



February 10, 2015

David Kaye
 United Nations Special Rapporteur
 Office of the High Commissioner for Human Rights

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Re: Use of encryption and anonymity in digital communications

Dear Mr. Kaye:

The Electronic Privacy Information Center (“EPIC”) writes to you in response to your call for information on the use of anonymity and encryption in digital communications.¹ Both anonymity and encryption in digital communications are supported by numerous international reports and guidelines as essential to protecting the human right of privacy. The 2015 Human Rights Council report should incorporate recommendations of these authoritative international frameworks because they signify international anonymity and encryption norms.²

EPIC is a public interest research center in Washington, D.C., established in 1994 to focus public attention on emerging civil liberties issues and to protect privacy, the First Amendment, and constitutional values. EPIC has a particular interest in preserving the use of encryption and anonymity in digital communications.³ In 1994 EPIC led the effort

¹ Office of the High Commissioner for Human Rights, Call for Submission of Information,

<http://www.ohchr.org/EN/Issues/FreedomOpinion/Pages/CallForSubmission.aspx>.

² Universal Declaration of Human Rights, Art. 12; International Covenant on Civil and Political Rights, Art. 17; European Convention on Human Rights, Art. 8; International Covenant on Civil and Political Rights, Art. 17; OECD Guidelines for Cryptography Policy; and OECD Guidelines for the Security of Information Systems Networks: Towards a Culture of Security (1992).

³ See e.g., *On Internet Privacy and Profiling Before S. Comm. on Commerce*, 106th Cong. (2000) (statement of Marc Rotenberg, Executive Director, EPIC), available at <https://epic.org/privacy/internet/senate-testimony.html>; *The Security and Freedom Through Encryption Act (SAFE) H.R. 695 Before the Subcomm. on Courts and Intellectual Property of the H. Comm. on the Judiciary*, 105th Cong. (1997) (statement of Marc Rotenberg, Executive Director, EPIC), available at https://epic.org/crypto/export_controls/epic_safe_testimony_397.html; EPIC, “Request for Information: Developing a Framework to Improve Critical Infrastructure Cybersecurity,” Apr. 8, 2013, <https://epic.org/privacy/cybersecurity/EPIC-Comments-NIST-Cybersecurity-Framework.pdf>; EPIC, Comments on “Draft Export Criteria for Key

in the United States to oppose the “Clipper Chip,” the NSA’s proposal for key escrow encryption that would have severely crippled the privacy and security of online communication.⁴ EPIC also published the first comprehensive survey of encryption use around the world and worked in support of the OECD Cryptography Guidelines of 1997.⁵ EPIC continues to urge Congress and federal agencies to establish strong encryption standards.⁶ And EPIC has filed amicus briefs in the Supreme Court arguing that the protection of anonymity is a core value protected by the First Amendment.⁷

Privacy is a fundamental human right, widely recognized around the world. The United States Constitution guarantees individuals the right “to be secure in their persons, houses, papers, and effects” against unreasonable searches and seizures.⁸ Supreme Court Justice Louis Brandeis, recognized the right to privacy as “the most comprehensive of rights, and the right most valued by civilized people.”⁹ The Universal Declaration of Human Rights is clear that “[n]o one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.”¹⁰ Article 8 of the European Convention on Human Rights states, “[e]veryone has the right to respect for his private and family life, his home and his correspondence.”¹¹ The International Covenant on Civil and Political Rights also memorialized privacy as a fundamental right.¹²

Escrow Encryption,” Dec. 5, 1995,
https://epic.org/crypto/key_escrow/sobel_criteria.html.

⁴ See e.g., EPIC, *The Clipper Chip*, <https://epic.org/crypto/clipper/>.

⁵ EPIC, *Cryptography and Liberty 1998: An International Survey of Encryption Policy* (Feb. 1998), available at <http://gilc.org/crypto/crypto-survey.html>.

⁶ *Supra* note 3.

⁷ See, Brief for EPIC et al. as Amici Curiae Supporting Respondents, *City of Los Angeles v. Naranjibhai Patel, et al.*, (No. 13-1175), available at <https://epic.org/amicus/patel/EPIC-Amicus-Brief.pdf>; Brief for EPIC et al. as Amici Curiae Supporting Petitioners, *Watchtower Bible & Tract Society of New York, Inc. et al. v. Village of Stratton et al.*, 536 U.S. 150 (2002) (No. 00-1737), available at https://dpic.org/free_speech/watchtower.html/; Brief for EPIC et al. as Amici Curiae, *Hiibel v. Sixth Judicial Dist. Court of Nevada, Humboldt Cnty.*, 542 U.S. 177 (2004) (No. 03-5554), available at http://www.epic.org/privacy/hiibel/epic_amicus.pdf.

⁸ U.S. CONST. amend. IV.

⁹ *Olmstead v. United States*, 277 U.S. 438, 478 (1928).

