



Is Google Ready to Protect Our Legal Rights?

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Is the government reading your e-mail messages? A routine law enforcement technique of using subpoenas instead of search warrants to obtain e-mail from internet service providers (ISPs) means that literally anyone who uses the Internet risks intrusion from unlawful government surveillance practices.

Subpoenas can be issued under a much lower standard than the probable cause standard used for search warrants. They require only a reasonable possibility that the materials or testimony sought will produce information relevant to the general subject of the investigation.

Unfortunately, it often seems ISPs are only too pleased to satisfy the random government inquiry. Although precise data is difficult to obtain, ISPs receive hundreds of subpoenas of this type each month. Rather than comply at once, an ISP that receives a subpoena should seek immediate legal advice to avoid handing over data that the government isn't legally entitled to or that the provider is legally forbidden from disclosing. There is no way to know how many subpoena recipients have opted for the path of least resistance and remained silent while simply handing over data that the government wasn't actually entitled to receive.

Perhaps the tide of ISP complacency is turning. Recently, privacy groups, Internet companies and industry coalitions joined Yahoo! in asking a federal court in Colorado to block the Justice Department's attempts to access the contents of a Yahoo! e-mail account without a search warrant. DOJ sought the e-mails as part of a case that is under seal, arguing that because the e-mail



had been opened by the user, it is no longer in “electronic storage” under the Stored Communications Act (SCA) and therefore did not require a warrant.

This legal theory -- that opened e-mail is entitled to less privacy protection than unread e-mail — has been flatly rejected by the one federal circuit court to address it. In challenging DOJ’s request, Yahoo! argued that the SCA and the Fourth Amendment require the government to get a search warrant before compelling Yahoo! to disclose the e-mail. The case was *In Re Application of the United States of America for an Order Pursuant to 18 U.S.C. 2703(d)*

The case presented a rare opportunity for the Court to address the application of the SCA and the Fourth Amendment to private information conveyed via modem communications technologies. However, consistent with its practice of evading court rulings on these issues, the government claimed that it no longer had an investigative need for the demanded e-mails and withdrew its motion. The practice of withdrawing its demand whenever an objection is raised is more reminiscent of the behavior of a schoolyard bully than a legitimate law enforcement technique

Crime in the Suites is authored by the [Ifrah Law Firm](#), a Washington DC-based law firm specializing in the defense of government investigations and litigation. Our client base spans many regulated industries, particularly e-business, e-commerce, government contracts, gaming and healthcare.

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