MAKING MUTUAL LEGAL ASSISTANCE REQUESTS TO THE UNITED STATES

Office of International Affairs (OIA)
U.S. Department of Justice
presented by
Evan Williams
International Computer Hacking & Intellectual Property (ICHIP)
Attorney-Advisor for Asia
Office of Prosecutorial Development, Assistance & Training (OPDAT)
U.S. Department of Justice

Overview

- Goal → Provide a general overview on how to obtain assistance from the United States, including:
  - Police-to-police sharing
  - Publicly available information
  - Mutual legal assistance requests
    - Drafting tips
    - Tips specific to electronic evidence requests

Assistance Provided at All Stages of Criminal Case

- Investigation

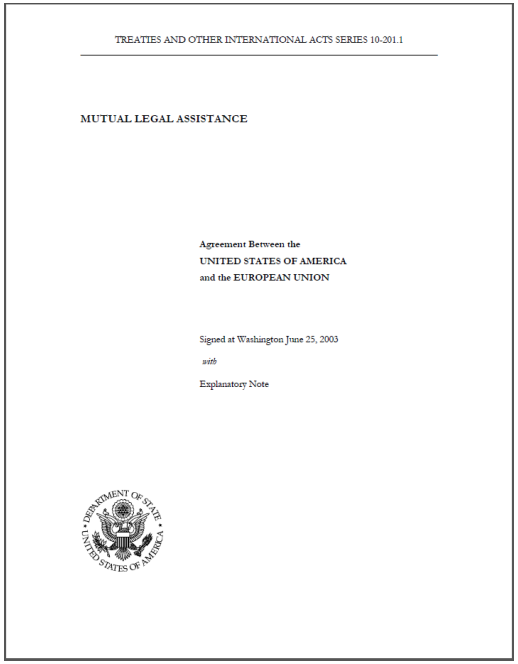
- Prosecution

- Related Proceedings including sentencing and confiscation of assets

Two Primary Types of Assistance

- Assistance through Police Channels

- Assistance through Mutual Legal Assistance (MLA) Process



TREATIES AND OTHER INTERNATIONAL ACTS SERIES 10-201.1

MUTUAL LEGAL ASSISTANCE

Agreement Between the
UNITED STATES OF AMERICA
and the EUROPEAN UNION

Signed at Washington June 25, 2003
with
Explanatory Note

Preliminary Measures for Foreign Law Enforcement Authorities to Consider

- Police-to-police sharing
- Publicly available information
- Voluntary participation or production of records by owner of the information or electronic data
- Direct request to communications service provider for non-content information

Police-to-Police Sharing

- If your investigators have contacts with U.S. investigators, such as the FBI, DEA, DHS, or other Legal Attachés at the embassy, ask them if the United States already has an open investigation.

- If so, the U.S. agency may be able to share evidence on a police-to-police basis.

Publicly Available Information

- Court documents
- Vital statistics (birth/death certificates)
- Corporate records
- Property records
- Location of inmates
- Addresses and telephone numbers

Examples of Legal Assistance

- Business and bank records
- Official records
- Electronic evidence
- Interviews (may also be available through police channel)
- Video teleconferences
- Testimony
- Service of documents
- Searches and seizures
- Restraint and forfeiture of assets

Types of Assistance Requiring Formal Requests

- Compelling a witness to give a statement or testimony
- Compelling a person or entity to produce documents, records and items
- Compelling production of electronic evidence from a communications service provider or web hosting service
- Executing a search warrant for a place or person (e.g., DNA)
- Restraining and confiscating proceeds or instrumentalities of crime

Bases for Legal Assistance

- Bilateral mutual legal assistance treaties (MLATs)
- Multilateral conventions such as:
  - Council of Europe Convention on Cybercrime (Budapest)
  - UN Convention Against Transnational Organized Crime (Palermo)
  - UN Convention Against Corruption (Merida)
  - UN Convention Against Illicit Traffic in Narcotic Drug and Psychotropic Substances (Vienna)
  - Anti-Terrorism Conventions
- Domestic law and reciprocity

The Channel for Seeking Legal Assistance

- OIA is the Central Authority for the United States.
- Send formal requests directly via e-mail (the preferred method) <oia.mla@usdoj.gov>, mail, or via the diplomatic channel (only if required by your law).
- OIA reviews the request for sufficiency under U.S. law.
- If insufficient, OIA will contact the requesting authority and ask them to clarify or supplement the request.
- If sufficient, the request will be executed in the most expeditious manner.

