# Four Myths and Realities: Civil Agencies, Subpoenas, and Digital Content

There is near-universal agreement that the Electronic Communications Privacy Act (ECPA) is in serious need of reform to offer real protections to our digital communications. One of the only barriers that remains is the misguided and dangerous calls from civil agencies for an exception to the warrant requirements reform would establish. Here we debunk the most prevalent myths civil agencies are peddling.

**MYTH #1**: *Failure to grant civil agencies authority to obtain digital content from providers will seriously hinder their investigations*.

- **REALITY**: Civil agencies already have many tools at their disposal for acquiring digital content. They can start by issuing a subpoena directly to the target of an investigation – the user himself. If the user fails to comply, officials can enforce subpoenas by having a court order the user to disclose the data sought. Some officials have expressed concern that a user can avoid handing over their data by deleting it, but ECPA already allows agencies to issue preservation orders – without court approval – that direct service providers to prevent destruction or alteration of evidence while a motion to compel is being pursued. ECPA reform would not change this.

**MYTH #2**: *Enabling civil agencies to access content from providers without a warrant is urgent and essential*.

- **REALITY**: Civil agencies may claim their need for warrantless access is urgent, but recent testimony before the Senate Judiciary Committee shows they have managed just fine without it. In 2010, the Sixth Circuit held that the government must obtain a warrant before accessing content stored with a service provider. Since then, the SEC has not sought to obtain digital content from a provider "out of an abundance of caution," despite its view that the *Warshak* decision does not deny it the authority to obtain content using administrative subpoenas with advance notice. In addition, the FTC's Daniel Salsburg said the FTC has never sought content from a provider, either before *Warshak* or since.

**MYTH #3**: *Obtaining a court order is just like getting a warrant*.

- **REALITY**: Court orders can be very different depending on the standard under which information is sought and the predicate for seeking that information. To obtain a warrant, the government must approach a judge and demonstrate probable cause and that specific evidence related to a crime is currently in the specific place to be searched. By contrast, civil proceedings only require the government to believe that the content sought is "relevant" to an investigation. Worse, many actions can be relevant to civil violations of the law, such as wrongly filing a tax return. If all federal civil agencies are

granted this power, entities such as the IRS and the EPA will suddenly gain access to vast troves of data for a variety of investigations.

**MYTH #4**: *There's no constitutional problem here*.

- **REALITY**: If civil agencies' warrantless access to communications content presented no constitutional problems, those agencies would already be reading our email. In addition, giving them this authority in civil investigations would erode the warrant protection in criminal investigations. If, for example, the Department of Justice is given the ability to gain content in a civil fraud investigation, nothing would stop the DOJ from using that data – obtained by a standard much lower than the Constitution's warrant requirement – in a criminal fraud investigation of the same conduct. The civil agencies' proposal to allow them to request content from a service provider is tantamount to allowing them to ask a landlord to hand them the keys when a tenant does not respond to a subpoena. It is a power grab of immense proportion – no matter how they try to spin it.