

Procedure for Requesting and Using Recorded Inmate Phone Calls, Videos and Emails in Criminal and Civil Cases¹

I. Purpose

In recognition of the well-established attorney-client privilege, the United States Attorney's Office for the District of Kansas (USAO) hereby establishes policy, procedure, and responsibilities regarding requests for the receipt, handling, and use of recorded inmate phone calls, videos and emails² obtained from jails, prisons, and/or detention facilities in criminal or civil cases handled by the United States Attorneys' Office for the District of Kansas (USAO).

Inmate calls, videos or emails used by the USAO in any investigation or case may only be obtained through grand jury subpoenas, trial subpoena, administrative subpoena, or specific form described below. The USAO will no longer handle investigations and/or prosecutions with recorded inmate phone calls, videos or emails obtained from facilities without following this policy.³

This policy and approval process is consistent with the Department's December 1, 2014, Memorandum regarding Electronic Surveillance Procedures within the Federal Prison System.

A "filter team" will be utilized to shield the prosecution team from being exposed to material that it should not receive under the rules of professional conduct or other laws. Exposure to such material could result in disqualification of members of the prosecution team or suppression of evidence. The use of a filter team may demonstrate that the investigative/prosecution team was not exposed to information to which it was not entitled.

II. Procedure

A. Approval to Request Recorded Phone Calls or Videos

Any Assistant United States Attorney⁴ (AUSA) and/or law enforcement officer working with an AUSA who seeks, in furtherance of an investigation or case, to obtain recorded inmate phone calls, videos or emails from any facility must first complete an internal form entitled "Request for Authorization to Obtain Recorded Inmate Phone Calls"

¹ This policy does not confer any rights on any person investigated or prosecuted in any federal investigation in the District of Kansas.

² For purposes of this policy, any reference to recorded inmate phone calls will include facility videos (of inmates) and inmate emails.

³ This policy does not address whether audio or video recordings of inmate calls or meetings with their counsel are privileged or confidential in nature. This is not an opinion on the law of privilege and/or when potentially privileged or confidential materials lose their protection, as those are questions of substantive law not considered or addressed in this policy.

⁴ Any reference in this policy to an AUSA applies to a Special Assistant United States Attorney (SAUSA).

EOUSA RIF

(referred to as Request"). In criminal cases, the branch Criminal Coordinator and Criminal Chief will review and approve the completed form. In civil cases, the branch Civil Coordinator and the Civil Chief will review and approve the completed form.

If the requested information includes an inmate or calls that are the subject of another known investigation or case, the request must be coordinated with the AUSA(s) and law enforcement officers(s) assigned to the other investigation or case. The USAO will not engage in crossover investigations or submit duplicate requests for information from facilities absent this coordination, so pursuit of an effective and efficient manner for proceeding is accomplished. The AUSAs will communicate the coordinated plan to the involved Criminal or Civil Coordinator(s).

When communicating approval of a Request, the branch Criminal or Civil Coordinator will also identify the assigned Filter AUSA. In criminal cases, the Criminal Chief selects Filter AUSAs after consultation with appropriate Civil and/or Criminal Coordinators. In civil cases, the Civil Chief selects Filter AUSAs after consultation with appropriate Civil and/or Criminal Coordinators.

B. Request to the Facility or United States Marshal

Upon approval, the prosecution team will complete a subpoena or internal form titled "Request to United States Marshal for Recorded Inmate Phone Calls or Videos" (referred to as "USMS Request"), which shall be provided to the facility or the United States Marshals Service (USMS) Office. A copy of each Request, USMS Request and/or subpoena shall be maintained in the case file and central location to be established and maintained by each branch Criminal or Civil Coordinator.

Due to the relationship that the USMS has with facilities holding pre-trial detainees, a USMS Request may be used (rather than a subpoena) to request recorded inmate phone calls or videos. The USMS Request must be completed by an AUSA and provided to Deputy XXX, the USMS Point of Contact in Wichita/Topeka/Kansas City.

Alternatively, if the USAO uses a grand jury subpoena, trial subpoena, or administrative subpoena to obtain the calls or videos, the subpoena should be directed to the custodian of record for the facility. The subpoena must specify each of the following – the inmate's calls requested, the time period covered and request that all calls involving the telephone numbers of all known attorney(s) for the inmate (including office telephone numbers/extensions and cellular phone numbers) be excluded from production. In addition, the period covered by the subpoena should be limited to what is relevant and does not overlap other investigations or cases.

C. Filter Team

When receiving recorded inmate phone calls, videos or emails from an institution, there is a reasonable possibility that communications between an inmate and his/her attorney may be provided. These circumstances warrant the use of filter teams.

