



U.S. Immigration
and Customs
Enforcement

September 7, 2012

Ms. Jennifer Lynch
Electronic Frontier Foundation
454 Shotwell Street
San Francisco, CA 94110

RE: **ICE FOIA Case Number 2012FOIA01331**

Dear Ms. Lynch:

This letter is in further response to your Freedom of Information Act (FOIA) request to the U.S. Department of Homeland Security (DHS), Immigration and Customs Enforcement (ICE), dated October 20, 2011. You have requested copies of records created from 2006 to the present pertaining to problems ICE faces obtaining information from communications providers who cannot comply with electronic surveillance requests as required under the Communications Assistance to Law Enforcement Act (CALEA); specifically, documents and reports concerning any communication company's non-compliance with an electronic surveillance order or request for retrieval of communications records. EFF makes reference to documents produced in response to a previous FOIA request entitled "ELSUR noncompliance incident report(s)", "Provider noncompliance with retrieval of communication records" reports, "ELSUR noncompliance incident report comments page" reports, and "Electronic surveillance capability assessment response" reports.

In a letter dated November 17, 2011, you modified your request to seek "all agency records (including, but not limited to, electronic records) created from January 1, 2009 to the present that are similar to or the same as attached documents titled variously CALEA 'ELSUR Noncompliance Incident Report' or 'Provider Noncompliance with Retrieval of Communication Records' and, in some cases, include a separate page or pages titled 'ELSUR Noncompliance Incident Report Comments Page' or 'Electronic Surveillance Capability Assessment Response.' EFF limits this request to reports from Special Agent in Charge Offices in Atlanta, New York and Florida."

After careful review of your revised request, I have determined that your request continues to be too broad in scope and does not specifically identify the records which you are seeking. The parameters of your revised request is broad to the point that any search conducted using them may result in thousands, if not tens-of-thousands of potentially responsive documents.

Although you have narrowed the geographic locations from which you seek records, the parameters of your request continue to require ICE to conduct an unduly burdensome search. The reports and information you seek are not maintained in any single location within ICE. To locate the reports you have requested ICE would be required to conduct a manual search of each individual investigative case file maintained by ICE within the three ICE Offices identified in your revised request. Additional investigative case files are in the custody of the National Archives and Records

Administration (NARA). ICE would be required to retrieve each case file and conduct a manual review of that case file for records that would be responsive to your request. It is expected that the majority of ICE's investigative case files will not contain any records that are responsive to your request; however, ICE is not able to determine which case files would (or would not) contain responsive records without first conducting a manual search of that file. This manual search would require the review of tens-of-thousands, if not hundreds-of-thousands of records. There are thousands of case files that would need to be searched for potentially responsive records.

The FOIA does not require agencies to search for the proverbial needle in a haystack, nor does it contemplate that requestors will ask for the entire haystack. "[I]t is the requester's responsibility to frame requests with sufficient particularity to ensure that searches are not unreasonably burdensome, and to enable the searching agency to determine precisely what records are being requested".¹

Records must be described in reasonably sufficient detail to enable government employees who are familiar with the subject area to locate records without placing an unreasonable burden upon the agency. For this reason §5.3(b) of the DHS regulations, 6 C.F.R. Part 5, require that you describe the records you are seeking with as much information as possible to ensure that our search can locate them with a reasonable amount of effort. Whenever possible, a request should include specific information about each records sought, such as the date, title or name, author, recipients, and subject matter of the records, if known, or the DHS component or office you believe created and/or controls the record. The FOIA does not require an agency to create new records, conduct research projects, answer questions posed by requesters, or attempt to interpret a request that does not identify specific records.

Please resubmit your request containing a reasonable description of the records you are seeking. Upon receipt of a perfected request, you will be advised as to the status of your request.

If we do not receive an amended request from you within 15 business days from the date of this letter, we will assume you are no longer interested in this FOIA request and will consider your request withdrawn. Please be advised that this action is not a denial of your request and will not preclude you from filing other requests in the future.

The Office of Government Information Services (OGIS) also mediates disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. If you wish to contact OGIS, you may email that entity at ogis@nara.gov or call 877-684-6448.

If you need to contact our office again about this matter, please refer to FOIA case number **2012FOIA01331**. This office can be reached at (202) 732-0600.

Sincerely,



FOR

Catrina M. Pavlik-Keenan
FOIA Officer

Enclosures: Your November 17, 2011 Letter

¹ See *Assassination Archives and Research Center, Inc. v. Central Intel. Agency*, 720 F. Supp. 217, 219 (D.D.C. 1989).



