

OITP Technology Policy Brief

The Communications Assistance for Law Enforcement Act (CALEA) and Libraries

Prepared by Albert Gidari

Overview

This FAQ has been prepared to explain the Communications Assistance for Law Enforcement Act or “CALEA” and how it relates to our Nation’s libraries. When the Federal Communications Commission (“FCC”) extended CALEA to all facilities-based broadband Internet access providers in September 2005, it deemed it not to be in the public interest at that time to extend CALEA to libraries “that acquire broadband Internet access service from a facilities-based provider to enable their patrons or customers to access the Internet.” Thus, any library that acquires its Internet access from another provider has no CALEA obligation whatsoever. Nonetheless, questions remain about the impact of CALEA on academic institutions through which academic libraries may obtain Internet access, regional and local network obligations, and library network consortia. . The American Library Association, the Association of Research Libraries and the Association of College and Research Libraries will continue to explain these impacts in filings with the Federal Communications Commission and the U.S. Court of Appeals for the District of Columbia and this FAQ should answer library questions regarding CALEA.

What is CALEA?

Passed by Congress in 1994, CALEA requires telecommunications carriers to ensure that their communications equipment, facilities and services are capable of conducting real-time electronic surveillance. Carriers have to be able to intercept the content of communications, acquire related call-identifying information and deliver both to law enforcement premises without the knowledge of the target of the surveillance. In a nutshell, CALEA requires phone companies to make it easier for law enforcement to conduct wire taps on phone lines.

Who is a Telecommunications Carrier?

CALEA defines a telecommunications carrier much the same way as the Telecommunications Act of 1996: An entity engaged in the transmission or switching of wire or electronic communications as a common carrier, including commercial mobile wireless services.

However, the definition under CALEA also includes any entity engaged in a communication service if the FCC finds, (1) that the service is a replacement for a substantial portion of the local telephone exchange service, and (2) that it is in the public interest to deem such an entity to be a carrier under CALEA. It is this definition that DoJ and the FCC relied upon to extend CALEA to Internet communications and that the Court of Appeals for the District of Columbia affirmed in June 2006.

Are There Exemptions From CALEA Coverage?

Yes. By definition, a telecommunications carrier is not covered by CALEA to the extent it provides “information services.” Equipment, facilities, or services that support the transport or switching of communications for private networks or for the sole purpose of interconnecting telecommunications carriers are also exempt. However, the scope of these exemptions remains undefined. For example, the FCC has not defined the term “private network.”

What is an Information Service?

An information service makes some computer processing application or service available to an end user via telecommunications. One example of an information service is electronic messaging like email or instant message. In contexts other than CALEA, the FCC has declared broadband Internet access to be an information service. Historically, the FCC has not regulated information services. However, the FCC has applied a different definition under CALEA and determined that the telecommunications component of an information service is covered by CALEA while the remainder of the information processing is not. The Court of Appeals upheld the FCC’s definition in its June 2006 opinion.

What is a Private Network?

In the telephone context, under CALEA, if a private business or entity owned its own telephone switch that connected to the public switched network, then under CALEA, that piece of equipment is exempt from coverage. In the context of Internet communications, the FCC has described a private network differently. It is a system that enables members of an organization or community to communicate with one another and/or to retrieve information from shared databases not available to the general public. The FCC has said that if these private networks connect to the Internet, however, the facilities that support the connection would be covered. Library associations and others have asked the FCC to clarify whether that means the private network operator has the obligation or whether it means the commercial ISP that connects the private network to the Internet has the obligation. In its briefing to the Court of Appeals, the FCC and DoJ stated that while private network equipment is not covered, the equipment used by private network operators to connect to the Internet is covered. The Court of Appeals did not decide whether the FCC and DoJ were correct and emphasized only that private network equipment was exempt. Thus, the answer is not clear.

Is CALEA Being Expanded to Cover Internet Access?