Consider Timing Issues

- Make the request as far in advance as possible.
- Consider prioritizing your request based on your time constraints.
- If you have already arrested or charged a person with criminal conduct, calculate when you will need the evidence and explain that timeframe in the request.
- Not all requests can or should be urgent.

Drafting a Request

Basis of your request

- State basis for the request for assistance: treaty, multilateral convention, or comity/reciprocity.

Introduction

- Include who you are – name of investigating or prosecuting authority.
- Explain who/what you are investigating or prosecuting.
- Describe, generally, the information or evidence you are seeking from the United States.

Confidentiality

- State whether you need the request to remain confidential and court records filed under seal; if so, state the reason.

Drafting a Request Cont.

Urgency

- If the request is urgent, explain why – for example, imminent trial date, possible destruction of evidence, etc.

Facts

- Provide an organized, succinct, chronological outline of the relevant facts of the case in clear, simple sentences – explain what happened and who did what.
- Include dates on which events took place.
- For electronic evidence, include dates of account use.
- For financial information, include bank and account number (if available).
- For business records, identify the business entity.

Offenses

- Identify the relevant offenses and include the penal code provisions (including their text) that describe the relevant criminal conduct charged or under investigation.

Drafting a Request Cont.

Subjects of the investigation

- Identify the subjects of the investigation/other individuals involved

Assistance Requested

- Clearly state what assistance you need, which should be supported in the facts section.
- Be realistic in the amount and type of information that you request.
- Check the spelling of all account identifiers.

Procedures

- Explain any procedures that need to be followed such as certification of records or the format of testimony for witness interviews.

Contact Information

- Include your name and contact information and any other investigator or prosecuting authority familiar with the case who can assist U.S. authorities to execute your request.

Drafting Tips: Collaboration

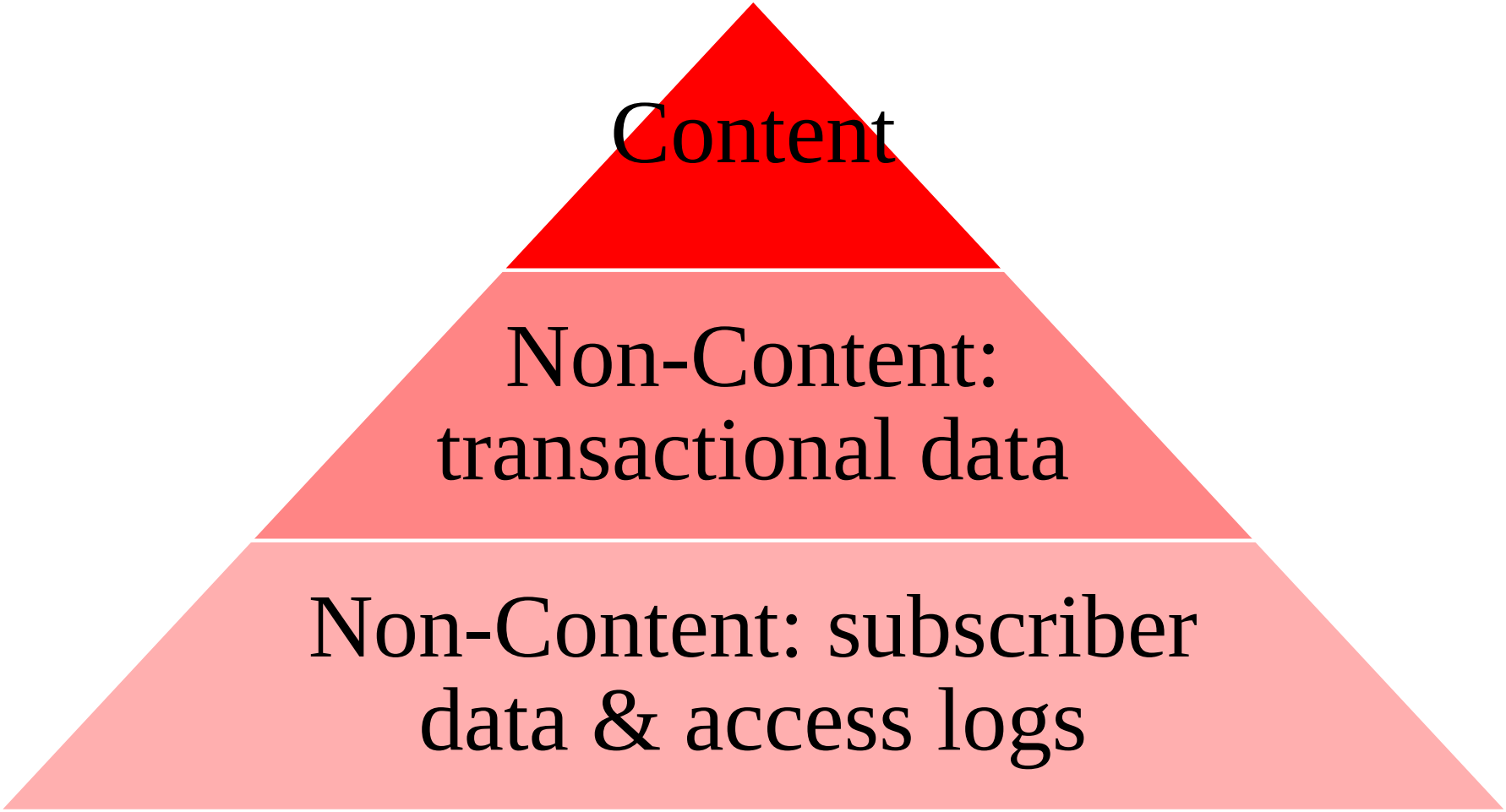
- If you are aware of a U.S. prosecutor or police agency that is already familiar with and interested in assisting the execution of the request, provide this information to ensure a speedier coordination and execution.

