

11-12-92

SUBJECT: CONSENSUAL LISTENING-IN TO OR RECORDING TELEPHONE/RADIO CONVERSATIONS

1. **PURPOSE.** This Order specifies the Department of Energy (DOE) policy regarding the consensual listening-in to or recording of conversations on radio and telephone systems.
2. **APPLICATION TO CONTRACTS.** The provisions of this Order are to be applied to covered contractors, and they will apply to the extent implemented under a contract or other agreement. A covered contractor is a seller of supplies or services under the following: (a) a management and operating (M&O) contract or (b) a non-M&O contract or a subcontract which authorizes the use of, or access to, a telephone system of the Federal Government. The term "contract" does not include small purchases. All paragraphs of this Order are to be applied to covered contracts except paragraph 7.
3. **EXCLUSIONS.** This Order does not apply to listening-in to or recording done without the knowledge of any of the parties to the conversation. DOE 5636.1A, PROHIBITIONS ON ILLICIT WIRETAPPING AND EAVESDROPPING, of 6-12-92, provides policy in the nonconsensual or surreptitious listening-in to or recording area.
4. **REFERENCES.**
 - a. United States Code (U.S.C.), Title 50, Chapter 36, Foreign Intelligence Surveillance Act of 1978, Section 1805(f), which describes electronic surveillance activities which may be carried out by technical surveillance countermeasures personnel in the conduct of their duties.
 - b. Executive Order 12333, U.S. Intelligence Activities, of 12-4-81, which describes the goals, direction, duties, and responsibilities of the national intelligence effort.
 - c. DOE 5636.1A, PROHIBITIONS ON ILLICIT WIRETAPPING AND EAVESDROPPING, of 6-12-92, which states that devices designed specifically for wiretapping or eavesdropping shall not be procured with DOE funds or installed or used in any building, installation, or real property owned or leased by the U.S. Government for the use of DOE.
 - d. The Federal Information Resources Management Regulation, 41 Code of Federal Regulations 201-21.603, Listening-in to or Recording Telephone Conversations, which describes the limited circumstances under which agencies are authorized to listen-in to or record telephone conversations.

- e. National Telecommunications and Information Systems Security Directive No. 600, Communications Security (COMSEC) Monitoring, dated 4-10-90, which establishes policy, basic procedures, and assigns responsibilities for conducting COMSEC monitoring activities.
 - f. DOE Radio Services Procedural Guide, dated 6-11-92, which provides policy and procedures regarding Departmental radio systems.
 - g. Title 5 U.S.C. 552a, Privacy Act of 1974 (Public Law 93-549), as amended, which establishes requirements for the collection, maintenance, and dissemination of personal information by Federal agencies.
 - h. Federal Standard 1037B, TELECOMMUNICATIONS: GLOSSARY OF TERMS, of 6-3-91, which defines "recorder warning tone" (beep tone).
5. DEFINITION. A determination as used in this Order means a written justification signed by the Director, Information Resources Management (AD-20), that specifies the operational need for consensual listening-in to or recording telephone/radio conversations, indicates the specific system and location where monitoring is to be performed, lists the number of telephones or recorders involved, and establishes operating times and an expiration date for the monitoring. In those instances when the request to listen-in or record is exclusively for law enforcement or national security purposes, and except for DOE Inspector General (IG) activities as specified in paragraph 6a(1) below, the written justification will be signed by the Director, Office of Security Affairs.
6. POLICY.
- a. Conversations on any Government or contractor procured telephone or radio system shall not be consensually listened-in to or recorded except under the following conditions:
 - (1) Law Enforcement/National Security. When performed for law enforcement, foreign intelligence, counterintelligence, or communications security purposes in accordance with applicable laws, regulations, and Executive orders governing such activities and when documented by a written request citing the law enforcement/national security need. DOE IG activities, conducted pursuant to legitimate law enforcement purposes, are not subject to the requirements/review under this Order. The DOE IG shall follow all Federal requirements and conduct listening-in and/or recording with the necessary approval of the Department of Justice. Communications security monitoring shall be conducted following notice to a user of any system covered by this regulation pursuant to procedures approved by the Attorney General. Line identification equipment may be installed on telecommunications systems to assist Federal law enforcement officials in

investigating threatening telephone calls, bomb threats, and other criminal activities. No invasion of privacy is involved, and such equipment does not violate the Privacy Act of 1974 or any Federal or State wiretap laws.

- (2) Public Safety. When performed for public safety purposes and when documented by a written determination citing the public safety needs. The determination shall identify the segment of the public needing protection and cite examples of the possible harm from which the public requires protection.
 - (3) Employee with a Disability. When performed by an employee with a disability, and when documented by a determination that the use of a listening-in to or recording device is required for full performance of the duties of the employee's position description. The equipment shall be for the exclusive use of the employee with a disability. Conversations recorded or relayed by operators of telecommunications devices for the deaf relay systems shall be held in confidence.
 - (4) Public Service Monitoring. When performed by an official to determine the quality of service, but only after an analysis of alternatives and a written determination that telephone conversation monitoring is required to perform the agency mission.
 - (5) Specific Instance (With All Party Agreement). When performed with the consent of all parties for each specific instance. This includes telephone conferences (including hands-free speaker telephones), secretarial recording, and other acceptable administrative practices. Strict supervisory controls shall be maintained to eliminate any possible abuse of this privilege.
- b. When recording telephone/radio conversations as permitted by paragraphs 6a(2), (3), and (4) of this Order, proof of consent is the responsibility of the recording party. Consent to record a conversation may be obtained by:
- (1) Prior mutual consent (oral or written) of all parties to the conversation;
 - (2) An oral notification recorded at the beginning, as part of the call, by the recording party; or
 - (3) The automatic superimposing of a distinct signal (e.g., beep tone) at regular intervals during the conversation. (FED-STD-1037B defines beep tone as follows: A one-half second burst of 1400 Hz applied to a telephone line every 15 seconds...).