Yes. In March 2004, the Department of Justice asked the FCC to declare that broadband Internet access and voice over Internet Protocol (VoIP) services were substantial replacements for a local exchange service and that it was in the public interest to declare any entity that provides such services to be a telecommunications carrier. In August 2004, the FCC issued a notice of proposed rulemaking asking for comments on the Justice Department’s proposal. Library associations, including ALA and ARL, urged the FCC to reject the Department’s proposal insofar as it suggested that CALEA applied to broadband Internet access provided by libraries or

to those private or municipal networks through which libraries made such access available to staff and patrons.

In August 2005, the FCC issued the First Report and Order (First Order) supporting the Department of Justice position despite strong opposition from libraries and other interested parties. The Court of Appeals upheld the FCC's interpretation of CALEA in a split decision issued June 9, 2006.

The First Order requires all facilities-based providers of broadband Internet access and all interconnected VoIP services to comply with CALEA within 18 months, or by May 2007.

When the FCC extended CALEA to all facilities-based broadband Internet access providers in September 2005, it deemed it not to be in the public interest at that time to extend CALEA to libraries "that acquire broadband Internet access service from a facilities-based provider to enable their patrons or customers to access the Internet." Thus, any library that acquires its Internet access from another provider has no CALEA obligation whatsoever. The access provider may be a commercial ISP or a state or local network operator, or a university or college. It does not matter which under the FCC's reasoning -- libraries are exempt.

However, many libraries obtain Internet access through local and regional library networks, academic institutions or other private networks. The FCC stated that to the extent these networks are interconnected with a public network like the Internet, providers of the facilities that support the connection of the private network to a public network are subject to CALEA. In its briefing to the court, the FCC and the DoJ stated that equipment owned by private networks that in fact interconnected to a public network was covered. The court decided that it was not ripe to decide the issue but emphasized that private networks were exempt. Thus, it is possible that private network connections that serve libraries still could be subject to CALEA obligations. The FCC's First Order does not address specifically the exact interconnection point in the network that would be subject to compliance, and in a more recent order, the FCC left it to public standards bodies and trusted third parties to decide what needed to be provided to law enforcement. So libraries remain concerned if those third parties on whom they rely for Internet access have obligations under CALEA that affect the pricing, manner or means of library Internet access.

The FCC asked for additional comment in its First Order as to what, if any, procedures it should adopt to consider for processing exemption requests from CALEA. The FCC has the power to exempt by rule any telecommunications carrier from coverage after consultation with the Attorney General. The FCC specifically is focused on small and rural carriers, but ALA and

Are Libraries Covered by the FCC Order?

Isn't the FCC Considering an Exemption for Libraries?

other library associations urged the FCC to consider rules to exempt academic institutions and other private networks and to affirm the exemption for libraries remains unaffected by the proceeding. There is no date certain for any FCC decision on the exemption issue.

Did Library Associations Appeal the FCC Decision?

Yes. Right after the FCC Order appeared in the Federal Register, the American Library Association, the Association of Research Libraries and the Association of College and Research Libraries petitioned the Court of Appeals for the District of Columbia to reverse the FCC Order on the grounds that CALEA does not cover information services such as broadband Internet access and that in no event can a provider of information service become a telecommunications carrier for CALEA purposes. The appeal was intended to ensure that libraries are not subjected to CALEA for providing broadband Internet access in the future. In other words, the library associations took a two-pronged approach to help ensure that libraries were not covered by CALEA. They are pursuing a regulatory approach with the FCC and at the same time it fighting a court battle. Unfortunately, on June 9, 2006, the Court of Appeals upheld the FCC's First Order, and the parties are now considering their appellate and legislative options.

What Happens to the Compliance Deadline and Other Obligations in the Meantime?

Several parties including the library associations have asked the FCC to stay the 18 month CALEA compliance deadline pending either the outcome of the appeal or at least pending the issuance of final technical requirements by the FCC. Because it is unclear what a service provider would have to do to meet CALEA at this time for broadband Internet access, the parties have urged the FCC to delay implementation. The FCC denied the request in its Second Order in May 2006, and has stated that the May 2007 compliance date is a firm date.