- Consider discussing your investigative needs with U.S. authorities prior to drafting your request.

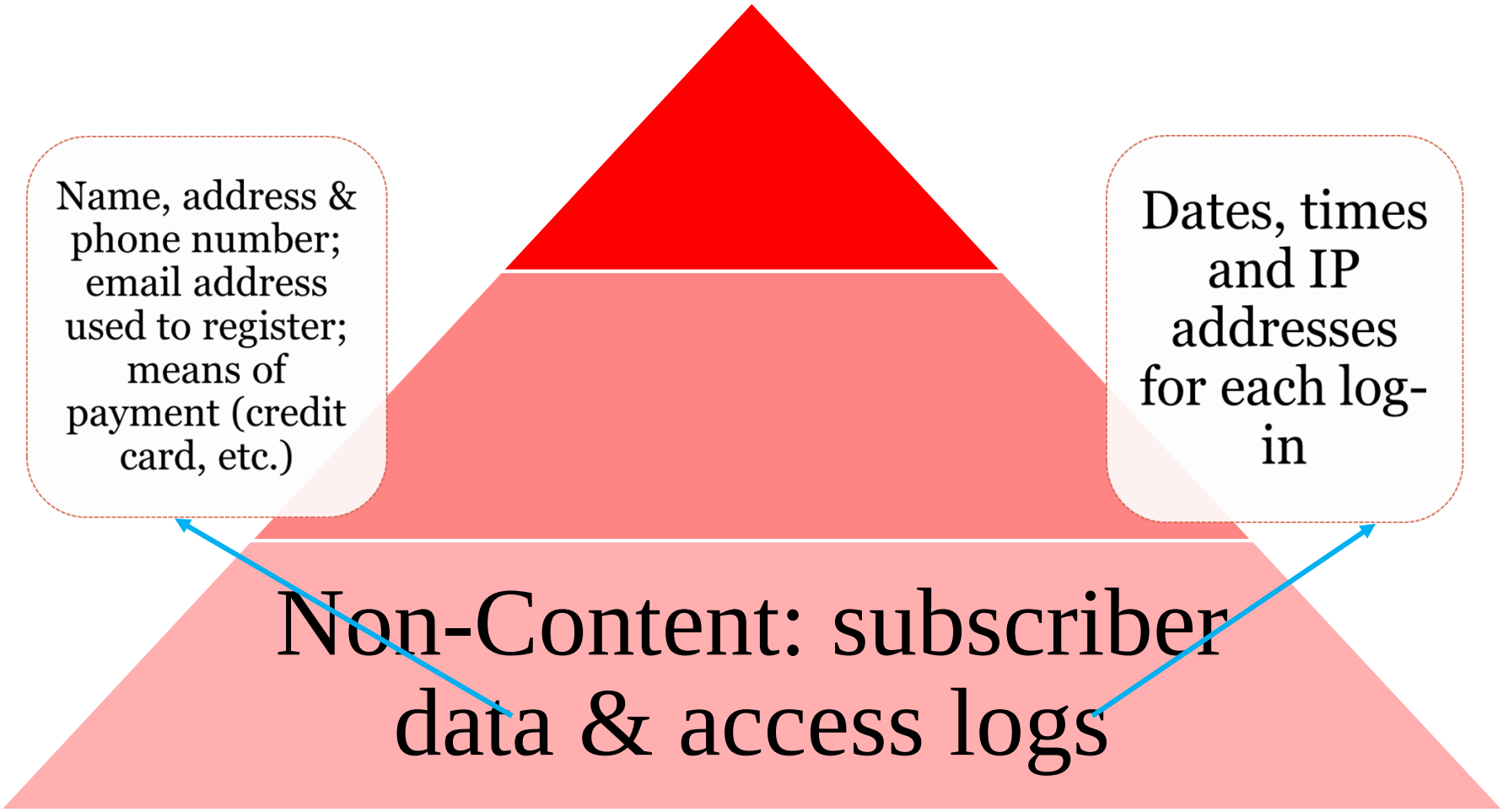
ELECTRONIC EVIDENCE REQUESTS

U.S. law puts electronic records evidence into three categories. The higher you climb, THE MORE YOU SEE, AND the harder it is to obtain the requested evidence

