

IF THE IRS OBTAINS E-MAILS WITHOUT A WARRANT, THEN WILL PEOPLE FREAK OUT?

The ACLU recently FOIAed the IRS to find out whether its investigative branch gets warrants before rifling through people's stored email. While the FOIA didn't answer the question definitively (IRS lawyers have clearly discussed it), it appears that the IRS still trains people that – except in the Sixth Circuit, where an Appeals Ruling prohibits its – the Agency handbook still tells investigators they can rifle away.

Accordingly, in 2010 the Sixth Circuit Court of Appeals decided in *United States v. Warshak* that the government must obtain a probable cause warrant before compelling email providers to turn over messages.

However, the IRS hasn't told the public whether it is following *Warshak* everywhere in the country, or only within the Sixth Circuit.

[snip]

Then came *Warshak*, decided on December 14, 2010. The key question our FOIA request seeks to answer is whether the IRS's policy changed after *Warshak*, which should have put the agency on notice that the Fourth Amendment does in fact protect the contents of emails. The first indication of the IRS's position, from an email exchange in mid-January 2011, does not bode well. In an email titled "US v. Warshak," an employee of the IRS Criminal Investigation unit asks two lawyers in the IRS Criminal Tax Division whether *Warshak* will have any

effect on the IRS's work. A Special Counsel in the Criminal Tax Division replies: "I have not heard anything related to this opinion. We have always taken the position that a warrant is necessary when retrieving e-mails that are less than 180 days old." But that's just the ECPA standard. The real question is whether the IRS is obtaining warrants for emails *more than* 180 days old. Shortly after *Warshak*, apparently it still was not.

The IRS had an opportunity to officially reconsider its position when it issued edits to the Internal Revenue Manual in March 2011. But its policy stayed the same: the Manual explained that under ECPA, "Investigators can obtain everything in an account except for unopened e-mail or voice mail stored with a provider for 180 days or less using a [relevant-and-material-standard] court order" instead of a warrant. Again, no suggestion that the Fourth Amendment might require more.

[snip]

Finally, to the present: has the IRS's position changed this tax season? Apparently not. The current version of the Internal Revenue Manual, available on the IRS website, continues to explain that no warrant is required for emails that are stored by an ISP for more than 180 days. Apparently the agency believes nothing of consequence has changed since ECPA was enacted in 1986, or the now-outdated Surveillance Handbook was published in 1994.

I've long wondered what it would take to get average Americans infuriated about the gutting of the Fourth Amendment.

Perhaps this – the strong evidence that the

government's tax collector can access your emails directly from your ISP without a warrant in most places (I'm in the Sixth but my emails are stored in Google servers elsewhere, so I wonder if even I am protected!) – will finally piss people off.