EOUSA RIF

The subpoena or USMS Request shall direct production to the filter AUSA or filter team (the team, in addition to an AUSA, may include a law enforcement officer not assigned to the investigation or case). No one involved in the filter team shall be assigned/designated as involved in the specific case at the time the initial request is approved by the Criminal Coordinator and Criminal Chief in criminal cases, or by the Civil Coordinator and Civil Coordinator. The filter AUSA or filter team shall not participate in the investigation or prosecution or civil case that is the subject of the requested information, except to the extent needed to prosecute issues related to the filter process. Supervisory AUSAs and filter AUSAs must take steps to ensure the filter AUSA does not have any investigations or cases connected in any manner to the investigation or prosecution for which the AUSA serves as the filter AUSA. To protect the integrity of the filter, it may be necessary to assign filter AUSAs who are not in the same branch office or division as the prosecuting AUSA(s). Law enforcement officers assigned to the filter team must also take steps to ensure the filter officer has no investigations or cases connected to the filter investigation or prosecution.

D. Filter Team Process

The filter team will review the written instructions provided by the Criminal Chief, Civil Chief, or branch Criminal or Civil Coordinator, which will rely on the information provided by the prosecution team.

The filter team must keep all potentially privileged material in a secure manner. This includes sealed, labelled as "potentially privileged or confidential" material, locked, and/or secured in a location not accessible to the prosecution team.

The filter team must use suitable safeguards and conduct all actions in a manner to rebut the presumption that the potentially privileged or confidential material was shared with the prosecution team before the filtering process concluded.

The entirety of recorded phone calls and the index of such calls provided by the institution must be maintained for subsequent review with defense counsel. The filter team will create a duplicate of the recorded phone calls for their review, which will lead to the elimination of any calls between an inmate and their counsel. The duplication will also include a copy for the inmate's counsel.

The filter team will use the index of phone numbers that accompanied the recorded phone calls to initially remove any recorded phone calls with known attorneys for the inmate. The filter team will use a log to document this preliminary elimination process. Unless the investigation is of ongoing criminal activity of the inmate, this log and duplicate of all recorded phone calls should be provided to inmate's counsel with an explanation of the filter process to date. Defense counsel will be given a specified period of time to review the remaining phone calls to assert privilege and communicate such to the filter team, with defense counsel's own privilege log. If the filter team disputes defense counsel's privilege claim then the filter team will evaluate the merits of the privilege claim with the First

EOUSA RIF

Assistant United States Attorney and Criminal Chief to evaluate seeking judicial review, which would be handled by the filter AUSA.

Depending upon whether defense counsel is reviewing the recorded phone calls to assert privilege, the filter team will review all remaining recorded phone calls involving phone numbers not known to be associated with the inmate's counsel, to include contractors known to be associated with inmate's counsel, such as defense investigators and forensic experts, etc. If potentially privileged recordings are identified, the filter team will promptly inform the First Assistant United States Attorney, and the Criminal Chief in criminal cases or the Civil Chief in civil cases without revealing any content. The potentially privileged recordings must be segregated from the non-privileged recordings. Unless the filter team is awaiting defense counsel to complete a review of the phone recordings to make any privilege assertion, then non-privileged recordings may be provided to the prosecution team. Before providing any materials to the prosecution team, the filter team should fully document the review process and how the prosecution team was excluded from the entire process, especially if any attorney calls were excluded. Additionally, before the filter team relinquishes any recorded phone calls to the prosecution team, it may be useful for the filter AUSA to be instructed by PRAO for guidance in that process.

If the filter team believes the crime fraud exception applies to any of the recorded phone calls, then it will inform the First Assistant United States Attorney and Criminal Chief without revealing any content. If approved by the First Assistant United States Attorney or Criminal Chief, judicial determination of the application of the crime fraud exception will be sought. Any such litigation will be handled by the filter AUSA, unless the First Assistant United States Attorney, Criminal or Civil Chief, and Civil or Criminal Coordinator determine that it is appropriate for the AUSA assigned to the case to do so.

E. Handling Recorded Calls, Videos or Emails Obtained from Facilities

When an inmate's recorded calls, videos or emails are received from a detention facility the materials will be provided to a filter team immediately for safekeeping and review. The filter team will follow the procedures described in paragraph D, above, before providing any of the evidence to the prosecution team or the civil AUSA assigned to the case.

F. Exception and Process for Current Recorded Phone Calls

On the effective date of this policy, recorded inmate calls, facility videos or emails may already be in the possession of some prosecution teams or civil AUSAs. To the extent possible, these prosecution teams or civil AUSAs shall apply this policy to their investigations/cases. For example, if any calls have not been reviewed, the prosecution team should immediately inform the Criminal Coordinator and Criminal Chief to request the assistance of a filter team.

EOUSA RIF

If the prosecution team or civil AUSA has completed the review of any recorded inmate phone calls or videos prior to this policy's effective date, the AUSA should inform the Criminal Coordinator and Criminal Chief, or in civil cases, the Civil Coordinator or Civil Chief, and provide the following:

- Identify defendant(s) charged;
- Case Number (USAO, agency number and court number);
- Case agent and agency;
- Names of inmates whose calls were obtained;
- Time period covered for the phone calls received;
- Process by which the calls were obtained, such as subpoena, USMS request, or other;
- Name of facility that provided the calls;
- Steps taken to ensure there were no attorney inmate phone calls requested or reviewed;
- Whether any calls between an inmate and attorney, were obtained; and
- If any inmate-attorney phone calls were obtained, the steps taken to isolate such calls.