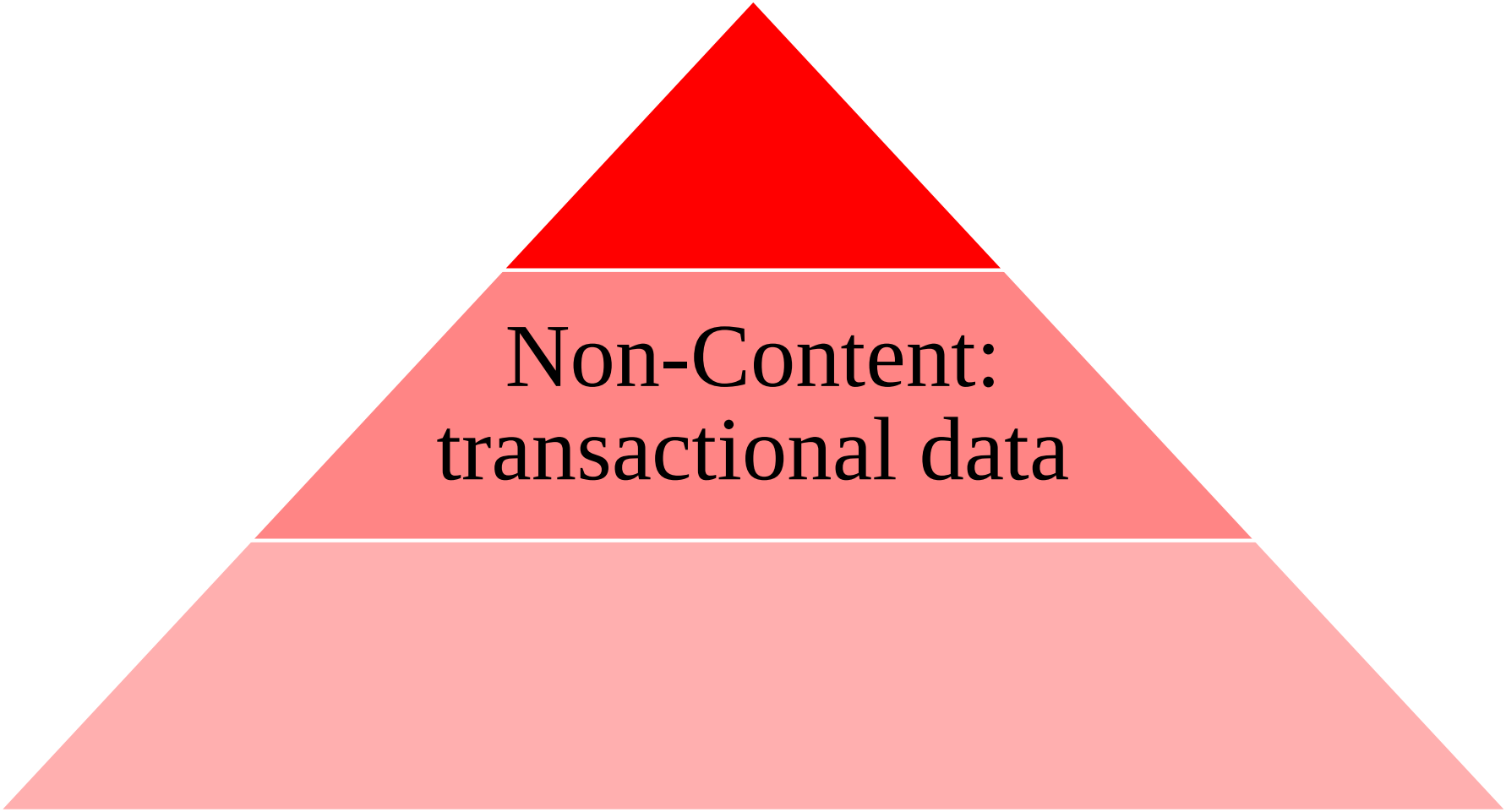
Categories of Electronic Evidence



Categories of Electronic Evidence



Categories of Electronic Evidence



Non-Content: Transactional Data

Sender **and** recipient, including their IP addresses;

