Is the DEA Using NSA Warrantless Surveillance Data in Domestic Drug Investigations?

Author : Jeff Welty

Categories : Procedure, Search and Seizure, Uncategorized

Tagged as : dea, fourth amendment, nsa, reuters, stored communications act, surveillance

Date : August 7, 2013

Maybe so, according to a recent Reuters report. Apparently, the Special Operations Division of the DEA receives information from the NSA and passes it to DEA field agents. The agents then begin criminal investigations based on the information. There are two possible problems with the program described by Reuters.

End run around privacy protections. First, the NSA collects huge amounts of data under permissive legal standards because the data is gathered in the interest of national security. Allowing that data to be used for domestic law enforcement purposes, where a higher legal standard applies to data collection, could amount to an end run around the privacy protections that apply in the criminal justice system. As a *Washington Post* blog notes here, the NSA-DEA pipeline may "break down the barrier between foreign counterterrorism investigations and ordinary domestic criminal investigations." It's hard to analyze this issue further without specific information about what types of data are being collected and shared. Some data is more protected – under the Fourth Amendment and under federal statutes such as the Stored Communications Act – than other data, and the Reuters story lacks detail about the nature of the information provided by the NSA.

Falsification of evidence. Second, the DEA agents who receive the information apparently are "directed to conceal how such investigations truly begin." Reuters explains:

A former federal agent . . . described the process. "You'd be told only, 'Be at a certain truck stop at a certain time and look for a certain vehicle.' And so we'd alert the state police to find an excuse to stop that vehicle, and then have a drug dog search it," the agent said. After an arrest was made, agents then pretended that their investigation began with the traffic stop, not with the SOD tip, the former agent said. The training document reviewed by Reuters refers to this process as "parallel construction."

This seems to me to be very serious. The implication is that DEA agents are preparing false reports about the chronology of their investigations, giving false information to prosecutors (who in turn may provide false information to the defense in discovery), and testifying falsely at trials, all to conceal the true source of their investigations.

How things should work. The impulse to protect the source of the information is understandable. Officers often have good reasons for wanting to conceal the origins of their investigations. For example, they may want to conceal the identity of a confidential informant who initiated a drug transaction in the hopes of using the same informant again in the future. Here, the DEA may want to hide the existence and the reach of the NSA's surveillance programs, because revealing those things might prompt the subjects of the programs to alter their behavior and evade surveillance.

But the proper way to handle those concerns is not to falsify reports and mislead the parties and the court. It is to ask a judge to enter a protective order shielding the sensitive information from discovery. The judge can balance the legitimate concerns of law enforcement against the interests of the defendant, such as learning whether the source of the information was reliable, whether the information contained any exculpatory material, and whether the information was obtained in violation of privacy protections. Balancing the need for secrecy against other interests is a process with which courts are very familiar. *See generally Pennsylvania v. Ritchie*, 480 U.S. 39 (1987) (requiring courts to review

sensitive documents such as DSS records *in camera* when they are potentially relevant to a criminal case, as a way of protecting both the defendant's right to exculpatory material and the need for confidentiality in such records); *United States v. Nixon*, 418 U.S. 683 (1974) (ruling, in a prosecution of former government officials for obstruction of justice, that the prosecutor's need for the President's tape recordings and documents outweighed the President's interest in the confidentiality of the materials where national security considerations did not appear to be at stake); *Roviaro v. United States*, 353 U.S. 53 (1957) (in a drug prosecution, the Court ruled that the defendant's need to know the identity of an informant who allegedly participated in a drug transaction with the defendant outweighed the Government's interest in protecting the informant's identity).

What's next? The DOJ says that it is "looking into" the story. Good. Perhaps the story is inaccurate or perhaps there are non-obvious reasons that justify the behavior the story describes, but at this point, the story appears to have exposed a genuinely pernicious practice.