ELECTRONIC FRONTIER FOUNDATION
Protecting Rights and Promoting Freedom on the Electronic Frontier

November 17, 2011

VIA FACSIMILE — 202-732-0660

VIA EMAIL — ice-foia@dhs.gov

United States Immigration & Customs Enforcement (ICE)

Catrina Pavlik-Keenan
Freedom of Information Act Office
500 12th Street, SW, Stop 5009
Washington, D.C. 20536-5009

RE: Freedom of Information Act Request 2012FOIA01331

Dear Ms. Pavlik-Keenan:

This letter serves to narrow the Electronic Frontier Foundation's October 20, 2011 FOIA Request, assigned case number 2012FOIA01331.¹

On October 20, 2011, the Electronic Frontier Foundation (EFF) submitted a FOIA request to Immigration and Customs Enforcement (ICE) seeking:

all agency records (including, but not limited to, electronic records) created from 2006 to the present that are similar to or the same as . . . documents titled variously CALEA "ELSUR Noncompliance Incident Report" or "Provider Noncompliance with Retrieval of Communication Records" and, in some cases, included a separate page or pages titled "ELSUR Noncompliance Incident Report Comments Page" or "Electronic Surveillance Capability Assessment Response."

(See attached FOIA Request). EFF attached to its FOIA request copies of the records referenced in the paragraph above.

In a letter dated November 4, 2011, ICE responded to EFF's request with a determination that the request was "too broad in scope and does not specifically identify the records which [EFF is] seeking. The parameters of [EFF's] request are broad to the point that any search conducted using them may result in thousands, if not tens-of-thousands of potentially responsive documents." The letter stated that EFF should resubmit the request "containing a reasonable description of the records [EFF is] seeking . . . within 15 business days from the date of this letter."

¹ ICE originally assigned this request case number 2011FOIA01331. In subsequent phone calls with the ICE office, it appears the request should have been assigned case number 2012FOIA01331.

Freedom of Information Act Request—ICE—ELSUR Noncompliance Reports
November 17, 2011
Page 2 of 2

On November 15, 2011, I contacted ICE and spoke with Todd Fuss regarding narrowing the request. Mr. Fuss stated that the request was too broad because these records are not stored in a central database and searching for it would require each agent to search in each case file for copies of these reports. I discussed ways to narrow the request with Mr. Fuss and suggested EFF pick specific ICE offices. He said the agency would consider this to be a good faith attempt on the part of the requester to narrow the request.

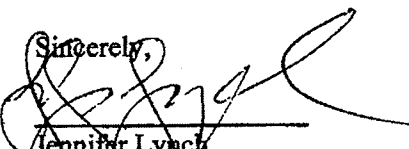
In light of the November 4, 2011 letter from ICE and my conversation with Mr. Fuss, I am writing to narrow EFF's original request.

EFF modifies its original October 20, 2011 request to now seek all agency records (including, but not limited to, electronic records) created from *January 1, 2009* to the present that are similar to or the same as attached documents titled variously CALEA "ELSUR Noncompliance Incident Report" or "Provider Noncompliance with Retrieval of Communication Records" and, in some cases, include a separate page or pages titled "ELSUR Noncompliance Incident Report Comments Page" or "Electronic Surveillance Capability Assessment Response." *EFF limits this request to reports from Special Agent in Charge Offices in Atlanta, New York and Florida.*

These records may also be in the possession of the "Law Enforcement Support and Information Management (LESIM) Technical Operations Unit (TechOps)" in ICE's Office of Homeland Security Investigations. EFF is attaching a document, also received in response to the prior FOIA request discussed in EFF's original ICE FOIA request letter, that state these records were collected by "TechOps." According to the attached document, "TechOps" was tasked with collecting "information about cases where investigations have been negatively impacted by communications carriers' delay in implementation, interruption, partial compliance, or non-compliance with a lawful electronic surveillance order." Also according to the attached document, "information was collected about cases where electronic surveillance was not considered due to lack of technical capability. This was accomplished by sending an Electronic Surveillance Survey and a Records Request Survey to all Special Agent in Charge (SAC) offices."

Please refer to EFF's original request for information about the requested format of documents, EFF's news media status, and EFF's request for a public interest fee waiver.

If you have any questions or concerns, do not hesitate to contact me at jlynch@eff.org or 415-436-9333 x 136.

Sincerely,

Jennifer Lynch
Staff Attorney
Electronic Frontier Foundation

Enclosures