Dates and times of communications;

Duration or "size" of communications

Transactional Data: Legal Standard

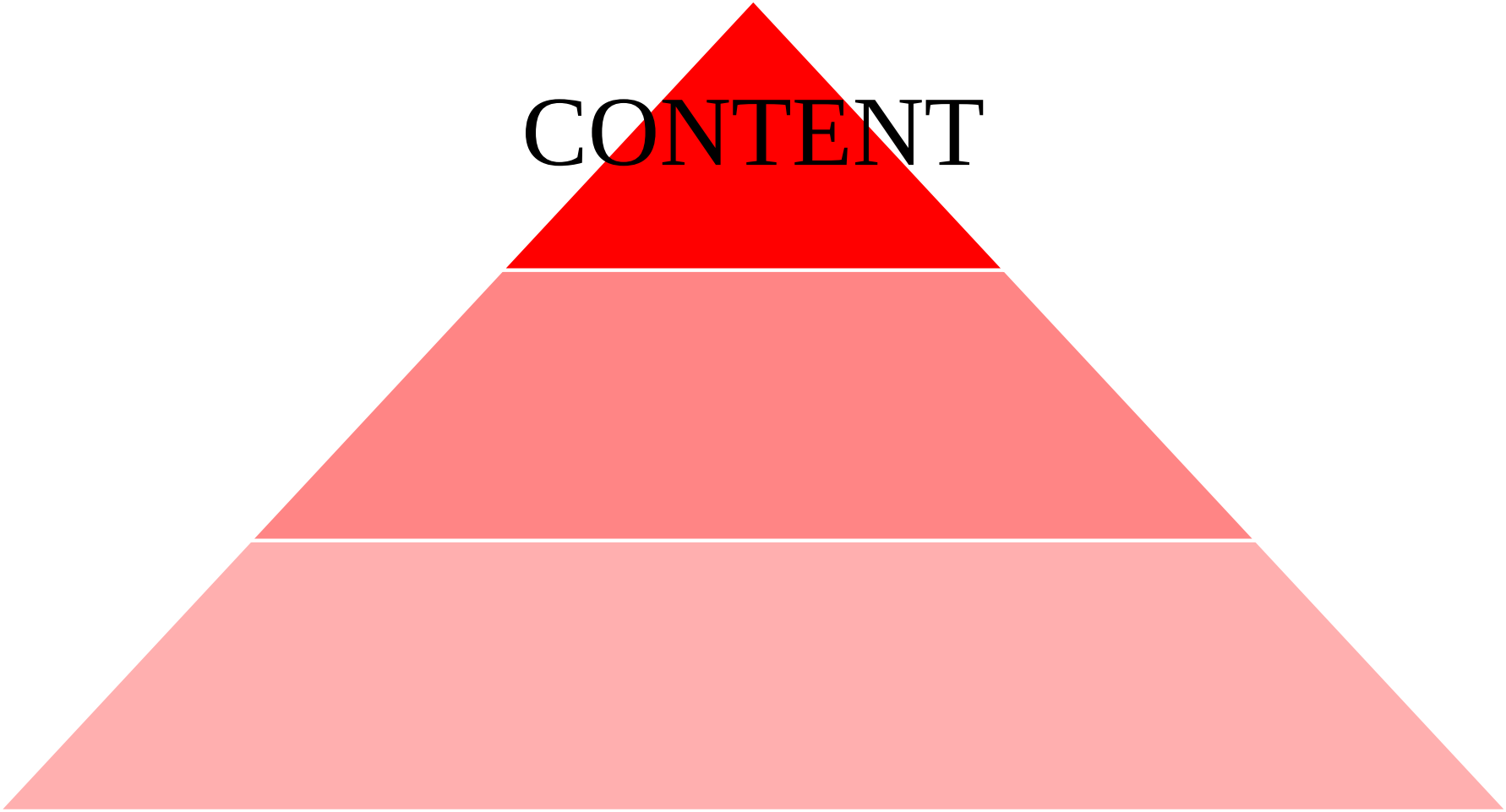
- Electronic Communications Privacy Act (ECPA), Title 18, United States Code, Section 2703(d)

