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# POLITICS

edited by MARC AMBINDER« [The Invisible Primary, 2/1](#) | [Main](#) | [The Sevugan v. Conant Budget Super-clash](#) »Feb 1 2010, 4:02 pm by [Marc Ambinder](#)

## Obama's Secret Wiretap Memo

An interpid reporter from Wired [noticed](#) a most unusual reference in a mostly-redacted paragraph on page 265 of a [Justice Department Office of Inspector General report](#) about how the FBI and telecoms colluded to improperly -- or illegally -- wiretap thousands of Americans.

Here it is:

The FBI did not rely on this section when it requested and obtained the records discussed in this report. However, after reviewing a draft of the OIG report the FBI asked the Office of Legal Counsel (OLC) for a legal opinion on this issue.<sup>280</sup> When making the request for an OLC opinion, the FBI stated that

[REDACTED]

On January 8, 2010, the OLC issued its opinion, concluding that the ECPA "would not forbid electronic communications service providers

[REDACTED]

<sup>281</sup> In short, the OLC agreed with the FBI that under certain circumstances [REDACTED] allows the FBI to ask for and obtain these records on a

voluntary basis from the providers, without legal process or a qualifying emergency.

A Justice Department official confirmed the existence of the Office of Legal Council memorandum. It is classified, and the official would provide no additional information. The existence of the memo -- which appears to provide a legal basis for the FBI to ask telecommunications companies for phone records "on a voluntary basis from the providers, without legal process or a qualifying emergency."

We are dealing with redactions here, but it is not clear what "under certain circumstances" means or who gets to decide what it means -- other than the FBI -- which the report spends 289 pages excoriating for creating what Cato national security scholar Julian Sanchez [calls](#) a "basically fictitious legal process" -- and for pursuing National Security Letters without any legal process

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whatsoever.

The plain language of the OIG report states that the FBI asked the OLC for legal grounding for some of practices -- what Sanchez calls a "post hoc rationalization of surveillance that would appear to be grossly illegal on its face." The OLC obliged.

Congress is curious about this new authority. Last week, Sen. Russ Feingold and two other senators asked the Department to provide them with a copy of the OLC memo because the "opinion appears to have important implications for the rights of Americans." The Department says it's reviewing the request.

Do we have any basis to think that the OLC has given the FBI any **significant** new authority? It is hard to say. The word "voluntary" may be a clue, because there are laws governing the types of information that service providers can give to the government without the consent of the person to whom the information belongs.

Disclosing what the FBI and the telecoms are able to share might help provide the bad guys with a way to figure out what they can't legally share -- which would obviously help them figure out how to evade domestic wiretaps (assuming the National Security Agency isn't listening in, which is an assumption one had better not make. Actually, many of the report's redactions almost certainly deal with tips provided to FBI counter-terrorism analysts directly by the NSA; the analysts would then request the telecom records based on those tips before any formal investigation was launched -- or any internal threshold was met.)

Sanchez tells me via e-mail that his guess is that the FBI and the Obama administration is "trying to claim a loophole for records providers keep on non-subscribers, possibly in a Visitor Location Register." that is -- the records that cell phone companies keep and store of services they provide to customers on other networks, either when they're roaming or through reciprocal agreements.

But we don't know. It's hard to imagine that the Obama administration would endorse a blanket new authority. There are good civil libertarians in the OLC. Still, we have no idea what the [NSA and FBI are really doing](#); we're told that we can't know because the bad guys shouldn't be given clues; and Congress, despite the best efforts of some of its members, doesn't seem to have the wherewithal to keep up with its oversight responsibilities.

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