What Exactly is Required if Libraries Must Comply?

The precise technical requirements have not been determined and were not part of the First Order. This being noted, it is not unrealistic to assume that routers and other equipment that support broadband connection to the Internet would have to be upgraded to provide wiretap capabilities at the library's own cost. In addition, entities that are covered must provide 7x24 security personnel to receive and implement wiretap orders. Wiretaps must be performed with the affirmative intervention of service provider staff so it can fairly be concluded that libraries will have to train personnel on the receipt of surveillance orders and their implementation. If library network operators were covered, similar upgrades and administrative procedures would have to be implemented.

While libraries have none of these obligations today, it may be useful to list the requirements in more detail.

* **Immediate Security Requirements:** All newly-covered entities must meet the Section 105 system security and integrity requirements within 90 days of publication of the Second Order in the Federal Register (pending publication). In short, newly-covered entities must create a security office, train personnel to receive and implement legal process for surveillance, and provide contact information for such personnel to the Commission.

* **Monitoring Reports:** The Commission will issue a future public notice that will require covered entities to submit compliance progress reports describing their compliance status and progress towards the May 2007 deadline. Newly-covered entities must coordinate with manufacturers immediately to avoid future enforcement actions by the Commission.

* **Cost Recovery:** The cost of CALEA compliance is on the newly-covered entity and the hurdle is high to show that the costs are unreasonable and that compliance cannot be achieved.

* **Technical Requirements:** There remain unanswered questions concerning what constitutes communications identifying information or "CII" and how it must be provided to law enforcement. The Commission has deferred to industry standards bodies to define it in the first instance, and has permitted trusted third parties to provide solutions.

Didn't the FCC Limit CALEA to the "Gateway" Routers of Universities?

On May 5, 2006, the Commission adopted its Second CALEA Order. There was discussion by the Commissioners clarifying that the Second Order would limit the impact of the First Order on universities and presumably other private network operators to the gateway routers that connect the private networks to the public Internet. This is no great decision. The requirements that would apply to gateway routers are unstated today. Because only high-level information about communications is available at the gateway, we expect law enforcement will insist on greater, more intrusive, technical requirements, entangling private network owners in further disputes with law enforcement or higher compliance costs. Further, the commercial ISP that provides the connectivity to the public Internet should be the responsible entity for providing CALEA capabilities. The information available at the commercial ISP is identical to the information available at the private network gateway and therefore it is not cost efficient to require both to provide the same information. So the so-called gateway router solution is not likely to be a solution at all.

Is Legislation Likely to Extend CALEA to Internet Service?

We understand that the Department of Justice has prepared legislation that would essentially codify the FCC decision to the extent it applies to commercial access services to the public, which means nonprofit networks would be exempt. In other words, network access providers would be covered by CALEA under the proposed legislation, but not universities and libraries. It is unclear with the change in Congress whether any CALEA legislation will be introduced.

Do Libraries have to File a Compliance Status Report with the FCC?

No, newly-covered entities are required to file a status report by February 12, 2007, regarding their compliance efforts towards the May 2007 compliance date, but because libraries are exempt from CALEA, no report is required.

Are Libraries Required to File System Security and Integrity Procedures with the FCC?

No, only newly-covered entities are required to adopt written security procedures for responding to electronic surveillance requests and to file such procedures with the FCC along with a point of contact for receipt of court orders. While all libraries should have in place procedures to respond to government requests for assistance, the FCC filing requirement does not apply.

Where Can These CALEA Orders and Other Information Be Found?

For more information on CALEA and libraries, visit the ALA CALEA page at: www.ala.org/ala/washoff/WOissues/techinttele/calea/calea.htm .

Further, there is a collection of FCC orders and law enforcement filings at www.askcalea.net. All of the comments and FCC orders filed in this matter may be obtained from the FCC Web site at: www.fcc.gov/cgb/ecfs/ . Select search for filed comments, and enter the proceeding number 04-295 in the search form template. The comments, documents and FCC orders will be returned in chronological order.