- Burden of proof to obtain a "2703(d) order":
  - ***Specific and articulable facts*** showing
  - reasonable grounds to believe that
  - records are ***relevant and material*** to
  - ongoing law enforcement investigation

Sealing and Protection Orders

- Must provide justification to the court for sealing court documents and issuing protection orders
- Statutory requirements for protection orders (reason to believe that notifying account holders will result in):
  - endangering the life or physical safety of an individual;
  - flight from prosecution;
  - destruction of or tampering with evidence;
  - intimidation of potential witnesses; or
  - otherwise seriously jeopardizing an investigation or unduly delaying a trial

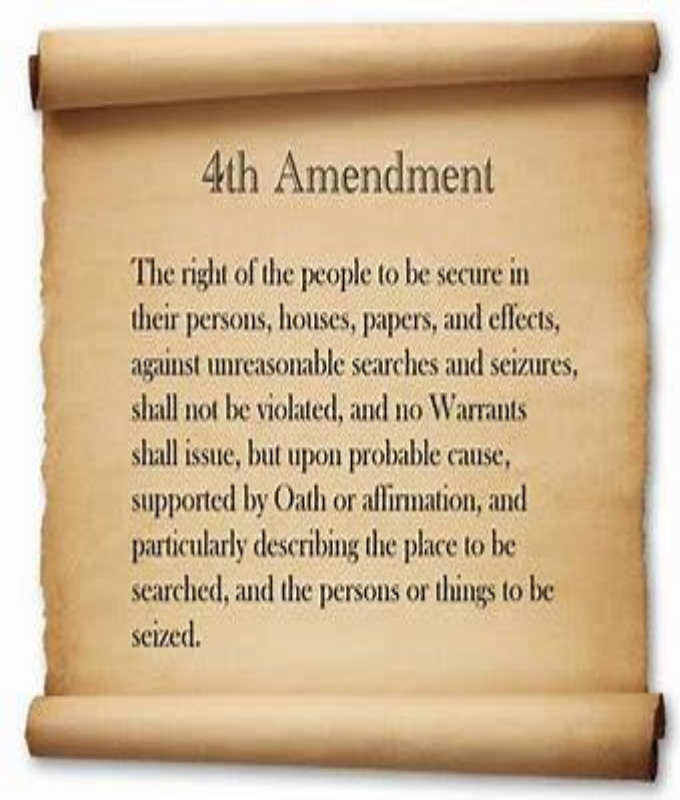
Obtaining Content



Search Warrant Requirement

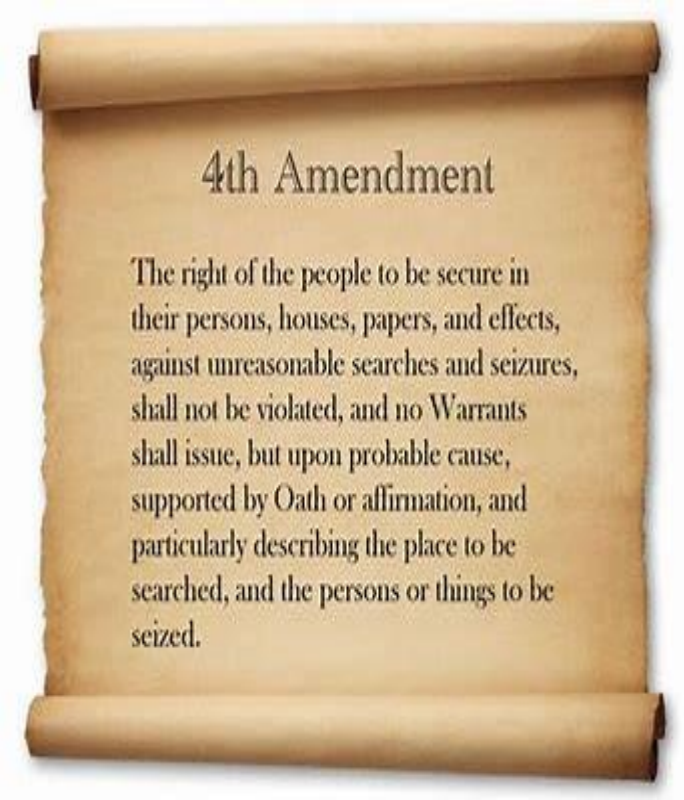
Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no **warrants** shall issue, but **upon probable cause,** supported by **oath or affirmation,** and **particularly describing** the place to be searched, and the persons or things to be seized.



Search Warrant

1. U.S. judge must issue a search warrant
2. Based on a sworn affidavit of a U.S. agent
3. Demonstrating **probable cause** that
4. The account will contain the **evidence, fruits or instrumentalities** of a **crime**.



What does "Probable Cause" Mean in this Context?

- Reliable facts indicating that a crime has been committed:
  - What sources are authorities relying on?
  - When did the crime occur?

- Reliable facts indicating that the target account would contain evidence related to the crime:
  - How was the account identified?
  - How was it connected to the suspect?
  - Was the account used to further the crime?
  - When and how was the account used to further the crime?

Practical Example: Social Media Accounts and Terrorists

- The suspect is being charged with terrorism.