The beep tone need not be applied, nor all party consent obtained before recording calls made to telephone numbers publicized for emergencies, or outgoing calls made in immediate response to such incoming calls.

- c. Monitoring of radio systems is authorized only for administrative purposes, such as circuit discipline, traffic analysis, frequency stability of equipment, or establishing the identity of a station causing harmful interference to authorize DOE communications.
- d. The recordings and records pertaining to listening-in to or recording of any conversations covered by this Order shall be used, safeguarded, and destroyed in accordance with the Departmental records management program.

7. RESPONSIBILITIES AND AUTHORITIES.

- a. The Director of Administration and Management (AD-1) shall administer this Order within the Department through the Director, Office of Information Resources Management (AD-20), who shall make the determination and approve/disapprove, as designee of the Secretary, all plans for the purposes specified in paragraphs 6a(2), (3), or (4) to consensually listen-in to or record telephone/radio conversations.
- b. The Director Office of Security Affairs (SA-1) shall have the responsibility to approve/disapprove, as designee of the Secretary, all plans to consensually listen-in to or record telephone/radio conversations when the purpose is for law enforcement or national security, except those activities conducted by the DOE IG as specified in paragraph 6a(1) above.
- c. The Director, Office of IRM Policy Plans, and Oversight (AD-24) shall:
 - (1) Have the responsibility to develop policy regarding consensual listening-in to or recording of telephone/radio conversations.
 - (2) Conduct reviews to ensure compliance with these policies and relevant regulations.
 - (3) Ensure that procedures are developed with each lead Program Secretarial Officer (PSO) which describes the process for interface and communicating with their cognizant field offices.

- d. Heads of Departmental Elements shall:
- (1) Assure that all listening-in to or recording of telephone/radio conversations by Government or contractor personnel are properly authorized and approved, as specified in this Order.
 - (2) Review each need to listen-in to or record telephone/radio conversations every 2 years, and forward documentation to continue or terminate the program directly to AD-24 or SA-1, as appropriate, or forward the documentation through the respective PSO.
 - (3) Designate an individual to be responsible for bringing to the attention of the contracting officer each procurement falling within the scope of this Order. Unless another individual is designated, the responsibility is that of the procurement request originator.
- e. Procurement Request Originators (the individuals responsible for initiating a request on DOE F 4200.33) or such other individual(s) as designated by the cognizant Head of the Departmental Element shall bring to the attention of the cognizant contracting officer the following:
- (1) Each procurement requiring the application of this Order.
 - (2) Requirements for flowdown of provisions of this Order to any subcontract or subaward.
 - (3) Identification of the paragraphs or other portions of this Order with which the awardee or, if different, subawardee is to comply.
- f. Contracting Officers, based on advice received from the procurement request originator or other designated individual, shall apply applicable provisions of this Order to awards falling within its scope. For awards other than M&O contracts, this shall be by incorporation or reference using explicit language in a contractual action, usually bilateral.

8. PROCEDURES.

- a. Heads of Departmental Elements shall submit plans to listen-in to or record telephone/radio conversations under paragraph 6a(2), (3), or (4) to AD-24 at least 75 days before the proposed operational date. These plans shall include a written justification that specifies the operational need for listening-in to or recording telephone/radio conversations, indicates the specific system and location where monitoring is to be performed, lists the number of telephones or recorders involved, and establishes operating times and an expiration date for

- the monitoring. If the reason for listening-in to or recording is exclusively law enforcement or national security, the plans, except those by the DOE IG as noted in paragraph 6a(1) above, shall be submitted to SA-1.
- b. AD-24 shall prepare the determination for the approval of the Director, AD-20, and shall forward it to him at least 45 days prior to the operational date. The Director shall approve, if appropriate, and return it to AD-24.
 - c. When the purpose of listening-in to or recording telephone/radio conversations is only law enforcement or national security, SA-1 shall ensure appropriate legal reviews are performed, prepare the necessary documentation for the approval/disapproval of the Director, SA-1, and return the approval to the requesting office. As noted in paragraph 6a(1) above, DOE IG law enforcement activities are exempt from this requirement.
 - d. AD-24 shall prepare a notification of all initiatives by Federal organizations to listen-in to or record telephone/radio conversations when the reason specified is one permitted by this Order in paragraphs 6a(2), (3), or (4) to the General Services Administration Regulations Branch (KMPR), 18th and F Streets, Washington, DC 20405 at least 30 days prior to the operational date. This notification will include the information received in paragraph 8a and current copies of agency documentation, determinations, policies, procedures supporting the application, and the name and telephone number of the agency contact. AD-24 shall include a review of these activities in the information resources management onsite reviews.
 - e. AD-24 or SA-1, as appropriate, will notify the requesting office of approval/disapproval of the listening-in to or recording request not later than 5 days before the operational date. Departmental Elements will not conduct listening-in to or recording until written approval is received from AD-20 or SA-1 as specified in this Order.
 - f. Organizational elements authorized to listen-in or record for the purpose of public service monitoring shall ensure:
 - (1) Continuous positive action to inform the public of monitoring;
 - (2) No recording or identification of public callers;
 - (3) Keeping the number of monitored calls to a statistically valid sample;
 - (4) Conspicuous labeling of telephone instruments subject to monitoring;

- (5) No use of the information obtained by monitoring against the public party; and
- (6) Calling-party consent for calls that are recorded.

BY ORDER OF THE SECRETARY OF ENERGY:



DOLORES L. ROZZI
Director of Administration
and Management