the target is involved in drug activity.
 - a. What safeguards are in place to ensure the target is actually involved in drug activity?
 - b. What constitutes involvement in drug activity?
 - c. If someone is targeted under this program, and it is later revealed there was no nexus to drug activity, what happens to the data that the DEA collected, and is the person ever notified that data about them was obtained by the government?
 - d. What actions will be taken to ensure this program will not be abused in a similar manner to the programs discussed in the OIG report?
4. In a statement provided to the media on or around March 28, 2019, DEA spokeswoman Katherine Pfaff said that the agency was taking steps to improve its use of administrative

⁵ *Id.*, at iii-iv.

⁶ *Id.*, at iii.

subpoenas to gather data and that agency policies continue to be vetted through a “rigorous legal review.”

- a. What steps will be taken to ensure that the DEA’s use of administrative subpoenas is consistent with the statute and that the agency never again adopts a secret interpretation of its legal powers that is kept hidden from Congress, the judiciary, and the American people?⁷
 - b. Why wasn’t Program A ever subjected to such a review?⁸
5. Ms. Pfaff also informed the media that the DEA “agrees” with the OIG’s recommendations and has “begun enhancing these processes.”
- a. How have these processes been enhanced and what future plans for further enhancements are under development or being implemented?⁹
6. According to the OIG, the DEA is a “major customer” of a surveillance program in which one unnamed telecommunications carrier, under contract with the DEA and other government agencies, mines a database of “bulk telephone metadata for billions of calls”.
- a. The OIG stated that this program raised “different kinds of challenging legal issues that the DEA also failed to fully assess.” Specifically, the OIG noted that “the DEA failed to formalize a complete and adequate legal assessment regarding its use of Program C to obtain reports and other advanced analytical information to ensure such use was lawful and appropriate.” Is the DEA planning on issuing this legal assessment and a written policy governing this program as the OIG recommended? If yes, when does the DEA expect to issue the legal review and written policy, and if not, why not?
 - b. To date, how much money has the DEA paid the telecommunications carrier for the services it has provided under Program C?
7. The OIG published 16 recommendations, which included undertaking a comprehensive review of “parallel construction” policies and practices, and conducting rigorous legal assessments before beginning new bulk collection programs.
- a. Do you support each of the recommendations made by the OIG?
 - If yes, which ones? How have you or will you implement them?
 - If no, why not?

⁷ *Justice under AG Barr began vast surveillance program without legal review – in 1992, inspector general finds*, USA TODAY, March 28, 2019, available at https://www.usatoday.com/story/news/politics/2019/03/28/review-finds-phone-data-drag-net-dea-doj-began-without-legal-review/3299438002/?utm_source=The+Marshall+Project+Newsletter&utm_campaign=35d5b83991-EMAIL_CAMPAIGN_2019_03_29_11_52&utm_medium=email&utm_term=0_5e02cdad9d-35d5b83991-174496349

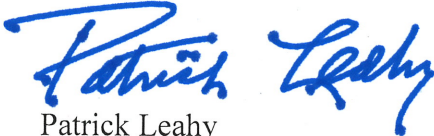
⁸ *Id.*

⁹ Zach Whittaker, *DEA says AT&T still provides access to billions of phone records*, TECH CRUNCH, March 28, 2019, available at <https://techcrunch.com/2019/03/28/hemisphere-phone-records/>

8. Finally, the OIG report indicates there is nothing currently preventing an administration from launching a similar, non-targeted bulk data collection program in the future. As Attorney General, will you ensure that administrative subpoena authorities are not again used for bulk collection?

Thank you for your attention to this letter. If you have any questions, please contact Deborah Fleischaker of Senator Leahy's staff at (202) 224-4242 or Chris Soghoian of Senator Wyden's staff at (202) 224-5244.

Sincerely,



Patrick Leahy
United States Senator



Ron Wyden
United States Senator