¹⁰ See Universal Declaration of Human Rights, Art. 12.

¹¹ European Convention on Human Rights Art. 8.

¹² International Covenant on Civil and Political Rights, Art. 17 (“1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. 2. Everyone has the right to the protection of the law against such interference or attacks.”).

In our modern age, encryption is the key technique and anonymity is the core legal right that protects the right to privacy. The importance of cryptography – the practice and study of techniques for secure communication¹³ – is the foundation of privacy protection in the modern age. As Whitfield Diffie, one of the fathers of modern cryptography, has stated, “Cryptography is perhaps alone in its promise to give us more privacy rather than less”¹⁴ Leading security expert Bruce Schneier notes the central role of encryption, stating “cryptology is a core technology of cyberspace. It lets us take all the business and social constructs we’re used to in the physical world, and move them to cyberspace. It’s the technology that let’s us build security into cyberspace, to deal with the attacks and the attackers”¹⁵

The recognition of technologists that cryptography is central to robust privacy and security is now well established in international policy instruments. The 1997 OECD Guidelines for Cryptography Policy, recognizing the tremendous growth of electronic networks world-wide, “has raised a legitimate concern with respect to the adequacy of security and privacy measures for information and communications systems and the data which is transmitted and stored on those systems.”¹⁶ The OECD Guidelines established cryptography as the essential technique to protect confidentiality and integrity of data networks.¹⁷ As the OECD Guidelines explained, “[t]he fundamental rights of individuals to privacy, including secrecy of communications and protection of personal data, should be respected in national cryptography policies and in the implementation and use of cryptographic methods.”¹⁸

Anonymity is a second critical pillar for the protection of privacy in the modern era. “The right to anonymity flow[s] from the conception of privacy as a fundamental human right. Anonymity is the right to control the disclosure of one’s actual identity, the

¹³ See, Ronald L. Rivest, *Cryptography*, 719 in HANDBOOK OF THEORETICAL COMPUTER SCIENCE: ALGORITHMS AND COMPLEXITY (J. Van Leeuwen ed. 1990).

¹⁴ See, *The Impact of a Secret Cryptographic Standard on Encryption, Privacy, Law Enforcement and Technology* by Whitfield Diffie, Sun Microsystems, before US House of Representatives, 11 May 1993 *available at* https://epic.org/crypto/clipper/diffie_testimony.html.

¹⁵ Bruce Schneier, *SECRETS & LIES: DIGITAL SECURITY IN A NETWORKED WORLD*, 85 (2000).

¹⁶ See, OECD Guidelines for Cryptography Policy, adopted on 27 March 1997 *available at* <http://www.oecd.org/internet/ieconomy/guidelinesforcryptographypolicy.htm>.

¹⁷ *Id.*

¹⁸ Recommendation of the Council concerning Guidelines for Cryptography Policy, OECD, 27 March 1997 - C(97)62/FINAL, <http://webnet.oecd.org/oecdacts/Instruments/ShowInstrumentView.aspx?InstrumentID=115&InstrumentPID=111&Lang=en&Book=False>.

bedrock of privacy.”¹⁹ The freedom to communicate anonymously safeguards individual privacy. Anonymous speech fosters a democratic marketplace of ideas without fear of retribution.²⁰ The U.S. Supreme Court has recognized “the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry.”²¹ Well-established international frameworks have also espoused anonymity as a way to preserve privacy and free speech. The Draft Declaration of Internet Rights states, “[a]ny person can anonymously communicate electronically in order to exercise civil and political freedoms without being subject to discrimination or censorship.”²² Recognizing the importance of preserving anonymous speech, the Madrid Privacy Declaration recommended extensive research into the adequacy of de-identification techniques.

Encryption and anonymity are recognized internationally as the fundamental pillars of the right to privacy in the modern age. We look forward to the 2015 Human Rights Council report reflecting the important role of secure, anonymous communications in the digital age.

Sincerely,

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EPIC Administrative Law Counsel

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EPIC National Security Counsel

Jared Galanis
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¹⁹ Marc Rotenberg, *EPIC: The First Twenty Years* in *PRIVACY IN THE MODERN AGE: THE SEARCH FOR SOLUTIONS* (Marc Rotenberg, Julia Horwitz & Jeramie Scott eds. forthcoming May 2015).

²⁰ Brief of Amici Curiae EPIC et al., *New Jersey v. Reid*, 194 N.J. 386 (N.J. S.Ct., 2007), available at https://epic.org/privacy/nj_reid/amicus_reid.pdf.

²¹ *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 342 (1995).

²² See, Draft Declaration of Internet Rights issued by the Committee on Internet Rights and Duties of Italy’s Chamber of Deputies, available at http://www.camera.it/application/xmanager/projects/leg17/attachments/upload_file/upload_files/000/000/189/dichiarazione_dei_diritti_internet_inglese.pdf.