  - Investigators have evidence that the suspect met in person with other known terrorists.
  - Authorities have tapped phone calls of suspect communicating with members of a terrorist group.
- The suspect has a Facebook account.
- The Facebook account belongs to the suspect.
  - Investigators know this because the personal details and Facebook profile picture match the suspect.

Practical Example Cont.

- Why is it likely that the Facebook account would contain evidence of terrorist activities?
  - Terrorists use Facebook to communicate – not enough
  - Based on investigation of other members of the group, these individuals communicate with Facebook – better, but still likely insufficient for content of Facebook account
  - In phone calls with other terrorists, the suspect discussed using Facebook to communicate – probably enough
  - Transactional records show messages sent between accounts belonging to known terrorists and the account in question on specific dates – definitely enough

Real Time Interception of Telecommunications or Computer Data

- Interception of content data is not available by MLA.
- Real time interceptions of communications are only available in domestic U.S. investigations pursuant to a court order for electronic eavesdropping (often known as a "wiretap" or "T3").
  - If such information exists in a U.S. investigation, its possible that it may be shared.
  - Very rare because very intrusive.
- Interception of non-content data (connection data) is available pursuant to MLA in furtherance of a foreign investigation for commission of a foreign crime.

QUESTIONS?

Contact OIA:
+1 202 514 0000
OIA.Operations@usdoj.gov

Evan Williams (韋義榮)

U.S. Department of Justice

U.S. Consulate General for Hong Kong & Macau

williamsec3@state.gov

evan.williams@usdoj.gov

O: +852 2841 2428

C: +852 6652 0037

C: +852 6828 5646

C: +1 (202) 262-1761